IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 26

Civil Appeal No 151 of 2017

Between

DIABLO FORTUNE INC

… *Appellant*

And

(1) CAMERON LINDSAY DUNCAN
(2) LUKE ANTHONY FURLER

… *Respondents*

GROUNDS OF DECISION

[Insolvency Law] — [Avoidance of transactions] — [Unregistered charges] — [Lien over sub-freights and sub-hires]

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v
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5 March 2018

21 May 2018

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

Introduction

1 This appeal raises an important question: are liens over sub-freights and sub-hires registrable charges? The characterisation of such a lien appears to have far-reaching and potentially dire consequences. In the shipping industry, charterparties and the ensuing freight operate as its lifeblood. Charterparties typically – in fact, *almost invariably* – provide for a lien on sub-freights to permit the shipowner (which includes any charterer holding a lien on sub-freights payable down the chain) to "attach" the sub-freights due from a third party sub-charterer. The determination at hand would impact shipping companies and their creditors, and it bears mention that non-registration is an offence under the Companies Act (Cap 50, 2006 Rev Ed) ("the Companies Act").

2 But this issue of registration has remained submerged (and the position in Singapore unarticulated) up until it surfaced in the applications below. This has been so, even though the settled English legal position for the last three decades has been that such liens operate as a charge on the company and would be void against the liquidator in the absence of registration. The reason for this long hiatus in Singapore is that the issue only arises for judicial determination when at least the following five principal facts are aligned. First, a Singapore-incorporated charterer is involved (only Singapore companies are subject to the registration regime under s 131 of the Companies Act). Second, that charterer becomes insolvent during the performance of the charterparty. Third, the freight due from the third party sub-charterer has not been paid over, and is therefore amenable to the exercise of the lien by the shipowner. Fourth, the insolvent charterer must be a substantial operator justifying the expense for the appointment of a liquidator. Finally, the validity of the lien is challenged by the liquidator so appointed (the liquidator being the proper plaintiff, on the liquidation of the chargor, to bring proceedings to avoid a charge for non-registration: *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 ("*Sculptor Finance*") at [54]). Although a challenge could technically be mounted by the Official Receiver, for all practical purposes, such challenges in Singapore have always been brought *only* by private liquidators. Given that this issue only surfaces for determination when there is a confluence of these five facts, it is understandable why in the past, the issue has always resolved itself in Singapore without judicial intervention. These critical facts were, however, present in the dispute which came before the Judge, and she followed the conventional English approach: see *Duncan, Cameron Lindsay and another v Diablo Fortune Inc and another matter* [2017] SGHC 172 ("the Judgment").

3 This issue of characterisation also brings into sharp relief "the tension between maritime and insolvency practitioners", as the Judge below astutely observed (at [71]). The shipowner finds it an inconvenient (or impracticable) task to register such liens, especially if the charterparty is for a short duration. But the creditor expects to find all of the charges encumbering the company's assets on the charge register, and it decides whether to extend credit or enter into transactions with the company based on what is reflected.

4 The underlying rationale for registration under s 131 of the Companies Act is that it gives creditors notice of charges against the company to enable them to decide whether to extend credit to the chargor: see *Sculptor Finance* at [30]–[31]. Notice, however, may not be necessary in the present context since all parties who deal with charterers are aware that such liens are standard in charterparties: A L Diamond, *A Review of Security Interests in Property* (Her Majesty's Stationery Office, 1989) at para 23.4.15. Further, the necessity for registration assumes the availability of information in order to effect the registration. But in the unique context of the shipping industry, back-to-back charterparties are commonplace with the result that the shipowner may not have information about the sub-charterparty at the material time. How does an shipowner register a charge over sub-freights if he is not aware of the details of the sub-charterparty?

5 These distinctive features of the shipping industry might make the requirement of registration of liens on sub-freights less compelling. However, can this, even if true, affect the underlying nature of the lien? Ultimately, it boils down to the proper characterisation of the legal nature of the lien on sub-freights. Once that inquiry is complete, the legal consequences would flow from that determination.

6 We heard and dismissed the appeal with costs on 5 March 2018. In doing so, we stated that we largely agree with the reasoning of the Judge but that we would explain our decision in due course, given the importance of the issue. These are our grounds.

Background

7 The present appeal stems from the liquidation of Siva Ships International Pte Ltd ("the Company"), a Singapore-incorporated company engaged in commercial vessel operations before it was wound up. It had a fleet of three chartered vessels, including the *V8 Stealth II* ("the Vessel"), and it sub-chartered these vessels out to third party charterers on shorter fixtures or participated in vessel pooling arrangements. The Vessel was chartered from the appellant, Diablo Fortune Inc ("Diablo"), pursuant to a BIMCO Standard Bareboat Charter ("the Bareboat Charter") that the Company entered into with Diablo on 6 June 2008. The charter period was initially stipulated to be five years, but was subsequently extended to 4 May 2017.

8 On 10 March 2010, the Company entered into a Standard Ship Management Agreement ("Management Agreement") with V Ships (Asia) Pte Ltd ("V Ships") for V Ships to provide technical and crew management services in respect of the Vessel. The Company also entered into a pooling arrangement with V8 Pool Inc ("V8") on 9 February 2011 ("the Pool Agreement"). Under the Pool Agreement, the Company earned revenue from the Vessel by sub-chartering it to V8, which in turn employed the Vessel in the pooling arrangement. To facilitate the Pool Agreement, V8 engaged Navig8 Asia Pte Ltd ("Navig8") to manage the commercial affairs of the Vessel. V8 paid the Company charter hire monthly based on the actual earnings from the pooling

arrangement divided by the number of pool participants and after deducting the management fee due to Navig8.

9 The Company subsequently incurred substantial losses and was unable to pay its debts. On 19 December 2016, the Company filed a winding up application in Singapore. On 21 December 2016, the Company's directors notified Diablo of the winding up application, and informed Diablo that it intended to arrange for early redelivery of the Vessel as the Company no longer had the financial means to pay hire or continue with the Bareboat Charter.[1]

10 Upon receiving this notification, Diablo sought to exercise a lien on the sub-freights due from V8 to the Company (the "Lien") pursuant to cl 18 of the Bareboat Charter, which states:

> **18. Lien**
>
> 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 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.

To this end, Diablo sent a lien notice to V8 on 30 December 2016.

11 As referred to at [8] above, under the Pool Agreement, V8 was to make distributions to the Company for charter hire earned. This was done on a monthly basis and the distributions would usually be paid during the first week of the following month. The sum of US$563,999, which was the distribution amount for the month of December 2016 ("the December Distribution") in respect of the Vessel, was due and owing from V8 to the Company. However,

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1 Luke Anthony Furler's affidavit, para 15 and Exhibit LAF–6.

