IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 08

Originating Summons No 1159 of 2017

Between

SCK SERIJADI SDN BHD

… Plaintiff

And

ARTISON INTERIOR PTE LTD

… Defendant

GROUNDS OF DECISION

[Civil procedure] — [Stay of proceedings] — [Effect of service of garnishee order *nisi*]

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SCK Serijadi Sdn Bhd
v
Artison Interior Pte Ltd

[2018] SGHC 08

High Court — Originating Summons No 1159 of 2017
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23 November 2017

9 January 2018

Tan Siong Thye J:

Introduction

1 In this Originating Summons No 1159 of 2017 ("OS 1159"), the plaintiff, SCK Serijadi Sdn Bhd, applied to the court under s 299(2) of the Companies Act (Cap 50, 2006 Rev Ed) to lift the stay of proceedings that had been imposed on the garnishee order *nisi* by the commencement of the winding-up of the defendant, Artison Interior Pte Ltd. After hearing the parties' submissions, I dismissed the plaintiff's application in part. The plaintiff has filed an appeal against my decision. I now give my reasons.

Background facts

2 The plaintiff had obtained judgment against the defendant in DC Suit No 286 of 2015 ("DC Suit 286") on 27 June 2017. As judgment creditor, the plaintiff filed its bill of costs for DC Suit 286 on 28 August 2017 and

commenced two garnishee proceedings on 12 and 27 September 2017 respectively and obtained garnishee orders *nisi*. The garnishee orders were served on the garnishee on 15 September and 2 October 2017 respectively. Before the garnishee show cause proceedings could be heard, the defendant was placed under creditors' voluntary winding-up on 5 October 2017. The garnishee show cause proceedings were adjourned on 10 October 2017.

3 On 11 October 2017, the plaintiff filed OS 1159 seeking to lift the stay of proceedings against the defendant (which operates automatically upon the commencement of the defendant's winding-up) in relation to (a) the garnishee proceedings and (b) taxation of the plaintiff's bill of costs in DC Suit 286.

Issues

4 At the hearing before me, the defendant informed the court that it was not objecting to the plaintiff's bill of costs being taxed for the purposes of submitting the claim before the liquidator.[1] Hence, the sole issue before me was whether the stay of proceedings should be lifted under s 299 of the Companies Act to allow the garnishee proceedings to continue.

My decision

The relevant provisions of the Companies Act

5 Section 299 of the Companies Act spells out the effect of a creditors' voluntary winding-up:

> **Property and proceedings**
>
> **299.**—(1) Any attachment, sequestration, distress or execution put in force against the estate or effects of the company after

[1] Defendant's submissions, p 3.

> the commencement of a creditors' voluntary winding up shall be void.
>
> (2) After the commencement of the winding up no action or proceeding shall be proceeded with or commenced against the company except by leave of the Court and subject to such terms as the Court imposes.

6 Under s 299(2), the plaintiff's garnishee proceedings cannot be "proceeded with" even though they have already been commenced before the winding-up action, unless the plaintiff obtains the court's leave to do so.

7 Section 334 of the Companies Act further provides for the restrictions on a creditor's right of execution or attachment in the case of a winding-up:

> **Restriction of rights of creditor as to execution or attachment**
>
> **334.**—(1) Where a creditor has issued execution against the goods or land of a company or has attached any debt due to the company and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or attachment against the liquidator unless he has completed the execution or attachment before the date of the commencement of the winding up, but –
>
> …
>
> (*c*) the rights conferred by this subsection on the liquidator may be set aside by the Court in favour of the creditor to such extent and subject to such terms as the Court thinks fit.

8 When these two provisions are read together, they establish the default position that upon a company's creditors' voluntary winding-up, all proceedings against it – even those which have already been commenced – are stayed. Creditors cannot retain the benefit of any attachment of debt or execution against goods or land of the company that was commenced before the winding-up proceedings unless it was *completed* before that date. Any inchoate attachment or execution actions against the company are therefore void. The

only exception is where relief is obtained from the court under ss 299(2) and 334(1)(*c*) of the Companies Act.

