IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2020] SGHC 50

Originating Summons No 698 of 2019

Between

(1) Aavanti Offshore Pte Ltd (in creditors' voluntary liquidation)

… *Applicant*

And

(1) Bab Al Khail General Trading
(2) Aavanti Industries Pte Ltd (in Liquidation)

… *Respondents*

JUDGMENT

[Credit and security] — [Charges]

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Aavanti Offshore Pte Ltd (in creditors' voluntary liquidation) v Bab Al Khail General Trading and another

[2020] SGHC 50

High Court — Originating Summons No 698 of 2019
Aedit Abdullah J
25 November 2019

31 March 2020 Judgment reserved.

Aedit Abdullah J:

Introduction

1 The liquidators of Aavanti Offshore Pte Ltd ("the liquidators"), who is the applicant in this Originating Summons, sought various orders, directions and declarations relating to the validity of certain security interests that the applicant had granted over its assets, as well as the validity of debit notes issued to the applicant's subsidiary. The two respondents, creditors of the applicant, take different positions on these various matters sought.

2 The applicant is a Singaporean company currently in liquidation,[1] which owns about 95% of the share capital in PT Palm Lestari Makmur ("PT Palm"), a company incorporated in Indonesia.[2] The shares of PT Palm are key assets of the applicant.[3] The 1st respondent is Bab Al Khail General Trading ("BAB"), a United Arab Emirates entity.[4] The 2nd respondent, Aavanti Industries Pte Ltd ("AIPL"), is a Singaporean company which is now in liquidation after having gone through judicial management for some time.[5] AIPL is the sole shareholder of the applicant,[6] and had the same sole director as the applicant.[7]

Background

3 In June 2012, the applicant entered into a Convertible Loan Agreement ("CLA") with Sawit Plantations Pte Ltd ("Sawit").[8] Under the CLA, Sawit made available to the applicant a loan facility of up to US$10,000,000.[9] The applicant subsequently drew a total of US$9,885,000 from this facility.[10] Clauses 7.6 and 9.1 of the CLA contained putative arrangements for the applicant to grant

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1 Vinod Kumar Jaria's affidavit dated 26 August 2019 ("Vinod Kumar Jaria's 1st affidavit") at para 4; Lin Yueh Hung's affidavit dated 29 May 2019 ("Lin Yueh Hung's 1st affidavit") at para 3

2 Lin Yueh Hung's 1st affidavit at para 8

3 Lin Yueh Hung's 1st affidavit at para 8

4 Vinod Kumar Jaria's 1st affidavit at para 3

5 Andrew Grimmett's affidavit dated 30 August 2019 ("Andrew Grimmett's 1st affidavit") at paras 7–8

6 Andrew Grimmett's 1st affidavit at paras 1 and 6

7 Lin Yueh Hung's 1st affidavit at para 4; BAB's submissions dated 18 November 2019 ("BAB's submissions") at para 28; Vinod Kumar Jaria's 1st affidavit at pp 55 and 76

8 Vinod Kumar Jaria's 1st affidavit at para 15

9 Vinod Kumar Jaria's 1st affidavit at para 15

10 Vinod Kumar Jaria's 1st affidavit at para 21

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security in favour of Sawit.[11] These clauses are the subject of the dispute and are discussed in greater detail below.

4 Subsequently, Sawit entered into an Assignment Agreement ("AA") with BAB under which Sawit unconditionally and irrevocably assigned to BAB all amounts due and payable by the applicant to Sawit under the CLA and "all Sawit's rights, title and interest" under the CLA.[12] BAB gave the applicant notice of this assignment.[13]

5 Around 12 February 2018, the applicant passed a resolution to place itself in provisional liquidation.[14] About a week after, BAB issued a letter of demand to the applicant, stating that the applicant had breached their obligations under the CLA by failing to pay the annual interest owed to BAB, and hence that BAB could "immediately exercise the pledge on… all assets of [the applicant]".[15] Pursuant to the AA, BAB then lodged a proof of debt against the applicant for the sum of US$13,202,051.40 against the applicant,[16] representing the drawdown from the loan facility, inclusive of interest and subject to additional interest.[17]

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11 Vinod Kumar Jaria's 1st affidavit at para 18

12 Vinod Kumar Jaria's 1st affidavit at para 22

13 Vinod Kumar Jaria's 1st affidavit at para 23

14 Lin Yueh Hung's 1st affidavit at para 13

15 Vinod Kumar Jaria's 1st affidavit at para 38(c) and pp 138–139

16 Lin Yueh Hung's 1st affidavit at paras 17–18

17 Lin Yueh Hung's 1st affidavit at pp 19–23

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6 The liquidators were appointed in March 2018.[18] BAB wrote to the applicant demanding that the liquidators execute the necessary security documents to perfect BAB's entitlement to security over the applicant's assets, including the shares of PT Palm that the applicant owns.[19]

7 The liquidators obtained legal advice on the validity of the entitlement to security claimed by BAB.[20] They were advised to execute the security documents to give effect to the entitlement to security.[21] BAB and AIPL's consent was sought for the liquidators to proceed to give effect to BAB's erstwhile entitlement to the security pursuant to the CLA, in order to resolve the matter expediently.[22] BAB agreed,[23] but AIPL objected and disputed BAB's entitlement to the security.[24]

8 While under judicial management, AIPL issued two debit notes ("Debit Notes") to PT Palm for a total sum of US$455,000.[25] The Debit Notes were described as "Being management fees for the following period: December 2010 to July 2017" and "Being management fees for the following period: January 2018".[26]

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18 Lin Yueh Hung's 1st affidavit at para 14