V8 did not make that payment to the Company in the light of Diablo's lien notice.[2]

12 Shortly after, the Company was wound up on 6 January 2017,[3] and the respondents ("the Liquidators") were appointed as its liquidators. Meanwhile, the Vessel was on a voyage ("the Voyage") from Nigeria to Cartagena, Spain, to deliver a consignment of goods. The Voyage was due to be completed around 16 January 2017.[4]

13 The Liquidators were of the view that the completion of the Voyage would be in the interest of the Company and its creditors. To this end, V8 and the Company executed a settlement agreement on 18 January 2017 (the "Settlement Agreement"). The material terms of the Settlement Agreement provide as follows:[5]

> (a) that the December Distribution amount, a separate sum of US$650,000 (being the working capital deposit paid by the Company to V8 under the Pool Agreement, which was to be reimbursed to the Company upon termination of the Pool Agreement), and all future amounts that the Company would be entitled to under the Pool Agreement (including but not limited to the distribution amount for January 2017) were due and payable to the Company;
>
> (b) that V8 would pay Diablo, out of the sums due to the Company, the hire for the Vessel at a rate of US$15,300 per day *pro rata* from 4 January 2017 to the date of discharge of the cargo on board the Vessel;

2 Luke Anthony Furler's affidavit, para 18.

3 Luke Anthony Furler's affidavit, Exhibit LAF–1.

4 Luke Anthony Furler's affidavit, para 16.

5 Luke Anthony Furler's affidavit, para 19.

(c) that V8 would withhold any sums covered by lien notice(s) issued to V8 and not withdrawn by Diablo;

(d) that out of any balance left after payment to Diablo for hire and after withholding any sums covered by the lien notice(s), V8 would pay V Ships US$176,814.17 for services provided from 1 January 2017 until 18 January 2017, or an amount increased *pro rata* for any delays to the completion of the Voyage; and

(e) that the above payments were to be made within three banking days from the date and time of completion of discharge of the cargo on board the Vessel.

14 The Vessel arrived at Cartagena on 16 January 2017 and completed discharge of its cargo on 19 January 2017. Hence, payment to the relevant parties under the Settlement Agreement was due on 24 January 2017. On or about 24 January 2017, V8 paid US$232,931.87 to Diablo for hire for the period from 4 January 2017 to 19 January 2017. However, V8 withheld payment due to V Ships and to the Company under the Settlement Agreement until the dispute over the validity of the Lien encapsulated in cl 18 of the Bareboat Charter was resolved.[6]

15 On 19 January 2017, Diablo sent a notice of arbitration to the Company in relation to claims under the Bareboat Charter, pursuant to an agreement to arbitrate in London.[7] The Liquidators then obtained an order from the Chancery Division of the English High Court on 28 February 2017, recognising the Singapore liquidation and granting an automatic moratorium and/or stay on all

6 Luke Anthony Furler's affidavit, para 24.

7 Luke Anthony Furler's affidavit, para 22.

proceedings.[8] On 25 January 2017, Diablo also obtained injunctive relief from the Madrid Court of First Instance No 101, prohibiting the consignee of the goods shipped on the Voyage as well as V8 from making payment to any other parties pending the determination of Diablo's claim and/or the validity of the Lien.[9]

The decision below

16 The Judge was concerned with three applications:

(a) Originating Summons No 287 of 2017 ("OS 287"), an application by the Liquidators seeking a determination that the Lien is void for want of registration, pursuant to s 131(1) of the Companies Act;

(b) Summons No 1317 of 2017 ("SUM 1317"), an application by Diablo to stay OS 287 in favour of arbitration; and

(c) Originating Summons No 307 of 2017 ("OS 307"), an application by Diablo to seek an extension of time to register the Lien, pursuant to s 137 of the Companies Act (should the Judge find in OS 287 that the Lien is a registrable charge within the meaning of s 131 of the Companies Act).

17 The Judge dismissed SUM 1317 on the basis that the validity of the Lien was not a dispute covered by the arbitration agreement and was therefore not arbitrable (Judgment at [14]). In relation to OS 287, the Judge found that the Lien was a registrable charge within the ambit of s 131 of the Companies Act (at [73]). She dismissed OS 307 as she was not persuaded that it would be just

8 Anna Devereaux's affidavit, para 32.

9 Anna Devereaux's affidavit, para 40.

and equitable to grant an extension of time to register the Lien (at [81]). Her decisions on SUM 1317 and OS 307 are not matters on appeal, so we will only deal with OS 287.

18 In determining the issue raised in OS 287, the Judge noted that there were two competing juridical bases for the lien over sub-freights in English jurisprudence (Judgment at [48]). Such a lien could be construed either as an equitable assignment by the charterer by way of security for payment of sums owed to the shipowner, or as a *sui generis* personal contractual right of interception analogous to an unpaid seller's right of stoppage in transitu. The Judge favoured the former (at [50]), which is the view that the English courts have endorsed.

19 The Judge also found that the lien over sub-freights possessed the characteristics of a floating charge (Judgment at [51] and [65]), and that this lien provided an immediate security interest at the date of the charter (not just a personal contractual right), although it might not create any proprietary interest in the sub-freights or sub-hires in favour of the shipowner until notice is given (at [57]). Notice from the shipowner was regarded by the Judge as the event of crystallisation, that is, the point when the floating charge bites on the pool of assets it hovers over (*ie*, the sub-freights or sub-hires), and becomes a fixed security such that the charterer's management over the sub-freights or sub-hires comes to an end (at [58]).

20 The Judge then addressed the objection that a lien over sub-freights does not give rise to any rights of property. She did not find this to be entirely accurate (Judgment at [60]–[61]). The very nature of a floating charge was such that a chargor could deal with the charged assets in the usual course of business prior to crystallisation. But after the lien has been validly exercised, the charge

crystallises, and the shipowner (the chargee) would be able to follow the sub-freights or sub-hires (being charged assets) into the hands of a third party. This right against the third party would, however, be defeated by a *bona fide* purchaser of the asset for value without notice of the existence of the charge or the rule in *Dearle v Hall* (1823) 3 Russ 1 ("*Dearle v Hall*").

21 The Judge concluded that the Lien was subject to the registration requirement in ss 131(3)(*f*) and 131(3)(*g*) of the Companies Act (Judgment at [73]). If the practical inconvenience occasioned by the requirement of registration outweighed the need to protect all other creditors through notice on the register of charges, it was for Parliament to determine whether such liens should be excluded from the existing scheme.

The competing views on characterisation

22 Until the present hearing, there were two prevailing theories of the juridical basis of the lien on sub-freights (see [18] above), and the parties before us adopted the theory that better suited their respective positions: Diablo submitted that the Lien was a contractual right of interception, whereas the Liquidators submitted that the Lien was a registrable charge. Given the novelty (especially before the Singapore courts) and importance of this question of characterisation, we appointed Professor Hans Tjio as *amicus curiae*. At the outset, we wish to thank him for his thoughtful submissions. Indeed, Professor Tjio introduced a fresh perspective by putting forth a third theory that was one step removed from the Liquidator's position – that the Lien was an *agreement to create a charge on the occurrence of a charterer's default*. We turn now to address these arguments in greater detail.

The "contractual right of interception" theory

23 The "contractual right of interception" theory first emerged in *In re Welsh Irish Ferries Ltd* [1986] 1 Ch 471 ("*The Ugland Trailer*"), when then Mr Peter Millett QC (who was acting for the shipowners) argued that the shipowner's lien was a *sui generis* right to intercept the sub-freight before it is paid to the charterer, analogous to a right of stoppage in transitu, and was therefore exempt from registration (at 474). Nourse J rejected this argument, but this view was subsequently taken up in an influential article by Professor Fidelis Oditah QC (see Fidelis Oditah, "The Juridical Nature of a Lien on Sub-Freights" [1989] LMCLQ 191 ("*Oditah's article*")). In his article, Professor Oditah considered six possible theories, three of which he gave short shrift to and we make no mention of. The remaining three were the equitable assignment theory, the equitable charge theory and the right of interception theory. He conjoined the first two as an equitable assignment by security which takes effect as an equitable charge (at 193); see also [36] below.