9 The plaintiff urged the court to grant the aforesaid relief as it had already served the garnishee orders *nisi* on the garnishee (and the defendant) prior to the commencement of the winding-up. Thus, the plaintiff argued that it was a secured creditor and was not subject to the insolvency regime. On the other hand, the defendant submitted that the plaintiff, even though it had served the garnishee orders *nisi* on the garnishee and defendant before the winding-up action, was nonetheless subject to the same regime as the other creditors. The defendant relied solely on the Court of Appeal's decision in *Transbilt Engineering Pte Ltd (in liquidation) v Finebuild Systems Pte Ltd* [2005] 3 SLR(R) 550 ("*Transbilt*")[2] and submitted that *Transbilt* applied as it was on all fours with the present case.[3] In response, the plaintiff submitted that this court was not bound by *Transbilt*, as the inquiry under s 299 involves an exercise of the court's discretion, and that in any case, the Court of Appeal in *Transbilt* did not consider the argument that the holder of the garnishee order *nisi* had become a secured creditor by virtue of having served the order on the garnishee.[4]

10 I disagreed with the plaintiff and dismissed its application. I shall explain my decision in two parts. First, I shall discuss *Transbilt* and its effect on this case. Second, I shall explain why I did not agree with the plaintiff's contention that it had become a secured creditor that had escaped ss 299 and 334 by virtue of having served the garnishee orders *nisi* on the garnishee.

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2 DBOA, pp 3–7.

3 Transcript, p 36, line 3.

4 Transcript, p 33, lines 21–26.

The Court of Appeal decision in Transbilt

11 *Transbilt* is not materially distinguishable from the present case. It is a decision of the Court of Appeal and on the principle of *stare decisis* this court is bound to follow it. In that case, the respondent obtained a garnishee order *nisi* against the appellant prior to the latter's winding-up. Before the show cause hearing could take place, the appellant commenced a creditors' voluntary winding-up. The respondent applied to the High Court for relief under s 334(1)(*c*) of the Companies Act, seeking to set aside the liquidator's rights so that the attachment of the garnishee order could be completed.

12 The High Court granted the application and the appellant appealed. The Court of Appeal allowed the appeal and restored the stay. In doing so, the Court of Appeal held that s 334(1) was intended to provide a clear path for a liquidator to perform his tasks. In order to do so, the section expressly provides that any inchoate execution and attachment would be nullified such that the executing creditor would not be able to reap the benefit of the execution or attachment. This would prevent the provision from being "substantially weakened and itself nullified". The provision was also necessary to prevent any disorganised or unfair rush by creditors to put assets of the company beyond the liquidator's control (at [2]).

13 Because of these policy considerations, the Court of Appeal held that the judgment creditor would need to show inequitable behaviour on the part of the company in order to obtain relief from the court. However, it was not necessary for the judgment creditor to show fraud or trickery in order to obtain relief. One example that the Court of Appeal cited where inequity was present without fraud or trickery was the English case of *Re Grosvenor Metal Co. Ltd* [1949] 2 All ER 948, where the stay was lifted because the company had made

certain representations to the judgment creditor to stall the execution against its assets.

14 The Court of Appeal found that such inequity was the "substantial ground" upon which the court would exercise its discretion. On the facts of *Transbilt,* the Court of Appeal found that there was no inequity (at [3]), and as such it reversed the High Court's decision. The Court of Appeal further noted that the High Court had placed great emphasis on whether the stay was lifted would make very little difference to the financial positions of the other creditors, as the garnishee order was for a relatively small sum. The Court of Appeal disagreed that this should be the only factor underpinning the court's discretion. Rather, such concerns should be regarded as "peripheral and additional considerations" which would only be considered after the more substantial ground of inequity has been established (at [3]).

15 Applying the approach of the Court of Appeal to the present case, I found that there was no inequitable behaviour on the part of the defendant and indeed the plaintiff did not suggest that there was any. The plaintiff's only ground of contention was that it had become a secured creditor by reason of serving the garnishee order *nisi*, a point that I shall turn to subsequently. *Prima facie*, applying *Transbilt*, there was no reason for me to grant the plaintiff's application.

16 Even the "peripheral and additional considerations" of the other creditors' positions work *against* the plaintiff in this case, making it an even weaker case than *Transbilt* (where lifting the stay made little to no difference to the creditors' financial positions). In this case, as the defendant's counsel pointed out during the course of the hearing, the total realisable assets of the defendant amounted to $291,961 and the amount available for unsecured

creditors was only $218,361. In contrast, the amount claimed by the plaintiff was $250,000. Allowing the plaintiff to continue its claim in these circumstances would substantially reduce the amount remaining for the defendant's other creditors – ten unsecured and three secured.[5] This would not only provide no "clear path" for the liquidator to perform his tasks, but would also tend to encourage a "disorganised or unfair rush" by creditors to put themselves above the other remaining creditors.