19 Lin Yueh Hung's 1st affidavit at para 19

20 Lin Yueh Hung's 1st affidavit at para 20

21 Lin Yueh Hung's 1st affidavit at para 20

22 Lin Yueh Hung's 1st affidavit at para 22

23 Lin Yueh Hung's 1st affidavit at para 24

24 Lin Yueh Hung's 1st affidavit at para 23

25 Lin Yueh Hung's 1st affidavit at paras 26–27

26 Lin Yueh Hung's 1st affidavit at paras 26–27 and pp 231 and 233

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9 BAB subsequently wrote to the applicant, raising concerns as to whether the Debit Notes were justified.[27] PT Palm also wrote to AIPL, rejecting the validity of the Debit Notes.[28] Thereafter, BAB wrote to the applicant requesting that the latter apply to court to determine the validity of the Debit Notes.[29]

The parties' cases

The applicant's case

10 The liquidators applied to court pursuant to s 310(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"), seeking the following:[30]

(a) a request that the liquidators be authorised to appoint solicitors to assist them;

(b) a declaration that the applicant is bound by the terms of the CLA;

(c) a declaration that the applicant is obliged to encumber all its assets, including the shares in PT Palm owned by the applicant, for the benefit of BAB;

(d) an order that the liquidators execute all security documents as appropriate to comply with the CLA; and

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27 Lin Yueh Hung's 1st affidavit at para 29

28 Lin Yueh Hung's 1st affidavit at para 30

29 Lin Yueh Hung's 1st affidavit at para 31

30 Applicant's submissions dated 18 November 2019 ("Applicant's submissions") at para 7

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(e) declarations that the Debit Notes are void and/ or invalid, or in the alternative, a direction that the liquidators proceed with the liquidation on such a basis.

11 In relation to BAB's entitlement to security, the legal opinion given to the liquidators concluded that the debt under the CLA was validly attached, the CLA was validly assigned from Sawit to BAB, and that BAB's entitlement to security was enforceable, with the debt due to BAB having priority to unsecured debts.[31]

12 The liquidators could not verify the proof of debt of the Debit Notes.[32] They claimed standing to apply for declarations in respect of these notes. They also argued that determination of the validity of the Debit Notes was necessary as recognition of the Debit Notes would affect the value of the applicant's shares in PT Palm, and thus on the realisable value of such shares.[33] They further contended that pursuant to s 269(1) of the Companies Act, affairs pertaining to the shares in PT Palm were within the applicant's custody and/ or control, as the applicant is PT Palm's majority shareholder.[34] By letter, PT Palm agreed to submit to the court's findings in this application.[35]

13 The liquidators were purportedly prepared to proceed on the basis of the legal opinion that they had obtained. They argue that they were compelled to

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31 Applicant's submissions at para 23

32 Applicant's submissions at para 27

33 Applicant's submissions at para 30

34 Applicant's submissions at para 33

35 Applicant's submissions at para 34

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take out the present application as AIPL disagreed with BAB's entitlement to security while BAB disputed the validity of the Debit Notes.[36]

BAB's case

14 BAB argues that the applicant is obliged to encumber its assets in favour of BAB, and that the court should order the execution of the necessary security documents. Clause 9.1 of the CLA purportedly makes clear that parties intended for the applicant to confer on BAB the beneficial interest in all of the applicant's assets as security for the loan.[37] If the security documents are not executed now, the applicant would have unfairly obtained a windfall at BAB's expense.[38] Ordering execution of the security documents is not an unfair preference as it occurs after the commencement of winding up, which is outside the prohibited period,[39] and it is not a void disposition under s 259 Companies Act as BAB already had beneficial title to the assets.[40] The security interest is not void for lack of registration under s 131 of the Companies Act as it is not a charge, but merely an entitlement to security.[41]

15 BAB also contends that the court should grant a declaration that the Debit Notes are void or invalid as the applicant is the proper party to apply to determine the validity of the Debit Notes for several reasons. First, as AIPL is in liquidation, PT Palm can only commence proceedings against AIPL with

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36 Applicant's submissions at paras 35–37

37 BAB's submissions at paras 17–18

38 BAB's submissions at paras 23–34

39 BAB's submissions at paras 35–52

40 BAB's submissions at paras 53–63

41 BAB's submissions at paras 69–70

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leave of court.[42] Moreover, the sole director of PT Palm cannot be found and/or is uncooperative.[43] On the other hand, the applicant is the majority shareholder of PT Palm and thus has an interest in PT Palm's assets.[44] The proceedings will also have an impact on the PT Palm shares, which are the main assets of the applicant, as the Debit Notes (if valid) will diminish the value of such shares.[45] Finally, AIPL has not itself commenced proceedings against PT Palm to recover the sum allegedly due and owing under the Debit Notes.[46]

16 BAB further submits that PT Palm had, through its solicitors, agreed to be bound by the decision of this court in relation to the Debit Notes.[47]

17 BAB highlights PT Palm's confirmation that there was no valid basis for the Debit Notes to have been issued, and contends that AIPL has failed to produce any credible evidence to substantiate the Debit Notes.[48]

AIPL's case

18 AIPL argues that the applicant does not owe BAB any security interest since no security documents were executed.[49] Since parties did not intend for cl 9.1 of the CLA to create an immediate security interest, cl 9.1 itself does not

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42 BAB's submissions at para 105

