IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2019] SGCA 05

Civil Appeal No 231 of 2017

Between

SCK SERIJADI SDN BHD

… Appellant

And

ARTISON INTERIOR PTE LTD

… Respondent

In the matter of Originating Summons No 1159 of 2017

Between

SCK SERIJADI SDN BHD

… Plaintiff

And

ARTISON INTERIOR PTE LTD

… Defendant

GROUNDS OF DECISION

[Insolvency Law] — [Winding Up] — [Stay of Proceedings]

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v
Artison Interior Pte Ltd

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13 November 2018

15 January 2019

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 This court in *Transbilt Engineering Pte Ltd (in liquidation) v Finebuild Systems Pte Ltd* [2005] 3 SLR(R) 550 ("*Transbilt*") at [4]–[5] held that a judgment creditor who has obtained a garnishee order *nisi* is to be treated as an unsecured creditor and absent exceptional circumstances, is not entitled to proceed to have the garnishee order *nisi* made absolute after the commencement of winding up proceedings.

2 In this appeal, the appellant sought to distinguish the present case from *Transbilt* on the basis that in *Transbilt*, the garnishee order *nisi* obtained by the judgment creditor had not been served when the company went into liquidation. We found this factual distinction to be unmeritorious not least because it was manifest from the facts of *Transbilt* that the order *nisi*, though not mentioned

explicitly, must have been served on the garnishee. The appellant relied on a number of authorities in which the courts have held that service of a garnishee order *nisi* creates an equitable charge in the sense that it binds the garnishee not to pay the debt over to the judgment debtor pending the garnishee show-cause hearing. On the strength of such an equitable charge, the appellant argued that it had a proprietary interest in the garnished debt and should, accordingly, be treated as a secured creditor for the purposes of obtaining leave under s 299(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act"). The appellant accepted that its sole purpose in seeking to continue the proceedings was to complete the attachment.

3 We recognised that the argument that service of the garnishee order *nisi* created an equitable charge in favour of the judgment creditor was not specifically raised in *Transbilt*. However, after considering the appellant's submissions, we agreed with the Judge below that the appellant was not a secured creditor. We thus dismissed the appeal with brief oral grounds. We also found that since the attachment was not completed prior to the commencement of the winding up, and in the absence of exceptional circumstances, the appellant would not be entitled to retain the benefit of the attachment against the liquidator pursuant to s 334(1) of the Act.

4 While an established line of cases has held that the service of a garnishee order *nisi* upon a garnishee does create an "equitable charge", we are of the view that the use of this term may give rise to misunderstanding as to its true nature and legal effect. We thus believe it would be beneficial for this court to trace the genesis of such an equitable charge and to provide our detailed grounds to explain why we have found that the service of the garnishee order *nisi* does not render the judgment creditor a "secured creditor" for the purposes of ss 299(2) and 334(1) of the Act.

Background

5 The facts giving rise to the appeal may be stated briefly. The appellant engaged the respondent to undertake interior decoration works under two subcontracts. After making certain overpayments in excess of work done under one of these subcontracts, the appellant sued the respondent in the District Court for the return of these overpayments.[1] On 27 June 2017, the appellant obtained judgment against the respondent for the sum of $250,000, plus interests and costs ("the District Court judgment").[2]

6 In a bid to enforce the District Court judgment, the appellant filed a garnishee application against the garnishee, Shanghai Chong Kee Furniture & Construction Pte Ltd ("Shanghai Chong Kee"), on 12 September 2017 in respect of the sum of $155,000.[3] It successfully obtained a garnishee order *nisi* which it then served on Shanghai Chong Kee on 15 September 2017. As the District Court judgment would not be fully satisfied from the attachment of the debt which formed the subject of this first garnishee application, the appellant filed a second garnishee application against Shanghai Chong Kee on 27 September 2017 in respect of a further sum of $57,500.[4] The appellant was granted a second garnishee order *nisi* which it served on Shanghai Chong Kee on 2 October 2017.

7 By a letter dated 4 October 2017, the appellant's solicitors informed the respondent's solicitors that the show cause hearing for both the garnishee applications had been fixed on 10 October 2017.[5] On 6 October 2017, however,

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1 *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2017] SGDC 178 at [2].