17 In the face of the Court of Appeal's decision in *Transbilt*, which was on all fours with the present case, the plaintiff argued that the court in *Transbilt* had exercised its discretion on the facts of that particular case. The plaintiff's counsel further submitted that if the cases cited in his submissions were brought to the attention of the Court of Appeal in *Transbilt*, it might have come to a different decision. I therefore now turn to these cases and address whether the plaintiff was a secured creditor that distinguished it from the judgment creditor in *Transbilt*.

***Whether the plaintiff was a secured creditor such that it is distinguished from the judgment creditor in* Transbilt**

18 I shall first deal with the issue of the legal status of the plaintiff before turning to address the cases that the plaintiff cited in support of its proposition that it had become a secured creditor upon service of the garnishee order *nisi*.

19 The plaintiff had obtained garnishee orders *nisi* that it served on the defendant before the creditors' voluntary winding-up had commenced. The plaintiff acknowledged that a judgment creditor was not a secured creditor, as a judgment creditor would not have a mortgage, charge or lien over the property

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[5] Transcript, p 35, lines 3–11.

of the defendant. However, the plaintiff submitted that when the garnishee orders *nisi* were served on the defendant, the plaintiff obtained an equitable charge over the garnishee's debt owed to the defendant for the amount of the judgment debt. The effect of this equitable charge was that the garnishee could not dispose of its properties that would be used to satisfy the debt without a court order. The plaintiff submitted that this equitable charge had the effect of changing the plaintiff's legal status from an unsecured judgment creditor into a secured creditor.

20 I rejected the plaintiff's argument that the service of a garnishee order *nisi* could transform the plaintiff into a secured creditor, even though I accepted that it gave the plaintiff an equitable charge. In a typical situation of a secured creditor, the debt-creating instrument simultaneously imposes a mortgage, charge or lien over the property of the borrower. However, as the equitable charge was only created upon *service* of the garnishee order *nisi* upon the defendant (and the garnishee), I would not consider the plaintiff to be given all the rights of a secured creditor upon creation of this equitable charge. Rather, the equitable charge only conferred on the plaintiff (who was only a judgment creditor) an interest for the limited purpose of preventing the garnishee order *nisi* from being frustrated pending its final order upon the show-cause hearing.

21 The plaintiff's argument, that it was a secured creditor, had arguably also been mounted in *Transbilt* on appeal. In *Transbilt*, the respondent (who was the judgment creditor) submitted that it "should not be regarded as any other general creditor because it had an execution order *nisi*" (at [4]). While the Court of Appeal did not expressly state whether the garnishee order *nisi* had been served on the garnishee, this appears to be the case because the garnishee "notified the respondent that it was indebted to the appellant" on 31 May 2004, which is prior to when the appellant's creditors wound it up on 10 June 2004

(although the commencement of the winding-up was deemed to have taken place on 31 May 2004 by virtue of s 291(6)(*a*) of the Companies Act)(see *Transbilt* at [1]). The Court of Appeal stated that the distinction the respondent hoped to draw between itself and all other creditors was "not correct in principle" because at the onset of liquidation, all creditors are placed on the same footing. The creditor who has not completed his execution or attachment is not part of an exception but rather part of the rule set out in s 334(1) (*Transbilt* at [4]). The editors of *Singapore Civil Procedure 2017* vol I (Foo Chee Hock JC gen ed) (Sweet & Maxwell, 2017) similarly noted that even if a creditor has attached a debt due to him, he will not be able to retain the benefit of that attachment unless he is able to complete execution of his order before the commencement of the winding-up (at para 49/1/38).

22 Indeed, in the case of winding-up actions, Parliament has clearly intended for ss 299 and 334 of the Companies Act to apply to both secured and unsecured creditors. These provisions set a level playing field for creditors and ensure that the limited assets of the company under liquidation are not dissipated by creditors through creative uses of purported legal remedies at the expense of other creditors. It is the function of the liquidator, and not the creditors acting for their own self-serving ends, to advance the interests of all the creditors as a whole by treating them fairly. The autonomy of the liquidator should be respected so that he can function effectively and the court should only intervene in limited instances to correct inequity or unfairness. These policy concerns were also alluded to by the Court of Appeal in *Transbilt* (at [4]–[5]) and I agreed fully with these concerns.