43 BAB's submissions at para 106

44 BAB's submissions at para 111

45 BAB's submissions at para 110

46 BAB's submissions at para 109

47 BAB's submissions at paras 116–118

48 BAB's submissions at paras 85–103

49 AIPL's submissions dated 18 November 2019 ("AIPL's submissions") at para 35

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create any equitable security interest.[50] Even if the CLA is intended to create or does create an equitable security interest, the equitable security interest created is a floating charge which is void against the applicant for lack of registration under s 131 of the Companies Act.[51] There has also been an inordinate delay in enforcing any such equitable security and the equitable doctrine of laches disentitles BAB from the benefit of any such equitable security interest created.[52]

19 Further, AIPL maintains that the Debit Notes are valid. It contends that the proper party to dispute the Debit Notes is PT Palm and not the applicant and/or BAB, who are not parties to the Debit Notes.[53] In any case, the Debit Notes are valid and enforceable as they are based on an understanding reached at a meeting on 21 December 2017 between one Mr Perumal s/o Samikavandan ("Mr Perumal") on PT Palm's behalf, and the judicial managers of AIPL.[54] Pursuant to this understanding, PT Palm would reimburse AIPL for paying Mr Perumal and Mr Edmond Perera's ("Mr Perera") salaries on its behalf.[55]

Issues to be determined

20 The issues to be decided are as follows:

(a) whether a declaration that the CLA is binding on the applicant should be granted;

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50 AIPL's submissions at para 40

51 AIPL's submissions at para 2

52 AIPL's submissions at para 2

53 AIPL's submissions at paras 73–77

54 AIPL's submissions at para 79

55 AIPL's submissions at para 61; Andrew Grimmett's 1st affidavit at para 42

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(b) what security interest is conferred by cl 9.1 of the CLA, if any;

(c) the validity of any security interest(s) created by cl 9.1 of the CLA;

(d) whether the requirements to grant a declaration in respect of the Debit Notes are met;

(e) if such requirements are met, whether the Debit Notes are valid;

(f) if such requirements are not met, whether to give a direction to the liquidators to proceed as though the Debit Notes are void;

(g) whether to grant an order that the liquidators are authorised to appoint solicitors to assist them; and

(h) whether the court should order costs of these proceedings to be paid out of the applicant's assets, before disbursement to the creditors.

While a number of the orders sought were not contested, the basis of such orders would still have to be considered.

Declaration that the applicant is bound by the CLA terms

21 The liquidators seek a declaration that the applicant is bound by the terms of the CLA. However, they have failed to satisfy the requirements for granting declaratory relief that were laid down by the Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another appeal* [2006] 1 SLR(R) 112 ("*Karaha Bodas*") (at [14]):

> (a) the court must have the jurisdiction and power to award the remedy;
>
> (b) the matter must be justiciable in the court;

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> (c) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case;
>
> (d) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve;
>
> (e) any person whose interests might be affected by the declaration should be before the court; and
>
> (f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.

22 There is no real controversy or uncertainty as regards the CLA. Neither respondent contests the validity or the binding nature of the CLA. The language of the CLA appears quite definitive; cl 17.2 explicitly states that the CLA shall be a "valid and binding obligation" of the applicant. It is hard to see why any such declaration is in fact required. No order is made on this.

Issues pertaining to the security interest

23 The questions in relation to the security purportedly created under the CLA were: what security interest was in fact granted; and whether the security is valid.

What security interest is granted by cl 9.1

24 The CLA was originally between Sawit and the applicant; BAB's arguments were made on the basis that the AA is valid and that any rights belonging to Sawit under the CLA now belong to BAB. There was no real dispute on this point.[56] For ease of reference however, Sawit is taken as the lender mentioned in the CLA.

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[56] Applicant's submissions at para 23; AIPL's submissions at para 17

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25 Clause 9.1 purports to grant security to Sawit:[57]

> For purposes of clarity in addition to clause 7 hereinbefore,
>
> > (i) In order to secure the due and punctual repayment of the Loan owed by the [applicant] and the performance by the [applicant] of its obligations hereunder, [Sawit] shall require the [applicant] to Encumber all assets of the [applicant] for the benefit of [Sawit] or any other party nominated by [Sawit];
> >
> > (ii) Encumber the bank account registered under the name of the [applicant] for the benefit of [Sawit] or any other party nominated by [Sawit];
> >
> > (iii) Procure and ensure that all of its shareholders grant pledge over all issued and paid-up shares held by them in the [applicant] and the investments of the [applicant] in any other entity for the benefit of [Sawit] or any other party appointed by [Sawit]; (collectively referred to as "Security")
>
> and the [applicant] and its shareholders shall execute and deliver to [Sawit] the agreements in respect of the Security and any related documents in the form and substance satisfactory to [Sawit] (the "**Security Documents**")
>
> [emphasis in original]

26 The difficulty in the present case is that the security documents were not executed, and AIPL has taken issue with the validity and perfection of the security.

The security under cl 9.1(iii)

27 There is an issue as regards the scope of the rights conveyed by cl 9.1(iii) – whether it extends to security over the shares held in the applicant and investments by the applicant in any other entity. BAB took an expansive view of the security granted under the CLA.[58]

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57 Vinod Kumar Jaria's 1st affidavit at p 92

58 BAB's submissions at paras 13(c) and 13(d)

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28 A plain reading of cl 9.1(iii) gives Sawit the right to require the applicant to procure and ensure that all of its shareholders grant pledge over all issued and paid-up shares held by them in the applicant and the investments of the applicant in any other entity, for the benefit of Sawit or such other party appointed by Sawit. The sole shareholder of the applicant,[59] AIPL, did not execute any security documents needed to grant any such pledge of its shares in the applicant.[60] Nevertheless, any potential action that can be pursued by BAB against AIPL is not before me and I do not have to decide this issue.