2 Appellant's Core Bundle ("ACB") Vol II, pp 7–8, paras 4–5.

3 ROA Vol III, p 33.

4 ROA Vol III, p 42.

the respondent's solicitors informed the appellant that the respondent company had been placed under creditors' voluntary winding up on 5 October 2017, pursuant to a directors' resolution and the appointment of a liquidator on the same date. Under s 299(2) of the Act, a stay of proceedings took effect whereby no action or proceeding could be proceeded with except with leave of court. The operation of s 334(1) of the Act also meant that the appellant would not be entitled to retain the benefit of the attachment against the liquidator, unless the court ordered otherwise. The appellant thus filed an application to the High Court for leave to proceed with the garnishee proceedings and to be allowed to retain the benefit of the attachment as against the liquidator.

The decision below

8 The Judge dismissed the appellant's application and declined to grant the appellant leave to continue with the garnishee proceedings. His grounds of decision are recorded at *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd* [2018] SGHC 08 ("the GD"). The Judge considered that he was bound by the decision of this court in *Transbilt* which, in his judgment, was materially indistinguishable from the present case (GD at [11]). In *Transbilt*, the respondent judgment creditor had similarly obtained a garnishee order *nisi* against the appellant, but was prevented from continuing with the garnishee proceedings after the appellant was placed under a winding up. This court held that s 334(1) of the Act was "intended to provide a clear path for a liquidator to perform his tasks" and was "necessary to prevent any disorganised or unfair rush by creditors to put assets of the company beyond the liquidator's control" (GD at [12], citing *Transbilt* at [2]). In light of these policy considerations, a judgment creditor would not be granted leave under s 334(1)(*c*) to be allowed to retain the benefit of the attachment unless it was able to show some

[5] ACB Vol II at p 9.

inequitable behaviour on the part of the judgment debtor, such as where the judgment debtor had made certain representations to the judgment creditor to stall the execution against its assets (GD at [13], citing *Transbilt* at [3]). Applying that approach, the Judge found that there was no inequitable behaviour on the part of the respondent, and thus, no reason to grant the appellant's application (GD at [15]).

9 The Judge disagreed with the appellant's argument that its situation was distinguishable from that in *Transbilt* because it had served the garnishee order *nisi* on the respondent and such service created an equitable charge in its favour, which rendered it a secured creditor. The Judge disagreed with the alleged factual distinction because it was clear that the decision in *Transbilt* expressly stated that the garnishee had "notified the [judgment creditor] that it was indebted to the [judgment debtor]", and this suggested that the garnishee order *nisi* had likely also been served on the garnishee (GD at [21], citing *Transbilt* at [1]). Although the Judge accepted that service of the garnishee order *nisi* had created an equitable charge in favour of the appellant, he did not accept that this rendered the appellant a secured creditor (GD at [20]). In any event, the Judge noted that on the onset of liquidation, all creditors, both secured and unsecured, were placed on the same footing and were subject to the provisions of ss 299 and 334 of the Act (GD at [21] and [22]).

Legal framework and issues arising

10 We agreed with the Judge that the starting position is governed by ss 299(2) and 334(1) of the Act which apply to secured and unsecured creditors alike. Since winding up had commenced, the appellant could not proceed with the garnishing process except with leave of court; and since the attachment of the debt was incomplete at the time of the winding up, the default position was

that the appellant could not retain the benefit of the attachment against the liquidator, unless the court were to set aside the liquidator's rights in its discretion under s 334(1)(*c*).