24 Professor Oditah preferred the right of interception theory to the equitable charge theory, and made three main arguments to support his view (*Oditah's article* at 194–195). First, that the lien on sub-freights is *intended* to be a non-possessory *security* does not mean that it necessarily takes effect as an equitable charge. Not every agreement intended to operate as a security creates a security interest in law; many quasi-securities, such as retention of title clauses, are intended to operate like securities but do not create a security interest because the priority they guarantee is not an incident of an underlying property right. Second, Professor Oditah debunked the notion that the right conferred by the lien must be an equitable charge since it can only vest through the mechanism of an assignment. Instead, the right is vested once the contract of hire is made, except that it is only exercisable after the obligations subject to

the security accrue. His third argument – what he regarded to be the "*more serious objection*" – was that lien holders of sub-freights do not enjoy a right of property whereas chargees do.

25 More than a decade after the publication of *Oditah's article*, Lord Millett (who had by then been appointed to the English Bench and the Privy Council) adopted Professor Oditah's characterisation in the Privy Council decision of *Agnew and another v Commissioner of Inland Revenue* [2001] 2 AC 710 ("*Re Brumark Investments*"). The court in *Re Brumark Investments* was concerned with the characterisation of a different security, namely a charge over book debts that arose in the company's ordinary course of business, but the first instance judge had pointed to a shipowner's lien over sub-freights as an example of a fixed charge over assets which is defeasible at the will of the chargor (see *Re Brumark Investments* at [38]). Lord Millett noted that the cases have not definitively held that such liens are fixed charges, but added that the better view is that such liens are simply not charges (at [39]). Lord Millett elaborated as follows (at [41]):

> The lien is the creation of neither the common law nor equity. It originates in the maritime law, having been developed from the ship owner's lien on the cargo. It is a contractual non-possessory right of a kind which is sui generis.

These comments, however, were *obiter*. They have also held little sway over first-instance judges in subsequent cases (see, *eg*, *Western Bulk Shipowning III A/S v Carbofer Maritime Trading APS and others (The "Western Moscow")* [2012] 2 Lloyd's Rep 163 (*"The Western Moscow*"), which adopted the "equitable charge" theory instead).

26 The principal objection to the "contractual right" analysis is the absence of any direct contractual relationship between the shipowner and the sub-

charterers. This means that the right conferred under the lien would be unenforceable for *lack of privity*. This was noted by Christopher Clarke J in *The Western Moscow* at [51]:

> *Further, if the right is only some form of sui generis contractual right it is one of restricted use. It would give the owners no direct claim against the sub-charterer*; but only a right to have the charterers restrained from receiving the sub-charter hire or ordered to direct its payment to the owners or to a blocked account. … It may be that the sub-charterers would be in contempt if, with notice of the injunction, they made payment to the charterers, and it may be that they could be joined in any action against the charterers for the purpose of securing protective relief; *but there would be no direct right of the owners against them.* [emphasis added]

27 In fact, this was a hurdle that Professor Oditah himself recognised in Fidelis Oditah, *Legal Aspects of Receivables Financing* (Sweet & Maxwell, 1991) ("*Legal Aspects of Receivables Financing*"), a book he authored after *Oditah's article* was published. He writes (at pp 87–88):

> The personal right analysis suffers from one obvious weakness: it does not explain how the shipowner overcomes the problem of privity when enforcing payment against the shippers or sub-charterers. When there is a sub-charter party there is no direct contract between the sub-charterer and the shipowner.

28 Similarly, in Hugh Beale QC *et al*, *The Law of Security and Title-Based Financing* (Oxford University Press, 2nd Ed, 2012) ("*The Law of Security and Title-Based Financing*") at para 8.159, the issue of privity is raised: if liens on sub-freights are contractual in nature, they "should no more bind third party sub-charterers than any other burden in a contract to which that third party is not privy".

29 The authors of *The Law of Security and Title-Based Financing* highlight another dimension to the privity problem (at para 8.160). In a situation where the sub-charterer responds to the shipowner's demand for payment of sub-

freights, the contractual analysis is unable to explain why payment to the shipowner would discharge the sub-charterer's debt to the charterer. Unless the sub-charter makes provision to that effect or the head charter names the sub-charterer as a third party beneficiary, a mere contractual relation between the shipowner and the charterer cannot have any legal effect on the *sub-charterer's* debt to the charterer. If the sub-charterer is to benefit as a third party under the head charter, statutory requirements, such as the express identification of the third party in the contract (see, *eg*, s 2(3) of the Contracts (Rights of Third Parties) Act (Cap 53B, 2002 Rev Ed)), might have to be satisfied.

30 This problem of privity becomes more pronounced when a chain of charters is involved, and when each of these charterparties is analysed separately as two-party contracts (between the shipowner and the charterer, the charterer and the sub-charterer, and so forth). In contrast, the characterisation of a lien on sub-freights as an equitable assignment provides a ready answer. By interpreting the word "sub-freights" in the lien clause of the head charter to include all sub-freights payable down the chain of charters, the lien holder at the top of the chain (typically, the shipowner) becomes the assignee of not only the hire payable under the sub-charter, but also the hire payable under the sub-sub-charter, and so on: *The Western Moscow* at [58]; *Care Shipping Corporation v Latin American Shipping Corporation* [1983] 1 QB 1005 ("*The Cebu*") at 1013B; *Carver on Charterparties* (Sweet & Maxwell, 2017) (Howard Bennett, gen ed) ("*Carver on Charterparties*") at para 13–068. The shipowner, being the assignee of the rights to payment conferred by the sub-charters, can discharge the sub-charterers in the same way that an assignee can discharge a debtor from its indebtedness to an assignor: *The Law of Security and Title-Based Financing* at para 8.160.

31 Counsel for Diablo, Ms Felicia Tan, acknowledged that liens on sub-freights do not fit squarely with the "contractual right of interception" theory, but according to her, this conception of the lien is the "least unattractive" formula. During the hearing, Ms Tan addressed our concerns on privity by pointing out that it is a matter of *industry custom* that sub-charterers comply with requests for payment upon notice of the lien. We find this argument bereft of legal content. Even if such an industry custom existed, it should not be allowed to ride roughshod over age-old legal doctrines, especially when the "equitable assignment" theory provides an answer that is sound in principle and comports with existing practice. On a related note, to the extent that this was suggested by Lord Millett's reference to "maritime law" in *Re Brumark Investments* at [41], the authors of *The Law of Security and Title-Based Financing* (at para 8.159) doubt that the fact that a lien on sub-freights is a creature of "maritime law" can enable an express term in the charter to have the effect of carving out an exception to the doctrine of privity.

32 In his submissions, Professor Tjio considered and rightly rejected two methods of overcoming the privity issue. The first was to characterise any sub-charterer's failure to pay sub-freights to the shipowner after notice has been given as a tort of interference with a contract. This is untenable as this tort requires the defendant to have *intended* and *procured* the contractual breach (see Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2nd Ed, 2016) at paras 15.007–15.014). Neither is likely to be fulfilled in the factual matrix we are concerned with. The second proposed solution was to regard the shipowner as the charterer's agent who would collect the sub-freights on behalf of the charterer. But an explanation based on agency would not reflect the reality of the parties' relationship. The "agency" explanation was expressly rejected in *Annangel Glory Compania Naviera SA v M Golodetz Ltd, Middle*

East Marketing Corporation (UK) Ltd and Clive Robert Hammond (The "Annangel Glory") [1988] 1 Lloyd's Rep 45 ("*The Annangel Glory*") at 47 where Saville J reasoned as follows: "[w]hatever the true nature of the 'lien', it seems to me to be obvious that the parties intended to give the owners a right which the owners could exercise on their own behalf – not on behalf of the charterers".