29 BAB further submits that the CLA required the applicant to grant a pledge over its investments in other entities.[61] This interpretation seems to stem from a reading of cl 9.1 in the following manner: "[Sawit] shall require the [applicant] to… grant pledge over… the investments of the [applicant] in any other entity for the benefit of [Sawit]…" However, this reading omits crucial words from the original language of cl 9.1 and goes against cl 9.1's natural plain meaning. The clause actually reads: "[Sawit] shall require the [applicant] to… [p]rocure and ensure that all of its shareholders grant pledge over all issued and paid-up shares held by them in the [applicant] and the investments of the [applicant] in any other entity for the benefit of [Sawit]…" BAB did not address why the clause should be construed in a way that is different from its plain meaning. I find that the plain meaning should be taken to be the objective intentions of the parties, and hence the clause does not require the applicant to grant any pledge, but merely to procure and ensure that its shareholders grant the stated pledge.

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59 Per [2] above

60 Andrew Grimmett's 1st affidavit at para 19

61 BAB's submissions at para 13(d)

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The security under cll 9.1(i) and 9.1(ii)

30 BAB argues that cll 9.1(i) and 9.1(ii) did not create charges and are merely entitlements to security, and the court should order execution of the necessary security documents.[62] BAB seems to have implicitly accepted that the clauses are agreements to create charges.[63] Conversely, AIPL argues that the clauses created floating charges.[64]

31 The applicable approach when construing whether and what security interest is created was laid down in *Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129 ("*Diablo*") at [57]): first, to identify the rights conferred under the security; and second, to identify the appropriate legal characterisation of such rights.

32 A plain reading shows that the rights conferred by cll 9.1(i) and 9.1(ii) are:

(a) the right of Sawit to "require" the applicant to encumber all of its assets for the benefit of Sawit or any other party nominated by Sawit (per cl 9.1(i));

(b) the right of Sawit to "require" the applicant to encumber the bank account registered under its name for the benefit of Sawit or any other party nominated by Sawit (per cl 9.1(ii)); and

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62 Per [14] above

63 BAB's submissions at para 67

64 Per [18] above

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(c) the right of Sawit to compel the applicant and its shareholders to "execute and deliver to [Sawit] the agreements" in respect of cl 9.1(i) and cl 9.1(ii) (per cl 9.1);

33 There are two issues of characterisation which need to be resolved: (1) whether the clauses convey legal security interests or are mere agreements to create security interests; and (2) what the nature of the security interests are.

Whether the clauses convey legal security interests

34 Clause 9.1 is not stand-alone but only clarificatory in nature and meant "for purposes of clarity in addition to clause 7 hereinbefore". Hence, cl 7, particularly cl 7.6, must first be considered. Clause 7.6 provides:[65]

> [Sawit] shall have an exclusive lien on all assets purchased and/or owned by the [applicant]. If any such assets are sold or otherwise disposed off [*sic*] by the [applicant], [Sawit] shall have the first lien on the proceeds from such sale or disposal to the extent of the Loan outstanding of [Sawit].

35 If cl 7.6 is read in isolation from cl 9.1, it appears that a legal security interest is granted by the applicant to Sawit over all the applicant's assets, because cl 7.6 does not mention that the security interest only takes effect on the occurrence of a contingent event or on a future date. This is supported by the finding in *Diablo* which deals with a clause substantially similar to cl 7.6. *Diablo* held that the clause was not merely an agreement to create a security, but created one itself, since the interest was not expressed to only arise in the future. The *Diablo* clause reads (at [10]):

> The Owners [*ie*, Diablo] to have a lien upon all cargoes, sub-hires and sub-freights belonging or due to the Charterers [*ie*, the Company] or any sub-charterers and any Bill of Lading

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65 Vinod Kumar Jaria's 1st affidavit at p 91

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> freight for all claims under this Charter, and the Charterers [*ie*, the Company] to have a lien on the Vessel for all moneys paid in advance and not earned.

36 The phrase "to have a lien upon all cargoes" in the *Diablo* clause is substantially similar to the phrase "shall have an exclusive lien on all assets" in cl 7.6 of the CLA in that both do not mention that the security interest only takes effect on the occurrence of a contingent event or on a future date.

37 Notwithstanding the above, cl 7.6 must be read in light of cl 9.1, which is intended to explicate cl 7. Clause 9.1 makes it clear that a security interest is not immediately granted, but that a further step through the execution and delivery of security documents is needed to execute these security interests. This is not disputed by the parties, who both agree that cl 9.1 does not convey any legal security interest.[66]

38 A difference in effect thus arises between construing cl 7.6 on its own, and reading it with cl 9; cl 7.6 in itself conveys a legal security interest, while cl 9.1 is merely an agreement to execute security interests. Reading the two clauses together harmoniously, cl 9.1 serves to develop the operation of cl 7.6 by setting out the mechanism by which the security interest in cl 7.6 will be granted, namely by way of the security documents that the applicant is bound to execute and deliver to Sawit. Hence, when cl 7.6 is read with cl 9.1, cl 7.6 should similarly be read as an agreement to execute security interests. In any case, it does not matter whether cll 7.6 and 9.1 are characterised as legal security interests or agreements to create security interests which potentially create equitable charges, because, as will be shown below (see [63] below), both

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[66] AIPL's submissions at para 35; Andrew Grimmett's 1st affidavit at para 24; Vinod Kumar Jaria's affidavit dated 6 October 2019 at para 6(c)

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characterisations constitute charges under s 4 of the Companies Act and are void for lack of registration.