11 We recognise, however, that while ss 299(2) and 334(1)(*c*) apply to all creditors alike, there is in some sense an "exception" carved out for secured creditors, which explains why the appellant had sought so vigorously to characterise itself as such. In general, the court will more readily grant leave to secured creditors to proceed with enforcing their security, notwithstanding the stay under s 299(2) of the Act, because their security is regarded as standing apart from the pool of assets available for *pari passu* distribution amongst unsecured creditors. Thus, in *Korea Asset Management v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671 ("*Korea Asset Management*") at [49], VK Rajah JC (as he then was) observed that leave to proceed would readily be given to an applicant who was "merely attempting to claim from the company, property which *prima facie* belongs to the applicant", and this expressed the law's recognition "that the rights of a secured creditor or *in rem* rights should not be fettered as a matter of course by the initiation of insolvency proceedings" (see also *Power Knight Pte Ltd v Natural Fuel Pte Ltd (in compulsory liquidation) and others* [2010] 3 SLR 82 ("*Power Knight*") at [27]). It is not disputed that what is needed in this regard is not the mere initiation of the procedural steps which will lead to the creditor obtaining a security for his debt, but the actual creation of that security *prior* to the winding up (*In re Aro Co Ltd* [1979] 2 WLR 150 at 155).

12 The key issue for determination was thus whether the appellant in this case, by virtue of the service of the garnishee order *nisi*, was rendered a secured creditor. As alluded to earlier, we were in full agreement with the Judge's determination that the appellant was *not* a secured creditor. However, given the

confusion which has attended this particular question (especially in some of the older precedents), we consider it useful to explain why the appellant was not a secured creditor with reference to a more detailed examination of the nature of the equitable charge which was created in favour of the appellant upon service of the garnishee order *nisi*. We shall also explain why, quite apart from the issue of whether the appellant was a secured creditor, we did not feel there were any operative equities in favour of granting the appellant leave to proceed.

The effect of service of a garnishee order **nisi**

The concept of an equitable charge

13 It has now been accepted in a long line of cases that the service of a garnishee order *nisi* creates an equitable charge on the debt forming the subject matter of the garnishee proceedings. Thus, in *Galbraith v Grimshaw and Baxter* [1910] 1 KB 339 ("*Galbraith"*) at 343, Farwell LJ opined that a garnishee order *nisi* does not operate as a transfer of the property in the debt, "but … is an equitable charge on it, and the garnishee cannot pay the debt to any one but the garnishor without incurring the risk of having to pay it over again to the creditor". Similarly, in *N Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 131, Atkin LJ noted that "[t]he service of the [garnishee] order *nisi* binds the debt in the hands of the garnishee – that is, creates a charge in favour of the judgment creditor". More recently in the House of Lords decision of *Société Eram Shipping Co Ltd v Compagnie Internationale de Navigation and others* [2003] 3 WLR 21 ("*Société Eram Shipping*"), Lord Millett observed that in respect of garnishee proceedings "[t]he first stage takes the form of an order nisi (or interim order) which creates a charge on the asset to be executed against …" (at [86]). Lord Millet noted that O 49 r 1(2) of the Rules of the Supreme Court (SI 1965/1776) (UK) ("the UK Rules of Supreme Court") provided that the

garnishee order *nisi* had the effect of "attaching" the debt to answer the judgment. He went on to observe (at [87]):

> The 'attachment' of a chose in action is the equivalent of the seizure of a tangible asset. A third party debt order 'attaches', that is to say appropriates, the debt owing to the judgment debtor to answer the judgment debt. *This is the classic method of creating an equitable charge over a debt or fund.* It creates a proprietary interest by way of security in the debt or fund and gives priority to the claim of the judgment creditor to have his debt paid out of the fund before all other claims against it including that of the judgment debtor himself ... [emphasis added]

14 O 49 r 1(2) of our Rules of Court (Cap 322, R 5, 2014 Rev Ed) similarly provides that an order to show cause must be served specifying the time and place for further consideration of the matter (*ie*, for the show-cause hearing) and "*in the meantime attaching* such debt … or so much thereof as maybe specified in the order, to answer the judgment or order …". O 49 r 3(2) then provides that the effect of the order to show cause is that it "bind[s] in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified". *Black's Law Dictionary* (Bryan A. Garner, ed) (Thomson Reuters, 10th Ed, 2014) defines "attachment" as "[t]he seizing of a person's property to secure a judgment" (at p 152). Thus, the effect of the garnishee order *nisi* described in O 49 r 1(2) appears to conform to the classic definition of an equitable charge proffered by Buckley LJ in the English Court of Appeal decision of *Swiss Bank Corporation v Lloyds Bank Ltd and Others* [1980] 3 WLR 457 ("*Swiss Bank Corp*"), where it was stated that "[a]n equitable charge which is not an equitable mortgage is said to be created when property is expressly *or constructively* made liable, *or specially appropriated*, to the discharge of a debt or some other obligation" [emphasis added] (at 467). Further, in Tan Yock Lin, *Personal Property Law* (Academy Publishing, 2014) ("*Personal Property Law*") at para 24.226, Professor Tan Yock Lin also writes