23 Accordingly, given the Court of Appeal's decision in *Transbilt* and the relevant policy concerns, I rejected the plaintiff's submissions that the service of the garnishee order *nisi* made it a secured creditor and took it outside the

regime imposed to level the playing field amongst creditors, subject to the liquidator's power to distribute the company's assets fairly amongst creditors, having regard to the securities that they hold and the debts that they were owed.

Cases cited by the plaintiff

24 I shall now deal with the cases that the plaintiff cited in support of its argument. I did not agree with the plaintiff's submissions that if the Court of Appeal in *Transbilt* had been referred to those cases, it might have come to a different conclusion.

25 Many of the cases cited by the plaintiff did not deal directly with the issue of the effect of garnishee orders in winding-up proceedings:

(a) In *Korea Asset Management Corp v Daewoo Singapore Pte Ltd (in liquidation)* [2004] 1 SLR(R) 671, the court dealt with the principles of compulsory winding-up when the company was undergoing a creditors' voluntary winding-up. By way of *obiter dicta* the court noted that the rights of a secured creditor should not eventually be fettered by the insolvency proceedings (at [49]). This *dictum* did not assist me in deciding whether the plaintiff in this case was such a secured creditor and whether there was inequity such that the distribution of assets should not be left to the liquidator and that the court should intervene instead.

(b) In *Power Knight Pte Ltd v Natural Fuel Pte Ltd (in compulsory liquidation) and others* [2010] 3 SLR 82, there was a competing claim between a debenture holder who was granted a fixed charge over the company's property and the company's liquidators who lodged a caveat claiming an interest over the property. The court noted in *obiter* that assets encumbered by a valid security interest were not available for

distribution among a company's unsecured creditors upon the winding up of the company (see [30], [38] and [40]). Sections 299 and 334 of the Companies Act were not referred to. Hence, this case did not assist this court as to the principles to apply in the context of these sections.

(c) In the case of *In re Aro Co Ltd* [1980] 2 WLR 453, the issue related to the arrest of a ship and whether the jurisdiction of the admiralty court had been invoked. The English Court of Appeal noted in *obiter* that a secured creditor could justly claim that he is independent of the liquidation as he was enforcing a right to his own property and not to the company's property. However, the court noted that s 228 of the UK Companies Act 1948 (which corresponds to s 299 of our Companies Act) "appl[ies] to secured as well as to unsecured creditors" (at 458). The court then went on to confirm that leave would not be granted to proceed unless there were "special reasons" to do so (at 459). This is in accordance with my analysis above, namely, that ss 299 and 334 of the Companies Act apply to both types of creditors. It is the liquidator's function to distribute the assets fairly between secured and unsecured creditors according to their security. The court should only interfere in limited situations (see [22] above).

(d) In *The Hull 308* [1991] 2 SLR(R) 643, the Court of Appeal considered and affirmed *In re Aro Co Ltd*, but again in the limited context of whether a writ *in rem* against a vessel could constitute security over that vessel. The Court of Appeal's comments were therefore targeted at the nature of the writ in that case and not against the nature of a garnishee order. In any case, the Court of Appeal went on to observe that whether the court would exercise its discretion to grant leave to proceed would depend on what is "right and fair in the

circumstances" (at [14]), which corresponds to the approach taken in *Transbilt* – that leave would only be granted if there were inequity on the part of the company (see [14] above).

These cases therefore did not assist the plaintiff's case as they were not in the context of garnishee orders, and the comments made in those cases were by way of *obiter dicta*. Instead, many of the general principles that these cases set out were consistent with my analysis above.

26 While some of the other cases cited by the plaintiff dealt with garnishee orders, they were also not useful for this case.

(a) The plaintiff relied on *In re Stanhope Silkstone Collieries Company* (1879) 11 Ch D 160 ("*Stanhope*"), a case decided more than 100 years ago. The court examined the effect of a garnishee order *nisi* that was not served and observed that it "does not operate to give the Plaintiff in the original action any security until it is served" (at 161–162).[6] However, the court did not make a finding on the effect of an order that *was* served on winding-up proceedings.