39 Following from the above, cll 9.1(i) and 9.1(ii) are obligations to execute security interests in favour of Sawit, in respect of "all assets of the [applicant]" (per cl 9.1(i)), as well as "the bank account registered under the name of the [applicant]" (per cl 9.1(ii)). If cl 9.1(i) was read in isolation, I would have thought that "all assets" inherently include the bank account registered under the applicant's name, since the bank account is also an asset. However, since the bank account is covered under cl 9.1(ii), the objective intention of the parties must be that cl 9.1(i) refers to all assets, excluding the bank account. Such an interpretation prevents cl 9.1(ii) from being otiose.

What the nature of the security interest is

40 Clauses 9.1(i) and 9.1(ii) do not specify the nature of the security interest, only providing that Sawit shall require the applicant to encumber the security assets. "Encumber" is defined in cl 1.1(j) of the CLA to mean:

> Any encumbrance of any kind whatever and includes any security interest, mortgage, deed of trust, lien, judgement, hypothecation, pledge, tax lien, assessment, restriction or burden or any other right or claim of others, affecting the assets and any restrictive covenant or other agreement, restriction or limitation on the assets or shares of the [applicant].

41 This definition is extremely broad and similarly does not specify the exact nature of the security interest that may be encumbered. Hence, it is necessary to first construe the nature of the security interest in cl 7.6 before returning to cll 9.1(i) and 9.1(ii), which are only meant to clarify cl 7.

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42 The applicant adduced a legal opinion from their solicitors which argued that cl 7.6 was a contractual possessory lien.[67] Neither AIPL nor BAB seems to have made submissions on the nature of the security interest conveyed by cl 7.6.[68]

43 In my view, the security interest conveyed by cl 7.6 is a floating charge. Although the security interest is described in cl 7.6 as an exclusive lien, the wording of the clause is not conclusive. As noted in *Diablo* at [57], the characterisation of a security interest should be done with an emphasis on substance, not form. The subjective intentions of the parties or the labels used are not determinative (*Diablo* at [57]).

44 Applying these principles, it is clear that the security interest in cl 7.6 is not actually a lien. A true lien requires the holder of the lien to have possession of the assets over which the lien is asserted. The same point is underscored in Michael Bridge *et al*, *The Law of Personal Property* (Sweet & Maxwell, 2nd Ed, 2018) ("*Bridge*"), which states at p 377:[69] "As with all possessory liens, the holder of a contractual lien must have possession of the assets over which the lien is asserted; if this is not obtained, then there is no lien."

45 The security interest granted by cl 7.6 is not a lien as it is non-possessory. It does not confer on Sawit a right to take possession of the applicant's assets. Instead, it allows the applicant to possess and deal with the assets as it pleases,[70]

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67 Applicant's submissions at Annex B, paras 32–34

68 AIPL's submissions at paras 33-50; BAB's submissions at paras 63–71

69 See also Tan Yock Lin, *Personal Property Law* (Academy Publishing, 2014) ("*Tan Yock Lin*") at pp 1078, 1079, 1090, 1092 and 1168

70 Andrew Grimmett's 1st affidavit at para 26(b)

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even being able to "[sell] or otherwise dispose[]" of them.[71] This must be the objective intention of the parties as the security is over all assets; if Sawit had possession over all of the applicant's assets, it would be impossible for the applicant to conduct its business. Sawit has also never had any other form of possession over the assets as the applicant has never transferred possession of any of its assets to Sawit and/ or BAB.[72]

46 Clause 7.6 is hence a contractual non-possessory lien, which is not a true lien, but is in substance a charge. As stated in *Bridge* at p 377:[73] "… A 'contractual lien' agreed between the parties but not requiring possession is therefore very likely to be characterised as a charge, a security that does not depend on possession."

47 In *Diablo,* the Court of Appeal held (at [58]) that the contractual non-possessory lien over sub-freights was actually a floating charge because it exhibited the defining characteristics of a floating charge. These defining characteristics include the three requirements found in *In re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, that: (*Diablo* at [38], [58]):

(a) It is a charge on a class of assets of a company both present and future.

(b) This class of assets is one which would, in the ordinary course of business of the company, be changing from time to time.

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71 Vinod Kumar Jaria's 1st affidavit at p 91

72 Andrew Grimmett's 1st affidavit at para 26(a)

73 See also *Tan Yock Lin* at p 1090

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(c) It is contemplated that until some future step is taken by or on behalf of those interested in the charge, the company may carry on business in the ordinary way so far as this class of assets is concerned.

48 In addition, the other characteristics exhibited by the security in *Diablo* were that (at [58]):

(a) The security created an equitable assignment of sub-freights earned by the grantor to the grantee, which was not absolute but by way of security.

(b) The grantee had a dormant right to claim the sub-freights in fulfilment of the grantor's obligations under the charter.

(c) Such right was exercisable after notice of the lien was given to the grantor.

49 In making this holding, the Court of Appeal observed that "the holder of a lien on sub-freights enjoys rights that are no different from a floating chargee" (at [44]), and that (at [46]):

> In practical terms, the floating chargee's position (before crystallisation) is not materially different from that of a lien holder… until crystallisation, the rights of the floating chargee are inchoate. The chargee is incapable of asserting any proprietary or possessory right to any specific asset even if dispositions of the assets are made outside the chargor's ordinary course of business or in breach of the terms of the debenture creating the floating charge… The constraint placed on the chargor is therefore fairly weak and in the absence of a negative pledge or some other restriction in the terms of the debenture giving rise to the floating charge, there is little separating the positions of the floating chargee and the lien holder.