33 We also reject the alternative solutions proffered by Professor Oditah in *Legal Aspects of Receivables Financing* (at p 88). His first proposal was to treat the shipowner as a joint promisee with the head charterer and the sub-charterer as the promisor (as regards enforceability of the lien), on the basis that the head charter will normally be incorporated into the sub-charter. The alternative proposal was to say that the charterer holds the benefit of the lien clause in the charterparty on trust for the shipowner. Insofar as the first argument is concerned, the incorporation of the head charter does not make the shipowner a party to the sub-charter. Insofar as the second argument is concerned, it would be a stretch for a trustee-beneficiary relationship to arise from a charter; any purported trust would fail for lack of certainty of intention.

34 We therefore find the privity hurdle insurmountable; accordingly, we reject the "contractual right of interception" theory. We should also clarify that we are not concerned with sub-freights due under a shipowner's bill of lading (under which the shipowner is a direct party to the bill of lading, and the charterer is the agent of the shipowner for the collection of bill of lading freight from the sub-charterer): see *The Annangel Glory* at 49; Ian Teo, "*Liens on Sub Freight Revisited: Charge or* Sui Generis *Right of Interception*" [2018] LMCLQ 14 ("*Liens on Sub Freight Revisited"*) at 18.

The "floating charge" theory

35 The prevailing position in English law is that liens on sub-freights give rise to an equitable assignment by way of floating charge: see, *eg*, *Federal Commerce & Navigation Co Ltd v Molena Alpha Inc and Others (The "Nanfri")* [1979] AC 757 at 784; *The Cebu* (*supra* [30] above) at 1015–1016; *The Ugland Trailer* (*supra* [23] above) at 478; *G & N Angelakis Shipping Co SA v Compagnie National Algerienne de Navigation (The "Attika Hope")* [1988] 1 Lloyd's Rep 439 at 441; *The Western Moscow* (*supra* [25] above) at [48]–[52]; *Dry Bulk Handy Holding Inc and another v Fayette International Holdings Ltd and another (The "Bulk Chile")* [2012] EWHC 2107 at [58]; Sir Bernard Eder *et al*, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell, 22nd Ed, 2011) at para 16–013; David Osborne *et al*, *The Law of Ship Mortgages* (Routledge, 2nd Ed, 2016) ("*The Law of Ship Mortgages*") at para 17.10.1; Terence Coghlin *et al*, *Time Charters* (Routledge, 7th Ed, 2014) ("*Time Charters*") at paras 30.32–30.33.

36 Under the "floating charge" theory, a lien on sub-freights creates an assignment that is equitable in nature because it assigns future choses in action (sub-freights that were not in existence when the charter was entered into). This purported assignment operates as an agreement to assign in the future and equity gives effect to this agreement once the chose in question comes into existence: *The Annangel Glory* (*supra* [32] above) at 47; *The Law of Ship Mortgages* at paras 17.3.2 and 17.3.4; John McGhee QC, *Snell's Equity* (Sweet & Maxwell, 33rd Ed, 2015) ("*Snell's Equity*") at para 3–030. Such an assignment would not be an out-and-out assignment, but one by way of security: *The Ugland Trailer* at 478E; *Tradigrain SA and others v King Diamond Shipping SA (The "Spiros C")* [2000] 2 Lloyd's Rep 319 ("*The Spiros C*") at [11].

37 The lien creates an immediate security interest on the date of the charterparty, and the shipowner (being the lien holder) has a dormant right to the sub-freights as and when they come into existence (as part of a circulating fund of assets), but the shipowner holds no proprietary interest in any particular sub-freights until sums due under the charter go unpaid and the shipowner crystallises the charge by giving notice of the lien. Until that point, the charterer is free to deal with the sub-freights as its own for its own business operations: *Carver on Charterparties* at para 13–054, citing *The Annangel Glory* at 49–50 and *The Western Moscow* at [49].

38 The Judge adopted the "floating charge" theory and used the following definition of a floating charge set out in *In re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 ("*Re Yorkshire Woolcombers Association*") at 295 (Judgment at [46]): (a) that it is a charge on a class of assets of a company both present and future; (b) that this class of assets is one which would, in the ordinary course of business of the company, be changing from time to time; and (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. To date, the factors in *Re Yorkshire Woolcombers Association* factors remain authoritative (see *Re Property Edge Lettings Ltd* [2018] 1 BCLC 291 at [23]). The Judge found that the Lien matched the description of a floating charge: (a) it was a charge on sub-freights and sub-hires, a class of assets of the Company; (b) this class of assets would, in the ordinary course of business, be changing from time to time; and (c) until the event of crystallisation, which in the present case would be when Diablo gives notice of the exercise of the Lien, the charterer is free to collect and deal with the sub-freights or sub-hires as its own (Judgment at [51]).

39 The primary objection to the "floating charge" theory, as we have alluded to above at [24], is that the lien holder does not enjoy a right of property. Professor Oditah argued that this was so because a lien holder is unable to trace into sub-freights paid and its proceeds before the right of lien is exercised (*Oditah's article* at pp 195–196):

> A more serious objection to the charge theory is that a lien on sub-freights is a right to intercept the freights before they are paid. There is no tracing remedy for the lienee. In this respect the lien is a charge of a kind unknown to equity jurisprudence because it lacks most of the ordinary incidents of a true charge. *It is common knowledge that a charge, as a proprietary security, gives the chargee a right of property (as opposed to a right to recover monetary compensation), a right of pursuit, a right of priority, and a right of enforcement.* A chargor who receives debts charged with the discharge of an obligation holds them as a constructive trustee for the chargee. But this is not true of a lienor of sub-freights. Furthermore, third parties who receive charged property with notice of the charge are constructive trustees. *The same cannot be said of a third party who receives sub-freights before the right of lien is exercised. …*
>
> *… The inability to follow its proceeds once paid is not so much because that is the event which defeats it; rather, the ability to trace is a consequence of an underlying property right, and this the lien does not give. …*
>
> [emphasis added]

Similar views were expressed by Lord Millett in *Re Brumark Investments* at [41]:

> … Since the sub-freights are book debts and so incapable of physical possession, the lien has been described as an equitable charge: see *Federal Commerce and Navigation Co Ltd v Molena Alpha Inc (The Nanfri)* [1979] AC 757, 784 per Lord Russell of Killowen. But this was a passing remark which was not necessary to the decision, and if the lien is a charge it is a charge of a kind unknown to equity. An equitable charge confers a proprietary interest by way of security. *It is of the essence of a proprietary right that it is capable of binding third parties into whose hands the property may come. But the lien on subfreights does not bind third parties. It is merely a personal right to intercept freight before it is paid analogous to a right of stoppage in transitu. It is defeasible on payment irrespective of*

> *the identity of the recipient.* In this respect it is similar to a floating charge while it floats, but it differs in that it is incapable of crystallisation. The ship owner is unable to enforce the lien against the recipient of the subfreights but, as Oditah observes, this is not because payment is the event which defeats it (as Nourse J stated in *In re Welsh Irish Ferries Ltd* [1986] Ch 471 [*sic*]; it is because the right to enforce the lien against third parties depends on an underlying property right, and this the lien does not give. Apart from the obiter dictum of Lord Russell in the *Federal Commerce* case, the cases in which the lien has been characterised as an equitable charge are all decisions at first instance and none of them contains any analysis of the requirements of a proprietary interest. Quite apart from the conceptual difficulties in characterising the lien as a charge, the adverse commercial consequences of doing so are sufficiently serious to cast grave doubt on its correctness. In passing from this topic their Lordships note that the decision in *In re Welsh Irish Ferries Ltd* will be reversed by Parliament by section 396(2)(*g*) of the Companies Act 1985 inserted by section 93 of the Companies Act 1989 when that section is brought into force. [emphasis added]

We note, as an aside, that the amendment referred to at the foot of the passage quoted above never came into force. Even so, it has been observed that registration has not become commonplace in the UK, especially for shorter charters, possibly because a charterer is more likely than not to be a non-English company: *Liens on Sub Freight Revisited* at 18.