that "[s]ervice of a garnishee order *nisi* creates as between the judgment creditor and debtor a charge on the receivable mentioned in the order". It should be noted, however, that according to O 49 r 1(2), the garnishee order *nisi* only attaches the debt "*in the meantime*". Thus, *Personal Property Law* notes that the charge "is only provisional and does not become effective against third parties until the completion of execution by sale and receipt" (at para 24.226).

15 In our view, the language of "equitable charge" is to some extent unhelpful, and is liable to confuse in at least two respects. The first of these is that it is unclear whether the term "equitable charge" implies the creation of any proprietary interest in the underlying debt, and if so, what the precise nature of that proprietary interest is. We note that whether or not an equitable charge which is not an equitable mortgage confers any proprietary interest has been the subject of a divergence in opinion: see the decision of the Federal Court of Australia in *Lyford and another v Commonwealth Bank of Australia* (1995) 130 ALR 267 at 273 ("*Lyford*"), where Nicholson J notes that several authorities (including *Swiss Bank Corp* at 467) have taken the view that an equitable charge which is not an equitable mortgage confers on the chargee a right of realisation by judicial process, but not any proprietary interest in the subject of the security. As Nicholson J notes, the Australian courts have preferred the contrary view that such an equitable charge does confer a proprietary interest. This is because it "involves some deduction from the ownership of the debtor and there is a transfer of certain proprietary incidents". What is deducted from the debtor's ownership is said to be his "full, unfettered right to 'deal' with the property charged in denial of, derogation from, or otherwise inconsistently with the agreement creating the charge" (*Lyford* at 273, citing William James Gough, *Company Charges* (Butterworths, 1st Ed, 1978) at p 17).

16 In our view, care must be used in employing terms such as *property*, proprietary *interests* and proprietary *remedies or consequences*. As this court has recently noted, the phrase "proprietary interest" has different meanings in different contexts, and it would be "delusive exactness" to come up with a universal definition (*Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129 at [45], citing *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd* [2017] WASC 152 at [317]–[318]). Further, whereas there is some degree of dependence between equitable proprietary rights and proprietary remedies, the two are not necessarily co-extensive (see *eg* John Dyson Heydon, *Meagher, Gummow & Lehane's Equity Doctrines & Remedies* (LexisNexis Butterworths, 5th Ed, 2015) at para 4.145).

17 It is undoubtedly true that garnishee proceedings are remedies which carry proprietary consequences, in the sense that the garnishment of the debt operates by way of attachment against the property of the judgment debtor (see *Société Eram Shipping* at [24] and [88]). That a garnishee order has such proprietary effect is integral to its very nature as a process of execution against the assets of the judgment debtor – if it were merely an order that operated on the garnishee *in personam*, it would be difficult to explain why the garnishee's debt to the judgment debtor is discharged by the garnishee making payment of the same debt to the judgment creditor under the garnishee order. However, the *proprietary effects* of a remedy should not be conflated with the idea that the remedy necessarily creates a *proprietary interest*, for much depends on the sense in which the term "proprietary interest" is used. A "proprietary interest" may well refer to an absolute right to have a particular property applied for the sole benefit and purpose of the rightholder, and which the rightholder may assert against any and all third parties. This understanding, which we shall refer to as "the Broad Definition", appears to represent the sense in which Lord Millett

employed the term "proprietary interest" in *Société Eram Shipping* at [87], where he stated that a third party debt order (as garnishee orders are now known under the UK Rules of Court) "*gives priority to the claim of the judgment creditor to have his debt paid out of the fund before all other claims against it* including that of the judgment debtor himself" [emphasis added].