50 Clause 7.6 therefore appears to create a floating charge as it exhibits the defining characteristics of one: (1) the security created is a charge on the assets

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of the applicant both present and future; (2) the applicant's assets would be changing from time to time in the ordinary course of business; (3) it is contemplated that until some future step is taken, the applicant may carry on its business in the ordinary way so far as its assets are concerned; (4) the cl is an equitable assignment of the assets by way of security, and not absolutely; and (5) the claim over the assets is a dormant one which has to be activated by giving notice to the applicant, as the assets are in the possession of the applicant for its business purposes.

51 Since cll 9.1(i) and 9.1(ii) are meant to clarify cl 7, and the nature of the security in cl 7.6 is a floating charge, cll 9.1(i) and 9.1(ii) must be similarly interpreted to refer to a floating charge.

52 For the above reasons, I find that cll 9.1(i) and 9.1(ii) are agreements to execute a floating charge in respect of all assets of the applicant, as well as the bank account registered under the name of the applicant.

Whether the security interests under cll 9.1(i) and 9.1(ii) are valid

53 BAB argued that s 131(1) of the Companies Act does not apply to an agreement to create a charge, and since no valid charge has been created, its security interests are not void for failure of registration.[74] AIPL contended that an equitable floating charge arose at the time of contracting, and is void for want of registration under s 131(1) of the Companies Act.[75]

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74 BAB's submissions at paras 64–71

75 AIPL's submissions at paras 46–50

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Legal framework for registration of charges

54 Section 131(1) of the present Companies Act provides that where a charge to which s 131 applies is not registered within 30 days of its creation, it shall be void against the liquidator and any creditor of the company. Section 131(3AA) of the present Companies Act provides that s 131 applies to any charge that:

> (a) falls under the version of s 131(3) that was in force immediately before the date of commencement of s 63 of the Companies (Amendment) Act 2014 (Act 36 of 2014) ("Companies (Amendment) Act 2014"); and
>
> (b) was created before that date.

55 Section 63 of the Companies (Amendment) Act 2014 provided for the amendment of s 131 of the Companies Act, and its date of commencement was 3 January 2016 (para 2 of the Companies (Amendment) Act 2014 (Commencement) (No. 2) Notification 2015). Hence, the version of s 131(3) which was in force immediately before the date of commencement of s 63 of the Companies (Amendment) Act 2014 is the version of the Companies Act as at 2 January 2016 ("Companies Act 2016").

56 The charges that fall under s 131(3) of the Companies Act 2016 include:

> (*c*) a charge on shares of a subsidiary of a company which are owned by the company;
>
> …

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> (*f*) a charge on book debts of the company;
>
> (*g*) a floating charge on the undertaking or property of a company;
>
> …

57 It is noted that only s 131(3)(*g*) refers to a floating charge whereas the other sub-sections of s 131(3) refer to a charge. This difference must have been intentional, such that only floating charges of the undertaking or property of a company must be registered, whereas both fixed and floating charges of the other categories of assets listed must be registered.

58 The definitions of a charge are identical under both the Companies Act and the Companies Act 2016. Pursuant to s 4 of the Companies Act 2016, a charge includes "any agreement to give or execute a charge… whether upon demand or otherwise". It was held in *Diablo* (at [67]) that an agreement to execute a charge does not have to be specifically enforceable in order to constitute a charge under s 4 of the Companies Act, and that s 4 of the Companies Act is broad enough to cover even an agreement to create a charge which is conditional on the occurrence of a contingent event. The court further affirmed (at [67]) the holding in *United Overseas Bank Ltd v The Asiatic Enterprises (Pte) Ltd* [1999] 2 SLRI 671 that "an option to take or create a charge is no different in truth from agreeing to give or execute a charge".

59 Hence, an agreement to execute a floating charge on any undertaking, property, book debts or shares of a subsidiary of a company owned by the company, would all fall under s 131(3) of the Companies Act 2016. If they also fulfil the second criterion of being created before 3 January 2016, s 131(1) of the present Companies Act would apply to require registration.

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Validity of the charges in cl 9.1(i) and 9.1(ii)

60 As mentioned, cl 9.1(i) is an agreement to execute a floating charge over all the assets of the applicant, excluding the registered bank account of the applicant. Read with s 4 Companies Act 2016, cl 9.1(i) falls under s 131(3)(*g*) of the Companies Act 2016. Alternatively, to the extent that the assets contain shares of a subsidiary of a company owned by the applicant, cl 9.1(i) would also fall under s 131(3)(*c*) of the Companies Act 2016; and to the extent that the assets contain book debts, cl 9.1(i) would also fall under s 131(3)(*f*) of the Companies Act 2016.

61 Clause 9.1(ii) is an agreement to execute a floating charge over the registered bank account of the applicant. This would constitute a charge over "the undertaking or property of a company" and fall under s 131(3)(*g*) of the Companies Act 2016.[76]

62 The date of creation of both cll 9.1(i) and 9.1(ii) was 1 June 2012, before the date of commencement of s 63 of the Companies (Amendment) Act 2014. By virtue of s 131(3AA), the registration requirements of s 131(1) of the present Companies Act apply to both cll 9.1(i) and 9.1(ii). Since the charges were not registered within 30 days after their creation,[77] they are void against the liquidator and any creditor of the applicant.

Equitable charge

63 It is not necessary to discuss AIPL's contention that an agreement to create a floating charge amounts to an equitable charge under the common law.

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76 AIPL's submissions at paras 47 and 50

77 Andrew Grimmett's 1st affidavit at para 27 and pp 48–51

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Section 4 of the Companies Act makes it sufficiently clear that an agreement to create a floating charge amounts to a charge under the Companies Act, and this statutory definition is all that is needed to resolve this issue.