40 The point addressed by Lord Millett and Professor Oditah – that payment of sub-freights would "defeat" the lien – makes reference to Nourse J's earlier holding in *The Ugland Trailer*. There, the shipowner had argued that the inability to follow sub-freights into the hands of the charterer demonstrated that the lien gave the shipowner no proprietary right in the sub-freights and that an essential element of a charge was missing. Nourse J rejected this argument (at 478G–H):

> I think that the submission proceeds on a confusion between the nature of the right and the event which defeats it. If, for example, the shipper were to make payment not to the charterer but to some third party who had notice of the lien, it could not be doubted that the shipowner could follow the money into the hands of the third party. *The reason why he cannot follow it into the hands of the charterer is because it is the very event of payment to him which defeats the right.* The assignment is, as Mr. Oliver described it, defeasible in that event. But, until defeated, it is nonetheless an assignment by way of security. [emphasis added]

41 We agree with the position taken by Nourse J. Payment of sub-freights to the charterer before the lien is exercised "defeats" the lien simply because the lien no longer applies to the freight which has been paid over. As stated in *Time Charters* at para 30.41, "until the lien is exercised, the charterers are free to collect their freight debts and, on collection, the monies received are outside the charge and at the charterer's free disposal".

42 Support for this position can be drawn from *Tagart, Beaton & Co v James Fisher & Sons* [1903] 1 KB 391, wherein the shipowner sought to exercise a lien after sub-freights had been paid to the charterer's agents at the port of discharge (the charterer had shipped cargo and appointed the agents to collect bill of lading freight from the consignees). The Court of Appeal held that the shipowner could not trace into sub-freights after they had been paid to the charterer or its agents. Lord Alverstone CJ held that after payment, "[n]o lien or

right in the nature of lien existed any longer, because there was no freight to which it could apply. The freight ceased to be freight when it got into the pockets of [the charterer] or their agents" (at 395). Earl of Halsbury LC held that when sub-freights were "so paid there was no longer any lien upon it" (at 395).

43 This reasoning was subsequently reiterated in *The Spiros C* ("if the shipowner's notice to pay comes too late, and the sub-freight has already been paid, then the lien fails to bite on anything": at [11]) and in *The Western Moscow* ("[i]f payment of that sub-freight is made to the charterer the right ceases to exist. There is no longer any freight due to which it can attach": at [48]). In *The Western Moscow*, Clarke J also considered the situation that Nourse J raised, namely when payment is made to a "third party who had notice of the lien". If such payment was not paid to the charterer or its agents, Clarke J considered it doubtful whether such payment to a third party could ever be characterised as a payment of freight or hire and could discharge the charterer's right to the freight or hire. In any case, if the payment was to be properly regarded as freight or hire paid (conceivably by way of another equitable assignment of the freight or hire), the shipowner would still be able to follow the sum paid if the payee had *prior* notice of the equitable assignment under the rule in *Dearle v Hall*. As rightly observed by Clarke J in *The Western Moscow* at [48], such situations of payment of freight or hire to a non-charterer third party will be "rare" though not "impossible".

44 It is also incorrect to differentiate liens on sub-freights from floating charges on the basis that lien holders do not enjoy a proprietary right in the sub-freights until the lien is exercised. The Judge found that while the lien on sub-freights creates an immediate security interest when the charter is entered into, it may not create any proprietary interest in the sub-freights until the charge crystallises (see Judgment at [57]; *cf* the equating of a proprietary interest and a

security interest in *Oditah's article* described at [24] above). In our view, the holder of a lien on sub-freights enjoys rights that are no different from a floating chargee (see [46] below); moreover, it is not an essential prerequisite of a floating charge that it creates an *immediate* proprietary interest (see [47]–[52] below).

45 We note that the phrase "proprietary interest" has different meanings in different contexts, and it would be "delusive exactness" to come up with a universal definition: *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liquidation) (Receivers and Managers appointed)* [2017] WASC 152 at [317]–[318]. As Professor Sarah Worthington observed in *Proprietary Interests in Commercial Transactions* (Clarendon Press, 1996) ("*Proprietary Interests in Commercial Transactions*") at p 3, a "proprietary interest" can be:

> … an absolute or limited right to particular property, or a right to have particular property or its derivatives applied towards the satisfaction of some obligation. The interest can be legal or equitable; it can be an ownership interest or a security interest and, at common law, it can also be a right of possession.

In this present context, we refer specifically to one aspect of a "proprietary interest", namely the right of pursuit (*ie*, the ability to follow sub-freights paid before the lien is exercised). It is the lack of this right of pursuit that is the thrust of the argument made against the "floating charge" theory (see [39] above; see also Tan Yock Lin, *Personal Property Law* (Academy Publishing, 2014) at para 2.005 where the right of pursuit is said to give a permanence or endurance that contractual rights lack).

46 In practical terms, the floating chargee's position (before crystallisation) is not materially different from that of a lien holder. As Professors Roy Goode QC and Lousie Gullifer QC noted in *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) ("*Goode and*

Gullifer"), 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 (although it may obtain injunctive relief to stop such dispositions or appoint a receiver if its security is in jeopardy) (at paras 4–03, 5–43 and 5–44). Moreover, there is considerable latitude in determining the scope of a party's "ordinary course of business". The threshold to be crossed before an activity is seen to be outside a party's ordinary course of business is high (for a brief summary of the applicable propositions, see *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 at [227]). 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.

47 On a conceptual level, we are of the view that while a floating charge confers an immediate security interest, the chargee enjoys a proprietary interest in the charged assets only after the event of crystallisation.

48 The conceptual basis of floating charges is a matter of some controversy: see generally Eilís Ferran and Look Chan Ho, *Principles of Corporate Finance Law* (Oxford University Press, 2nd Ed, 2014) ("*Principles of Corporate Finance Law*") at p 321; *Snell's Equity* at para 40–002. One view, espoused by Dr William J Gough in *Company Charges* (Butterworths, 2nd Ed, 1996), is that no proprietary rights are conferred on the chargee until crystallisation, and that prior to that the chargee's right is only *contractual*. Dr Gough states (at 347):

> Although under a floating charge there is a present and immediate charge prior to crystallisation, there is no present

> and immediate equitable proprietary interest conferred on the chargee prior to crystallisation by reason of ownership of specifically identified existing assets or acquisition of future assets in compliance with the contract description. Prior to crystallisation, the rights of the chargee remain contractual. The proprietary rights conferred on the chargee by assignment are suspended or deferred until crystallisation, when the assignment is completed and the equitable proprietary interest passes to the crystallised chargee. Prior to crystallisation, the chargee acquires only a contractual equity or a personal equity, and not an equitable proprietary interest. …

49 In juxtaposition to this is the idea that the floating charge creates an immediate, unattached security interest in the *fund* of charged assets, such fund being distinct from its components; it is only after crystallisation that the charges attaches specifically to the assets within the fund: *Goode and Gullifer* at para 4–03. The authors of *Goode and Gullifer* explain the distinction between a fund and its components with an analogy (at para 4–04):

> In English law, a fund is considered to have an existence distinct from that of its components. The contents of the fund are constantly changing as assets are removed from the fund and new assets come into it, but the identity of the fund itself remains unchanged, in much the same way as the river Thames remains the river Thames despite the fact that the water in it is never the same from one minute to the next. Indeed, an open-ended fund (i.e. one which by the terms of its establishment is capable of increase with the addition of new assets) has a notional existence even at times when there are no assets comprised in it. To carry the river simile a stage further, we should continue to speak of the river Thames even if, through a drought, it had temporarily dried up.