18 In other contexts, however, the term "proprietary interest" has been used to refer to a much less extensive right to prevent the owner of the property from exercising his "full, unfettered right to 'deal' with the property charged" in a manner that is inconsistent with the rightholder's interest" (as in *Lyford* at 273; see also William James Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) ("*Company Charges*") at pp 38–39). We shall refer to this as "the Narrow Definition". An equitable charge may give rise to proprietary interests according to *both* the Narrow Definition and the Broad Definition, but these arise at different points in time: Whereas proprietary interests according to the Narrow Definition exist even prior to any default by the chargor, the creditor's right of realisation, which is a proprietary interest according to the Broad Definition, only "springs into life" upon default (see *Company Charges* at pp 34 and 38–39).

19 In our judgment, it would only be correct to say that a garnishee order *nisi* creates a "proprietary interest" if that term is understood according to the Narrow Definition. The true effect of the service of the garnishee order *nisi* is that it creates an obligation on the garnishee not to pay the moneys attached to the judgment debtor in breach of the order *nisi*. If the garnishee pays the sum to the judgment debtor in breach of the garnishee order, he does so at his own peril, and bears the risk of being held liable to pay the same amount to the judgment creditor (*William Henry Rogers and Maria Henrietta Riches, trading as Rogers & Son v William Whiteley* [1892] AC 118 at 121–122; see also *Telecom Credit*

Inc v Midas United Group Ltd [2018] SGCA 73 at [30]). Thus, the judgment creditor has the right, by virtue of the service of the garnishee order *nisi*, to seek satisfaction from the garnishee who has acted in breach of the garnishee order, but the judgment creditor does not have an interest that allows him to trace the moneys originally attached into the hands of the receiver.

20 It is clear that the garnishee order *nisi* does *not* confer a proprietary interest according to the Broad Definition of that term, because the judgment creditor does not gain any absolute right to have the debt applied towards the satisfaction of the judgment. Whatever right the judgment creditor might acquire is not absolute in any sense because it remains *subject to the order being made absolute* at the show-cause hearing, and only attaches the debt "in the meantime". We would also note that while Lord Millett remarked in *Société Eram Shipping* at [87] that the judgment creditor gains "priority" and a right "to have his debt paid out of the fund before all other claims against it", it is unclear whether these remarks were made with reference to a garnishee order *nisi*, or a garnishee order which has been made absolute. To the extent that the remarks refer to a garnishee order *nisi*, the observation that the order *nisi* "gives priority to the claim of the judgment creditor to have his debt paid out of the fund *before all other claims against* it" [emphasis added] cannot be correct; for the terms of O 49 r 6 expressly empower the court to hear the claims of any third persons claiming to be entitled to the debt sought to be attached, or to have any charge or lien upon it. If in the course of the garnishee proceedings it comes to the court's notice that such third party claims on the debt exist, the court may order the relevant third parties to attend before it and state the nature and particulars of the claim (O 49 r 6(1)). That the rules provide for such third party claims to be heard (whether before or after the making of the garnishee order *nisi*) further reinforces the point that the judgment creditor does *not* obtain any absolute right

to have the debt applied for his sole benefit in priority to all third parties, simply by virtue of the garnishee order *nisi* or service thereof. Further, that a garnishee order does not confer a proprietary interest according to the Broad Definition is also apparent from the fact that the charge is described as being provisional and ineffective as against third parties until the completion of the execution, which here would be the receipt of the sum attached (see [14] above, citing *Personal Property Law* at para 24.226).

21 What is also clear and beyond dispute is that there is no transfer of *property* in the debt upon the service of a garnishee order *nisi*. The appellant has sought to rely on the case of *ex parte Joselyne*, *In re Watt* (1878) 8 Ch D 327 ("*ex parte Joselyne*"), where it was said (at 330) that the service of the garnishee order *nisi* effected a transfer of the property in the debt from the judgment debtor to the judgment creditor. It then followed that such transfer created a complete and perfect security in the hands of the judgment creditor. This view however is clearly incorrect, and has been doubted in subsequent cases. Thus, Farwell LJ said in *Galbraith* at 343 that the order *nisi* "does not … operate as a transfer of the property in the debt".