Conclusion on the security interest issue

64 From the foregoing, there is no valid security interest owed by the applicant to BAB under cl 9.1.

65 I respond briefly to some points made by BAB. First, even if AIPL receives a windfall as a result of the invalidity of the charges, this is simply the legal consequence of the agreement that was entered into. Second, it is irrelevant whether AIPL had knowledge or notice of the CLA. The Companies Act makes it clear that non-registration of a charge renders it void, regardless of whether other creditors had notice of the charge.

66 There is no need to deal with BAB's arguments on unfair preference and void disposition (per [14] above) as the security interests have been found to be charges, which have been found to be void. For the same reason, there is also no need to deal with AIPL's argument on laches.

Issues pertaining to the Debit Notes

Whether the requirements to grant a declaration are met

67 The applicant seeks a declaration that the Debit Notes are void and/ or invalid. The legal requirements to grant a declaration as established by *Karaha Bodas* have been set out at [21] above and are reproduced here for ease of reference:

> (a) the court must have the jurisdiction and power to award the remedy;

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> (b) the matter must be justiciable in the court;
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> (c) as a declaration is a discretionary remedy, it must be justified by the circumstances of the case;
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> (d) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve;
>
> (e) any person whose interests might be affected by the declaration should be before the court; and
>
> (f) there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.

Not all interested parties are joined

68 Requirement (e) of the *Karaha Bodas* requirements provides that all parties with affected interests should be before the court. This rule originated from the case of *London Passenger Transport Board v Moscrop* [1942] 1 AC 332 ("*Moscrop*"). There, the plaintiff sought a declaration that a contract between his employer and a trade union was void for violation of an anti-discrimination provision, as it allowed the employer to discriminate against persons not in that trade union. However, the affected trade union was not joined as a party. Viscount Maugham refused the declaration, stating (at 345) that:

> … the courts have always recognized that persons interested are or may be indirectly prejudiced by a declaration made by the court in their absence, and that, except in very special circumstances, all persons interested should be made parties, whether by representation orders or otherwise, before a declaration by its terms affecting their rights is made…

69 This requirement was first accepted by the Court of Appeal in *Karaha Bodas*. It was later applied by the High Court in *Ng Foong Yin v Koh Thong Sam* [2013] 3 SLR 455 ("*Ng Foong Yin*") at [21]–[25] and *The One Suites Pte Ltd v Pacific Motor Credit (Pte) Ltd* [2014] 4 SLR 806 ("*Pacific Motor*") at [97]–[101]. In both of these cases, the failure to join all interested parties was a reason for refusal of the declarations sought.

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70 The rationale for this requirement is that it ensures that all persons who may be prejudiced by the declaration are given the opportunity to raise objections to the declaration (see *Singapore Court Practice 2017* (Jeffrey Pinsler gen ed) (LexisNexis, 2017) ("*Court Practice 2017*") at p 559; *Ng Foong Yin* at [23]). Further, it ensures that the court takes into account all considerations in the course of exercising its discretion (*Court Practice 2017* at p 559), including evidence that could be adduced by the interested party (*Pacific Motor* at [100]). In addition, there is a general rule that only actual parties to the proceedings are bound by the remedy and that joining the interested party would also serve to bind him (*Court Practice 2017* at p 559).

71 In the instant matter, PT Palm was not joined as a party, although their interests are clearly and directly affected by the declaration pertaining to the Debit Notes. That means that PT Palm would not be bound by an order made by this court. Both the applicant and BAB highlighted that PT Palm had consented to submit to the findings of this court,[78] ostensibly implying that PT Palm therefore did not need to be joined as a party. However, the mere consent of PT Palm to be bound by the decision of this court is insufficient as PT Palm can conceivably resile from this consent. There is no legal basis to hold PT Palm to its consent, except for possibly some form of estoppel or other representation-based doctrine as between PT Palm and the parties. The court cannot by the order hold PT Palm to its supposed consent. Hence, no order made by the court can be expressed to extend to PT Palm, nor can it have the effect of doing so.

72 Further, this court would be making a decision based on incomplete knowledge, without the benefit of PT Palm's evidence and arguments. PT

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[78] Applicant's submissions at para 34; BAB's submissions at paras 114–118

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Palm's evidence is crucial as it is the party central to the dispute of whether it had agreed to reimburse AIPL for management fees. BAB's submissions relied extensively on an email and a letter sent by Mr Perumal, the plantation manager of a plantation owned by PT Palm, in support of its claim that there was no agreement by PT Palm to reimburse AIPL.[79] These emails were tendered by BAB as alleged witness evidence given by Mr Perumal concerning his knowledge about the dispute. This is not desirable as such evidence is many steps removed from the primary source. The court is effectively limited to relying on BAB's representations that the contents of these emails allegedly sent by Mr Perumal, who is allegedly the agent of PT Palm, are indicative of PT Palm's position in this dispute. PT Palm should have been joined as a party to the proceedings, and Mr Perumal should have given such witness evidence by way of affidavit.

73 For these reasons, I find that the requirement that all affected parties be before the court is not satisfied and the declaration should not be granted. The situation might have been different if PT Palm had been joined to the proceedings but had chosen not to take part. BAB argued that PT Palm was not joined because of practical concerns.[80] However, even if true, these difficulties do not mean that the legal requirement can be ignored.