(b) The plaintiff also cited *Croshaw v Lyndhurst Ship Company* [1897] 2 Ch 154, a case that was also decided more than 100 years ago. The issue was not the effect of a garnishee order but whether the appointment of a receiver conferred on the judgment creditor any charge over the debtor's property, making him a secured creditor in the company's winding-up proceedings. Hence, while this case cited *Stanhope*, it was not useful to resolve the present issue.

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6 PBOA, pp 68–69.

(c) The plaintiff then referred to *N Joachimson (A Firm Name) v Swiss Bank Corporation* [1921] 3 KB 110, which was also an old case decided almost a century ago. It was an action taken by a partner against the bank for the balance of the money in its current account. The issue was whether the service of a garnishee order *nisi* sufficiently operated as a banker's demand and therefore whether a cause of action had accrued. Hence, although the partnership had been dissolved in that case (which is arguably similar to a company being wound up), the issue that was decided was entirely different from the present case.

(d) The plaintiff then referred extensively to *Société Eram Shipping Co Ltd v Cie Internationale de Navigation and others* [2004] 1 AC 260 ("*Société Eram Shipping*"). The issue in that case was whether the court could make final a garnishee order *nisi* obtained in England as against a Hong Kong bank, given that the Hong Kong court would not give effect to a garnishee order obtained in the English courts by reciprocal enforcement. The issue was primarily one of international law and is therefore very different from the present case. Further, I would add that the passages of Lord Hoffmann and Lord Millett that the plaintiff cited from *Société Eram Shipping* were also not about a garnishee order *nisi*. Rather, the law lords were describing the proprietary effect of a garnishee order *in general*, which does not shed light on the effect of a garnishee order *nisi*.

(e) Finally, the plaintiff cited *Galbraith v Grimshaw and Baxter* [1910] 1 KB 339 ("*Galbraith*") for the proposition that the garnishee order *nisi* made it a secured creditor. The English Court of Appeal in *Galbraith* had to consider whether s 108 of the Bankruptcy (Scotland) Act 1856 or s 45 of the UK Bankruptcy Act 1883 was applicable, as the

> proceedings in that case were initiated across the two jurisdictions. The outcome would have been different depending on which law was applicable. Farwell LJ, in the passage that the plaintiff cited, noted that *Stanhope* stood for the proposition that the service of the order gives the judgment creditor "some security". However, Farwell LJ went on to say that the service of the order "does not … operate as a transfer for the property in the debt", although it was an "equitable charge on it" in the sense that "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" (at 343). I considered this passage to be saying no more than the fact that once the notice was given, the garnishee could no longer freely deal with the assets, and the assets were in that sense frozen. But this did not make the judgment creditor a secured creditor, even though he had served the garnishee order *nisi*.

27 Accordingly, I found that the cases cited by the plaintiff – even those that pertained to garnishee orders – did not assist the plaintiff's case that serving the garnishee order *nisi* transformed it into a secured creditor. I was therefore completely unconvinced that the Court of Appeal in *Transbilt* would have taken a different position had it been confronted with these cases. Indeed, there are policy considerations against adopting the position that the plaintiff was a secured creditor. A garnishee order *nisi* can be obtained *ex parte* and does not even require the garnishee to show cause as to why the order should not be perfected until a later stage. Hence, this would not have given the liquidator a clear path to fulfil his tasks in liquidation and to prevent creditors from a "disorganised or unfair rush" to put their assets out of the liquidator's hands. To the contrary, such an interpretation would "substantially weaken[]" the strength

of ss 299 and 344, which goes against the policy that the Court of Appeal in *Transbilt* elucidated (see [12] above).

Conclusion

28 In summary, I followed the decision of the Court of Appeal in *Transbilt* and for the above reasons, I dismissed OS 1159. Therefore, the plaintiff's application for the stay of proceedings to be lifted was not granted, except for the issue of taxation of costs for DC Suit 286 which was not disputed.

29 After hearing the parties on costs, I awarded costs fixed at $2,000 (inclusive of disbursements) to the defendant.

Tan Siong Thye
Judge

Chia Swee Chye Kelvin (Lumen Law Corporation) for the plaintiff;
Tan Cheng Kiong (CK Tan & Co) for the defendant.