22 The second respect in which the use of the term "equitable charge" is liable to give rise to confusion is that it may suggest that the holder of an equitable charge is akin to a person who holds an equitable charge *as security for a debt*. In fact, this was precisely the argument advanced by the appellant before us. As the remarks of Buckley LJ in *Swiss Bank Corp* reproduced at [14] above demonstrate, the concept of an equitable charge is in fact *wider,* in that an equitable charge may arise whenever property is "expressly *or constructively* made liable, *or specially appropriated* to the discharge of a debt or some other obligation" [emphasis added]. Yet the paradigmatic example of a "charge" is that it is an instrument which creates security for a debt – *ie*, an instrument which

gives a creditor a right to resort to certain property in the event of a default of repayment. Thus, in *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431, Atkin LJ remarked (at 449–450):

> It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property … shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge …

23 Similarly, in *Re Bond Worth Ltd* [1980] Ch 228 at 248, Slade J noted that:

> any contract which, by way of security for the payment of a debt, confers an interest in property defeasible or destructible upon payment of such debt, or appropriates such property for the discharge of the debt, must necessarily be regarded as creating a mortgage or charge …

And in *Personal Property Law* at paras 23.128–23.135, Professor Tan Yock Lin traces the historical origins of the equitable charge and notes how the equitable charge evolved from the equitable mortgage. In brief, the equitable charge originated as an equitable chose in action much like the equitable mortgage, and it is now well established that an equitable charge may take the form either of an equitable mortgage or of an equitable charge not by way of mortgage (at para 23.129). Whereas the equitable mortgage was first developed to remedy inadequacies or failures of formality in the execution of a legal mortgage, or where the mortgagor merely had an equitable interest, the idea of an equitable mortgage of personal chattels did not gain much traction at first except in the context of ships and aircraft (at para 23.130). Professor Tan goes on to say at para 23.132:

> The equitable charge which is not an equitable mortgage gained in importance as personal property ceased to be of trifling value. Instead of transferring ownership, *the chargor gave the chargee* ***a right to sell the specified property for the purposes of***

> ***recouping his outstanding indebtedness upon default by the chargor*** … [emphasis added in italics and bold italics]

24 It will be seen from the above excerpts that the use of the term "equitable charge" to describe the effect of a garnishee order *nisi* is, in some sense, anomalous. In the typical situation, a charge is used as a security interest: it confers upon the chargee the right to have property made available for the satisfaction of a debt *in the event of default*. The condition which must be fulfilled before the chargee gains the right to resort to the charged property to satisfy the debt is thus the chargor's failure to repay, or some other contractually defined condition, such as the commencement of winding up proceedings. In the case of a garnishee order *nisi*, however, the chargee's right to resort to the charged property is premised upon an entirely different condition, as illustrated by the following remarks of Denning LJ in *Choice Investments Ltd v Jeromnimon (Midland Bank Ltd, garnishee*) [1981] 2 WLR 80 ("*Jeromnimon*") at 83:

> There are two steps in the [garnishing] process. The first is a garnishee order nisi. *Nisi* … means 'unless'. It is an order upon the [garnishee] to pay the [debt which it owes to the judgment debtor] to the judgment creditor or into court within a stated time, *unless* there is some sufficient reason why the [garnishee] should not do so. Such reason may exist if the bank disputes its indebtedness to the [judgment debtor] for some reason or other …

25 In this regard the equitable charge which is created upon the service of the garnishee order *nisi* is materially different in character from an equitable charge which creates security for the repayment of a debt, because the *conditions* which must be satisfied before the chargor gains the right to resort to the charged property are entirely different. Where the equitable charge is used to create security for repayment, the creditor is usually given the right to resort to the property or have it sold *if the debt is unpaid* – and this condition is *necessarily* fulfilled in every situation where the judgment creditor is seeking to