The applicant does not have locus standi

74 Parties also made substantial submissions regarding *locus standi*, which is another requirement for declaratory relief. The applicant argued that it has standing pursuant to s 269(1) of the Companies Act (per [12] above). BAB took

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79 BAB's submissions at paras 84, 95, 99 and 101

80 BAB's submissions at paras 104–118

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the same position as the applicant and argued that the applicant is the proper party to apply to determine the validity of the Debit Notes for the reasons set out at [15] above. Conversely, AIPL argued that the proper party to dispute the Debit Notes is PT Palm, who is party to the Debit Notes, unlike the applicant and BAB.[81] AIPL also argued that the court should not entertain litigation by proxy.[82]

75 Given the finding above that PT Palm should have been joined, it is not strictly necessary to discuss the issue of standing, but I will do so for completeness. The *locus standi* rule in respect of declarations is that only a party with a legal right in the subject matter of the dispute should be able to seek a declaration. AIPL adopts this rule and argues that the applicant has no standing as it is not a party to the Debit Notes. BAB argues for a broader proposition that any party with a significantly affected interest will have *locus standi*, and that since the applicant owns 95% of the shares of PT Palm, it has *locus standi* as the validity of the Debit Notes would significantly affect its interests.

76 The simple answer to BAB's argument is that *Karaha Bodas* has decisively dealt with this issue, establishing AIPL's approach as the legal position in Singapore and rejecting BAB's position. In *Karaha Bodas*, the Court of Appeal stated (at [15]) that "in order to have the necessary standing, the plaintiff must be asserting the recognition of a 'right' that is personal to him", and (at [19]) that "the jurisdiction of the court to make declarations of rights was confined to declaring contested legal rights of the parties represented in the litigation". The Court of Appeal also affirmed (at [15]) Lord Diplock's remarks

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81 AIPL's submissions at paras 73–77

82 AIPL's submissions at para 75–77

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in *Gouriet* that "… for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation".

77 The authorities in favour of the approach propounded by BAB were dealt with comprehensively in *Karaha Bodas* (at [22]–[26]).

78 In the present case, since the applicant is not a party to and has no legal right in relation to the Debit Notes, it also has no *locus standi* to seek a declaration.

The proper law and the natural forum of the Debit Notes issue

79 There may also be an issue about whether Singapore is the appropriate forum for the resolution of the Debit Notes issue, as well as the relevance of Indonesian law and whether sufficient evidence about it was given. These may have to be matters considered on another day.

Whether the Debit Notes are valid

80 Given my holding that the requirements to grant a declaration are not met, there is no need for me to decide the merits of whether the Debit Notes are valid. Nevertheless, since parties have made extensive submissions, I make some brief comments for completeness.

81 In my view, the basis to support the validity of the Debit Notes seems to be thin. The primary basis for the validity of the Debit Notes seems to be an alleged oral agreement between Mr Perumal, acting on behalf of PT Palm, and

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AIPL, made at a meeting on 21 December 2017.[83] It was alleged that under this agreement, PT Palm agreed to reimburse AIPL for the salaries of Mr Perumal and Mr Perera.[84] However, no records or contemporaneous minutes of this meeting were adduced to substantiate this alleged oral agreement. Further, it is strange that this alleged oral agreement only occurred on 21 December 2017, but is alleged to be an agreement for PT Palm to reimburse AIPL for salaries dating all the way back to 2010.[85] In relation to the Debit Note made on February 2018, it is also unclear whether management services were really rendered to PT Palm as claimed by AIPL, as PT Palm has denied that there were such management services.[86]

Directions to the liquidators

82 The liquidators sought a direction to proceed with the liquidation as though the Debit Notes are invalid. While the determination of the security interest issue was properly raised to the court, the issue of the Debit Notes should not have been raised for the reasons stated above. The basis for any direction by the court to authorise the liquidators to proceed as sought has not been made out.

83 I would further note that liquidators should only seek directions if in real legal doubt. It is not for liquidators to throw questions of commercial discretion to the court. In appropriate cases, in addition to the refusal of the court to substitute its directions for the commercial decision of the liquidator, the court

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83 Andrew Grimmett's 1st affidavit at para 42

84 Andrew Grimmett's 1st affidavit at para 42

85 Andrew Grimmett's 1st affidavit at para 42

86 Andrew Grimmett's 1st affidavit at paras 51–52

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may also disallow the liquidator the costs incurred both by him directly as well as in instructing counsel, leaving it to him to bear such costs personally.

Appointment of solicitors

84 The liquidators applied for the court to authorise them to appoint solicitors to assist them in their duties. This was not contested by the respondents. The appointment of solicitors sought appears necessary in view of the legal matters canvassed, and as such, the request is granted.

Conclusion

85 In conclusion:

(a) No declaration is granted as to whether the CLA is binding on the applicant, as there is no real controversy or dispute.

(b) In relation to the security interest issue, cll 9.1(i) and 9.1(ii) amount to charges under s 131 of the Companies Act that are void against the liquidator and creditors of the applicant for failure of registration. I also find that cl 9.1(iii) does not require the applicant to confer any security interest.

(c) In relation to the Debit Notes issue, I find that the conditions to grant a declaration are not met as PT Palm has not been joined to the proceedings and the applicant lacks *locus standi*. Further, no directions are given to the liquidator.

(d) The liquidators' request for appointment of solicitors is granted.

86 Directions for cost orders will be given separately. Time for any application or appeal, as the case may be, is extended in the meantime.

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Aedit Abdullah
Judge

Leo Cheng Suan and Tay Hui Yuan, Denise (Infinitus Law Corporation) for the applicant;
Chacko Samuel, Charmaine Chan-Richard and Sharmila Sanjeevi (Legis Point LLC) for the 1st respondent;
Cheng Yu Ning Teri, Kirpalani Rakesh Gopal and Oen Weng Yew Timothy (Drew & Napier LLC) for the 2nd respondent.

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