50 This conception of floating charges comports with how floating charges have been described. In *Illingworth v Houldsworth and Another* [1904] AC 355, it was held (at 358) that a floating charge is:

> …. ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

In *Evans v Rival Granite Quarries, Limited* [1910] 2 KB 979, Buckley LJ held (at 999):

> A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. … A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security.

51 Prior to crystallisation, whilst the charge is still hovering, there is no proprietary interest in the charged assets. In *Re City Securities Pte* [1990] 1 SLR(R) 413, Chao Hick Tin JC (as he then was) held at [76] that:

> … the grantee of a floating charge does not have a proprietary right to or an interest in the property subject to the charge as his rights do not attach to any specific property but only hover over the class of property subject to the charge.

52 We adopt the view set out at [49] above, not only because it is consistent with the "hovering" (and then "attaching") nature of the floating charge, but also because it accords with the inchoateness and narrowness of the rights that the floating chargee enjoys prior to crystallisation, which is also evident from the following passage in *Goode and Gullifer* at para 4–05 (see also [46] above):

> Returning to the current law, what, then, does this presently existing security interest give the floating chargee which he would not have under a mere contract to assign assets in the future? First, the occurrence of the crystallising event causes the charge to attach without the need for any new act on the part of the debtor. Secondly, the debenture holder has the right on crystallisation, to follow the assets into the hands of a purchaser or incumbrancer who prior to crystallisation took them from the company otherwise than in the ordinary course of the company's business. Thirdly, restrictions in the floating charge on dealings in the assets by the company bind a subsequent party taking with notice of such restrictions, so that upon the floating charge crystallising it will have priority. Fourthly, the procedural security which an execution creditor

> obtains over goods by receipt of a writ or warrant of control to a person under a duty to endorse it takes effect subject to the prior equity of the debenture holder under the floating charge, so that if the charge crystallises before the execution is completed, the debenture holder obtains priority over the execution creditor, even though crystallisation does not occur until after the goods have become bound by the writ or warrant or even, indeed, until after their seizure by the enforcement agent. Finally, by virtue of the fact that he has an existing security interest, albeit floating in character, the debenture holder has the right to apply to the court for the appointment of a receiver where his security is in jeopardy, even if the charge has not crystallised and even if there has been no default.

53 This position that we have taken may appear, at first blush, to be at odds with the holding by Lord Walker of Gestingthorpe in *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 ("*Spectrum Plus*") at [139] that the chargee enjoys an immediate proprietary interest in the fund:

> Under a floating charge … [t]he chargee has a proprietary interest, but its interest is in a *fund* of circulating capital, and unless and until the chargee intervenes (on crystallisation of the charge) it is for the trader, and not the bank, to decide how to run its business. [emphasis in original]

But this may not necessarily be so, given that there is no clear indication of the precise nature and quality of the proprietary interest contemplated by Lord Walker (see *Principles of Corporate Finance Law* at p 321). We are also cognisant of Professor Worthington's comment at [45] above that a "proprietary interest" could also refer to a security interest; to this extent, any apparent difference may be in respect of the meaning of "proprietary interest", and not in respect of how floating charges operate. It bears mention that in *Spectrum Plus*, Lord Scott opined that "the essential characteristic of a floating charge … is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event" (at [111]). We take the view that this "future event" – the event of crystallisation – is when the hovering charge attaches to the charged assets, the security is finally

appropriated, and proprietary consequences (and we refer particularly to the right of pursuit exercisable against third parties) flow.

54 Professor Tjio also referred us to the conceptualisation of the floating charge as a defeasible fixed charge (see *Proprietary Interests in Commercial Transactions* at 81) and the theory of overreach (see Richard Nolan, "Property in a Fund" (2004) 120 LQR 108; *Snell's Equity* at para 40–008). To the extent that these theories are premised on the floating charge being of the same quality of proprietary interest as a fixed charge from the outset, with respect, we disagree for similar reasons expressed in *Goode and Gullifer* at para 4–05. First, these theories do not capture the significance of the event of crystallisation (which is when the charge attaches to the assets *in specie*). Second, crystallisation is not retrospective.

55 We therefore reject the argument that liens on sub-freights cannot be floating charges because they do not confer a proprietary right until the lien is exercised. In fact, this accords with the operation of floating charges – that the chargee enjoys an immediate security interest when the charge is created, but the charge creates no proprietary interest in favour of the chargee until crystallisation. This was the view expressed by Clarke J as well in *The Western Moscow* at [47]–[50]:

> 47 In *Agnew* Lord Millett said that the inability of the shipowner to enforce the lien against the recipient of the subfreight arose … not because payment was the event which defeated it but because the right depended on an underlying property right that the lien did not give.
>
> …
>
> 49 … I do not see why the clause cannot be regarded as amounting to an agreement to assign future debts by way of security, which gives rise to rights in equity: *Tailby v Official Receiver* (1888) 13 App Cas 523; *Re Lind* [1915] 2 Ch 345. The right cannot be exercised if nothing is due to the owner and,

> being an agreement to assign a debt, it cannot subsist if the debt in question is paid without notice of the assignment. *Although the lien provides an immediate security interest at the date of the charter, it may be that it creates no proprietary interest in favour of the owner until the owner gives notice because, until then, it is open to the charterer to claim the debt in the ordinary course of business.* The assignment may, in respect of an English corporation, be registrable and void for want of registration against a liquidator and creditors; and there may be questions as between different competing claimants to the debt or the monies representing them.
>
> 50 But none of that seems to me to be a reason to hold that there is no assignment at all. In *Agnew* Lord Millett described the lien as similar to a floating charge while it floats but incapable of crystallisation and said that the lien did not give any property right. *I do not, however, with respect, follow why the lien is incapable of crystallisation by notice from the owner so that, upon notice, gives rise to a property right.*
>
> [emphasis added]

56 Before we turn to discuss Professor Tjio's view, we pause to briefly comment on how cl 18 of the Bareboat Charter is drafted (see [10] above), and whether that precludes this court from finding that a charge is created. Clause 18 is brief; it is not titled "floating charge"; and there is no indication from the wording used that it is to be a floating charge. Can it still be considered a floating charge? We answer this in the affirmative.

57 The authorities have made clear that a two-step approach is to be employed to determine whether rights conferred can properly be characterised as a charge: *Re Brumark Investments* at [32] (cited with approval by the High Court in *Jurong Data Centre Development Pte Ltd (provisional liquidator appointed) (receivers and managers appointed) v M+W Singapore Pte Ltd and others* [2011] 3 SLR 337 at [72]); *Re Lehman Brothers International (Europe) (in administration)* [2012] EWHC 2997 at [39]; *The Law of Security and Title-Based Financing* at para 4.16. The first step is to identify the rights conferred under the security in question. The second step is to identify the appropriate

legal characterisation with reference to the rights identified in the first step. The second step is to be carried out with an emphasis on substance, not form. It is a matter of law that does not turn on the subjective intentions of the parties or the labels used. As Chao JC (as he then was) held in *Re Lin Securities (Pte) Ltd; Chi Man Kwong Peter and others v Asia Commercial Bank and others* [1988] 1 SLR(R) 220, "there is no magic in any particular set of words. A floating charge may be created without resort to such classical words and expressions as 'present or future property' or 'undertaking'" (at [24]).