enforce its security and applies for leave of court to do so. The reason a secured creditor is described as "merely attempting to claim from the company, property which *prima facie* belongs to [it]" (*Korea Asset Management* at [49]) is because the very fact that the debt has not been repaid gives the creditor certain accrued rights in respect of the subject of the security. Of course, where the security takes the form of a charge, it is not strictly accurate to say that the charged property "*belongs to*" the creditor; since a charge, unlike a mortgage, does not convey any property in the charged asset, even upon default. However, upon default the creditor gains an accrued right to resort to the charged property for satisfaction of the debt (see *Company Charges* at pp 18–19). On the other hand, in the context of an equitable charge arising from service of the garnishee order *nisi*, the judgment creditor is given only a contingent right to resort to the property *which is dependent on whether some good cause may be shown otherwise*. Yet whether such "good cause" may be shown is a *future contingency*, and where the judgment debtor is placed under winding up before the show-cause hearing, this future contingency is, as it were, thwarted. Thus such a judgment creditor is *not* in the same position as a secured creditor who has *already* accrued an entitlement to have the charged property of the company made available by virtue of the company's default.

26 A related point arises from the foregoing analysis, and further illustrates the incongruity of using the language of equitable charge in this context. In a typical situation of an equitable charge creating a security interest, such security interest is a right over property intended to ensure the performance of an often *unrelated obligation*, *eg* the satisfaction of a debt arising out of a prior loan. It is because the property attached is distinct from the obligation whose primary performance is sought to be secured, that the property attached can be said to be a security or collateral. In the case of a garnishee order however, the equitable

charge is an attachment of the very debt which is both the "security" and the obligation that is sought to be fulfilled. To speak of any "security interest" in the debt when there is no separate obligation whose performance is sought to be secured in such circumstances is thus conceptually confusing.

27 Further, it is also noteworthy from the foregoing that the typical analysis of the equitable charge is that it is a *consensual* security right – a pragmatic creature of great flexibility that arises from the *intention of parties* for the chargee to have some sort of security interest over a property to hedge against the risk of default on the chargor's obligation (see *eg*, Gerard McCormack, *Registration of Company Charges* (Jordan Publishing Limited, 3rd Ed, 2009), at paras 1.06–1.20, 1.51; Peter W Young, Clyde Croft & Megan Louise Smith, *On Equity* (Thomson Reuters (Professional) Australia Limited, 2009) at paras 9.180–9.190). Thus, Professor Tan Yock Lin explains in *Personal Property Law* (at para 23.134) that "equity's willingness to uphold and enforce an equitable mortgage and an equitable charge" is explicable on the basis that since

> *the chargee had given value and the transfer to him was according to the common intention of both parties, the chargor's conscience was burdened as against the chargee* and the chargor could not in good conscience complain if he had defaulted and the chargee took the property with a view to selling it to recoup his outstanding indebtedness. [emphasis added]

In the context of garnishee proceedings however, the garnishee order *nisi* follows an *ex parte* application by the judgment creditor, and as such any equitable charge that arises would in that sense arise by operation of law, or more specifically by virtue of statutorily prescribed legal procedure. This is not to say that there is no doctrinal impetus for equity to intervene, for in this situation, too, the garnishee's conscience is burdened by the fact that the debt has been made the subject of a garnishee order *nisi* and, subject to the outcome

of the show-cause hearing, has been provisionally attached for the satisfaction of a judgment. What is clear, however, is that the holder of such an equitable charge arising from a garnishee order *nisi* is in a materially different position from that of a company's secured creditors. Whereas the typical secured creditor takes security *precisely to ensure* that the secured asset will not fall into the debtor's general pool of assets and will be unavailable to the unsecured creditors upon liquidation (this was described as the *raison d'être* of taking security in *Power Knight* at [26]), the same cannot be said of a creditor who gains a limited interest in the form of an equitable charge simply by virtue of the fact that it has commenced garnishee proceedings after its judgment debt remained unsatisfied. There is, in such circumstances, a lesser imperative to protect the interest of the creditor, when it was not obtained in the circumstances of a commercial bargain from which the company would have reaped some benefit.

28 In totality, we are of the opinion that the language of equitable charge when used in the context of garnishee proceedings is both anomalous and unhelpful, and ought to be jettisoned.