58 With these principles in mind, an application of the two-step approach leads us to find that the Lien created a floating charge, notwithstanding the fact that the *wording* of cl 18 made no express indication to this effect. The Lien created an equitable assignment of sub-freights earned by the Company (the charterer) to Diablo (the shipowner), and such an assignment was one by way of security and not absolute (see [36] above). Diablo had a dormant right to claim the sub-freights in fulfilment of the Company's obligations under the Bareboat Charter; such right was exercisable after notice of the Lien was given; and the Company was free to deal with the sub-freights as its own for its own business operations prior to Diablo's notice (see [37] above). Based on the rights conferred, we agree with the Judge that the Lien exhibited the defining characteristics of a floating charge, including the factors in *Re Yorkshire Woolcombers Association* (see [38] above). It therefore matters not that there was no use of the word "charge" or the like in cl 18; the Lien should nevertheless be characterised as one.

The "agreement to create a charge" theory

59 Professor Tjio proposed a third view – that liens on sub-freights should be characterised as agreements to create a charge on a future contingent event

(*ie*, the giving of notice to the sub-charterer upon charterer's default). Professor Tjio's proposal is based on this court's decision in *The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [1999] 3 SLR(R) 976 ("*Asiatic Enterprises (CA)*"). In that case, an agreement to grant security on a contingency – such agreement not being specifically enforceable immediately – was found to grant no present security (whether by way of an equitable charge or otherwise). Professor Tjio posited that the same could be said of the Lien. Registration would only be required after the giving of notice to the sub-charterers, which is the event which fully perfects the assignment previously agreed to by the charterer and the point from which the shipowner asserts a security interest.

60 We see the attractiveness of Professor Tjio's proposal, not least because it averts the attendant consequences of requiring registration within the statutorily stipulated period from the time of the conclusion of a charterparty. But we disagree with it for three main reasons.

61 First, the language of cl 18 (which does not differ materially from lien clauses in other standard charterparties) does not permit the clause to be construed as an agreement to create a charge. It simply provides that the shipowner would enjoy a lien, without specifying that the counterparty would only be able to assert a charge on some future date upon the occurrence of a contingency (such as an event of default). This distinguishes such liens from the conditional agreement to give security in *Asiatic Enterprises (CA)*. There, the court was concerned with a clause within the bank's standard terms and conditions annexed to a facility letter which provided as follows (as quoted in *Asiatic Enterprises (CA)* at [3]):

> *On the occurrence of any of the following events of default* (i) the Bank [the respondent] shall cease to be under any further commitment to you [the appellant] and all outstandings under the entire credit line ("the Outstandings") shall become due and

> payable immediately; (ii) *the Bank shall, in addition to the rights set out herein, be entitled (as equitable chargee) to attach the Outstandings to any property of yours* (whether real or personal) and to lodge a caveat against any real property that may now or hereafter be registered in your name whether singly or jointly … [emphasis added]

This was then followed by a list of events of default, including the failure to pay debts when they become due or any "act of bankruptcy or insolvency". This court construed the clause in the following manner (at [13]):

> Giving the clause its ordinary and natural construction, we find that it gives to the respondent a right or entitlement at some future date, upon the occurrence of any of the events of default, by unilateral action on its part to assert or to impose a security on the property of the respondents.

62 In *Asiatic Enterprises (CA)*, this court also referred to *Murphy v Wright* (1992) 5 BPR 11,734 ("*Murphy v Wright*"), which concerned a deed of guarantee containing the following clause:

> *In the event of default* by the Borrowers in payment of moneys due under the Security Documents or in performance or observance of any covenants therein *then the Lender shall* in addition to the rights set out herein or in the Security Documents *be entitled to attach the debt due to any of the assets of the Guarantor or Guarantors* whether such assets be real or personal and further the parties hereto agree that in the event of such default the Lender may register a caveat against any property registered in the name of any or all of the Guarantors until the Moneys Secured are repaid. [emphasis added]

While they disagreed on the precise effect of the clause, all the judges of the Court of Appeal of New South Wales were of the view that this clause did not create a charge with immediate effect. Sheller JA held that the language of the clause "is not the language of charge by the guarantors of their assets", and that the guarantors could not be taken to have expressly or impliedly charged their assets (at 11,742).

63 Unlike the conditional agreements in *Asiatic Enterprises (CA)* and *Murphy v Wright*, cl 18 of the Bareboat Charter does not contain language indicating that a security will *only* be asserted on the occurrence of a contingent event. On this point alone, we are unable to agree with Professor Tjio's suggested approach.

64 There is also an issue as to whether an agreement to create a charge should be regarded as a charge but since it is strictly not essential for us to decide this, we will only make a few brief comments. While there is support for Professor Tjio's view that agreements to create a charge on the occurrence of some uncertain event are merely contractual (see, *eg*, *Goode and Gullifer* at para 2–15), there are also formidable authorities in support of the opposing view. For one, in the High Court decision of *United Overseas Bank Ltd v The Asiatic Enterprises (Pte) Ltd* [1999] 2 SLR(R) 671 ("*Asiatic Enterprises (HC)*"), Tay Yong Kwang JC (as he then was) found that the clause in question (set out at [61] above) was a floating charge (at [19]). Two House of Lords decisions that post-date *Asiatic Enterprises (CA)* also suggest that agreements to create a charge are simply floating charges. In *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2002] 1 AC 336, Lord Scott of Foscote held at [63] that:

> In my opinion, a charge expressed to come into existence on the occurrence of an *uncertain future event* and then to apply to a class of assets that cannot be identified until the event has happened would, if otherwise valid, qualify for registration as a floating charge. [emphasis added]

In *Spectrum Plus*, Lord Scott restated his view (at [107]):

> … There can, in my opinion, be no difference in categorisation between the grant of a fixed charge expressed to come into existence on a future event in relation to a specified class of assets owned by the chargor at that time and the grant of a

> floating charge over the specified class of assets with crystallisation taking place on the occurrence of that event.

We say no more about this issue, and leave it open for future determination.

65 Our second reason for rejecting Professor Tjio's proposal is that agreements to create a charge undermine the system of registration. If the Lien was an agreement to create a charge, it would only be registrable when the lien is exercised in response to a default by the charterer. By this time, the charterer would likely be in a parlous financial situation, teetering on the verge of insolvency. Allowing the shipowner to impose a charge over the charterer's sub-freights would be tantamount to allowing the shipowner to steal a march on the other creditors, who would be adversely affected if they had dealt with the charterer on an unsecured basis prior to the contingency, and without knowledge of the shipowner's lien; if they had been notified of the agreement to grant a charge, they might not have chosen to deal with the charterer or they might have decided to deal with the charterer on different terms: Tan Cheng Han, "Springing Security Interests and Registration" (2001) 13 SAcLJ 451 at p 453. Such springing securities evade the fundamental *pari passu* principle of insolvency law and are therefore "anathema to insolvency law": Lee Eng Beng, "Invisible and Springing Security Interests in Corporate Insolvency Law" (2000) SAcLJ 210 at 213. And although the other creditors of the charterer might seek to unwind the agreement to grant a charge on the basis that it is an unfair preference, they may not be able to show that the preference was influenced by a desire to prefer the shipowner in the event of its own insolvent liquidation: Tan Cheng Han, "Charges, Contingencies and Registration" (2002) 2(2) JCLS 191 ("*Charges, Contingencies and Registration*") at 206; see also *DBS Bank Ltd v Tam Chee Chong and another (judicial managers of Jurong*

Hi-Tech Industries Pte Ltd (under judicial management)) [2011] 4 SLR 948 at [20]–[27].