Whether the appellant had a security interest or became a secured creditor by virtue of the service of the garnishee order nisi

29 Now that we are unencumbered with the concept and language of equitable charges, a straightforward analysis of the legal effect of the service of garnishee order *nisi* follows. In this regard, we need to look no further than the Rules of Court themselves – O 49 r 3(2) provides that the effect of the order to show cause is that it "bind(s) in the hands of the garnishee as from the service of the order on him any debt specified in the order or so much thereof as may be so specified". As articulated above at [18], this means no more than that the garnishee is not entitled, upon service of the garnishee order *nisi*, to deal with

the debt specified in the order in a way that is inconsistent with the order. This provision, which is in the form of a rule of *civil procedure*, does not create substantive or proprietary rights from thin air, and is a prohibition that is in some aspects akin to an injunction. As Lord Denning said in *Jeromnimon* (at 83):

> *As soon as the garnishee order nisi is served on the bank, it operates as an injunction.* It prevents the bank from paying the money to its customer until the garnishee order is made absolute, or is discharged, as the case may be. It "binds the debt in the hands of the garnishee …" … The money at the bank is then said to be "attached"—again derived from Norman-French. But the "attachment" is not an order to pay. *It only freezes the sum in the hands of the bank* until the order is made absolute or is discharged … [emphasis added]

30 Thus, the service of the garnishee order *nisi* did not create any security interest which rendered the appellant a secured creditor.

The lack of operative equities in favour of granting leave to proceed

31 Since the appellant was not a secured creditor, its legal position was no different from that of other unsecured creditors upon the respondent's winding up, and we must return to the starting point as to whether its position justified granting leave under ss 299(2) and 334(1)(*c*) of the Act. The court's discretion in this regard must be exercised judiciously, so as to ensure that the legislative purpose of those provisions – to clear the way for the liquidator to perform his tasks and to prevent any creditor gaining an unfair advantage over other creditors (*Transbilt* at [2]) – is not easily subjugated.

32 It was clear that the mere service of the garnishee order *nisi* could not be sufficient as to justify the grant of leave, since that would amount to judicially overriding s 334(1)(*c*) under which the benefit of an attachment can only be retained by the creditor if the attachment is *complete*. In particular, if the court were to set aside the liquidator's rights under s 334(1)(*c*) in every case where

the process of attachment has progressed to the stage of service of the garnishee order *nisi* on the garnishee, s 334(2)(*b*), which establishes that the attachment is only complete when the debt is actually received, would be devoid of any legal content.

33 We agreed with what this court held in *Transbilt* (at [3]) and the conclusion of the Judge below in this case, that a judgment creditor would typically need to show some form of "inequity" to justify the granting of leave. The example from *Re Grosvenor Metal Co, Ltd* [1949] 2 All ER 948, cited in *Transbilt* at [3], is a clear instance of such inequity – in that case execution had been stalled by representations expressly made by the judgment debtor. It was held in that case that the English equivalent of s 334(1)(*c*) conferred on the court a wide discretion that went beyond intervening on the basis of actual dishonesty. We do not think that it is necessary to spell out what would amount to such inequity as to justify the court's intervention pursuant to s 334(1)(*c*), save as to point out that in the case of *Re Tiong Polestar Engineering Pte Ltd (formerly known as Polestar Engineering (S) Pte Ltd*) [2003] 4 SLR(R) 1, it was held (at [10]) that the fact that the delay in receiving payment was caused by bank who was unrelated to the parties, was not a sufficient reason to set aside the rights conferred on the liquidator under s 334(1). The threshold is thus quite high.

34 The appellant has relied on the fact that it had commenced garnishee proceedings prior to the winding up and was taken by surprise by the winding up, but that did not change the balance of equities in this case. Even though the appellant might not have intentionally attempted to steal a march on other creditors, that would be the effect of granting leave. The inquiry is not whether or not the judgment creditor did anything wrong – the statute draws a line between complete and incomplete executions and attachments, and where the

judgment creditor falls on the wrong side of the line, it is for him to show that the equities of the case nonetheless justified a different treatment.

Conclusion

35 For the foregoing reasons, we dismissed the appeal with costs fixed at $25,000 (all-in) to the respondent.

Steven Chong	Quentin Loh	Chao Hick Tin
Judge of Appeal	Judge	Senior Judge

Chia Swee Chye Kelvin (Lumen Law Corporation) for the appellant;
A Rajandran (A Rajandran) for the respondent.