66 Thirdly, even if we were to accept that the Lien was an agreement to create a charge, it would fall within the definition of "charge" in the Companies Act, and thus would be registrable. Section 4 of the Companies Act defines a "charge" as follows:

> "charge" includes a mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise;

Professor Tjio's response is that s 4 refers only to specifically enforceable agreements to create a charge. On an application of the maxim that "equity considers as done that which ought to be done", specifically enforceable agreements would constitute present security and would be registrable interests. But if the agreement provides for a charge to be created on the occurrence of some future event, especially if such occurrence is said to be uncertain, it should not be registrable.

67 We have some difficulty with this argument. The broad wording used in s 4 of the Companies Act is wide enough literally to include an agreement to give or execute a charge upon the occurrence of a contingency. This was the position taken by Tay JC in *Asiatic Enterprises (HC)* at [21], where he held that "an option to take or create a charge is no different in truth from agreeing to give or execute a charge" and falls within the "extended meaning of 'charge'" in the Companies Act. This is also the suggestion made in *Charges, Contingencies and Registration* at 210:

> If this is correct, it means that when the parties in *Asiatic* entered into the agreement, a charge within the meaning of the extended definition of "charge" came into existence by virtue of clause 10. *The agreement should therefore have been registered*

> *even though there was no "real" charge (in the property law sense) unless the contingency occurred.* [emphasis added]

Professor Tan goes on to note that the existing legislation "probably never foresaw arrangements providing for security to arise upon the occurrence of a contingency" and that it is an "inadequacy of the present legal framework" to require registration of all charges (at 212). But this does not detract from the point that the law, as it stands, requires registration of *any agreement* to give a charge. In fact, it fortifies the point.

68 For the avoidance of any doubt, we should make some clarifications as regards *Asiatic Enterprises (CA)*. In *Asiatic Enterprises (HC)*, Tay JC found that an agreement to charge on a contingent event was registrable within 30 days of the acceptance of the facility letter. It was not registered during this 30-day period but a certificate of registration lodged several months thereafter was found to be conclusive evidence that the requirements as to registration had been complied with under s 134(2) of the Companies Act (Cap 50, 1994 Rev Ed) (at [32]). Thus, the court no longer had the power to expunge the registration or cancel the certificate (at [34]). However, in *Asiatic Enterprises (CA)*, the certificate of registration was found to have no effect as there was no equitable charge created and the certificate of registration could not confer validity on an otherwise invalid charge (at [32]). We clarify that while a certificate of registration would not validate an invalid charge, the agreement to charge had to be registered nonetheless, and the certificate meant that the agreement could not be void against the liquidator and creditors on ground of *non-registration* (see also *Charges, Contingencies and Registration* at 210).

Application to the facts

69 Having examined the competing views, we find that liens on sub-freights should be characterised as floating charges that are registrable under s 131(3)(*g*) of the Companies Act. Given that the Bareboat Charter was entered into on 6 June 2008 and that the charge remains unregistered to date, the 30-day period for registration has long expired, and the Lien is void against the Liquidators and any creditors of the Company.

70 We would also add that in order for Diablo to prevail in this appeal, we had to be persuaded to adopt the "contractual right of interception" theory. This is because, even if we had accepted Professor Tjio's conceptualisation of the Lien, the Lien would have been subject to the registration requirement during the 30-day period following 30 December 2016, the date on which the lien notice was sent to V8 (see [10] above). This period has likewise long elapsed. Diablo's application for an extension of time to register (OS 307) was also not a matter on appeal.

Policy considerations and the way forward

71 We acknowledge the commercial inconvenience of requiring registration, especially if the charter is for a short duration or for a single voyage, and if registration may even be required after the charter has come to an end (when there are further sub-freights yet to fall due). Further, companies and their officers are exposed to fines and penalties under s 132 of the Companies Act if the duty to register charges is not complied with.

72 The concomitant commercial consequences of requiring registration, however, cannot change the nature of the security; nor can it justify this court in exempting liens on sub-freights from registration: *The Ugland Trailer* at 481;

Graeme Bowtle, "Liens on Sub-Freights" [2002] LMCLQ 289 at 292. The time is perhaps ripe for Parliament to review the current position and consider introducing an exception for liens on sub-freights. Indeed, given that parties who deal with charterers are aware that such liens are typically included in standard form charterparties (see [4] above), registration "adds nothing to publicity and the protection of third persons", and exempting such liens from registration would "[make] sense": *Caisse populaire Desjardins de Val-Brillant v Blouin* [2003] 1 SCR 666 at [106]. This would also be in line with industry sentiment, given that members of the general shipping community view registration as "onerous" and an "administrative burden", and favour a "statutory 'carve out'": Singapore Shipping Association Legal & Insurance Committee, *Consolidated Feedback on the Tensions Between Insolvency and Shipping* (September 2017) (Chairperson: Gina Lee-Wan).

73 At this juncture, it would be helpful to briefly examine the position in Hong Kong, where liens on sub-freights have been expressly excluded from the registration regime. Section 334(4) of the Companies Ordinance (Cap 622) (HK) states as follows:

> For the purposes of subsection (1)(d) and (j), if a company charters a ship from a shipowner, the shipowner's lien on the subfreights for amounts due under the charter is not to be regarded as a charge on book debts of the company or as a floating charge on the company's undertaking or property.

Sub-sections 1(d) and (j) refer to the categories "a charge on book debts of the company" and "a floating charge on the company's undertaking or property", similar to s 131(3)(*f*) and (*g*) of the Companies Act.

74 The Hong Kong exception is worded in a similar manner to s 93 of the Companies Act 1989 (c 40) (UK) which inserted s 396(2)(*g*) into the Companies Act 1985 (c 6) (UK). As we noted at [39] above, this amendment never came

into force and s 396 of the Companies Act 1985 has since been repealed. Nevertheless, we find it helpful to refer to this as an example of a legislative solution. The proposed amended s 396 of the Companies Act 1985 was to read as follows:

> **396 Charges requiring registration.**
>
> (1) The charges requiring registration under this Part are –
>
> …
>
> (c) a charge on intangible movable property (in Scotland, incorporeal moveable property) or any of the following descriptions —
>
> …
>
> (iii) book debts (whether book debts of the company or assigned to the company)
>
> …
>
> (e) a floating charge on the whole or part of the company's property.
>
> (2) The descriptions of charge mentioned in subsection (1) shall be construed as follows—
>
> …
>
> (g) a shipowner's lien on subfreights shall not be treated as a charge on book debts for the purposes of paragraph (c)(iii) or as a floating charge for the purposes of paragraph (e).

75 The UK and the Hong Kong provisions specifically treat a shipowner's lien on sub-freights as not amounting to a floating charge for the purposes of registration. It may be more consonant with our pronouncement that liens on sub-freights are in substance floating charges to directly provide that the registration regime does not apply to such liens (so as to still acknowledge the legal character of such liens as floating charges). In other words, liens on sub-freights would be carved out from the registration requirement. Section 131(3A) of the Companies Act provides a useful example of such a carve-out as regards

charges on negotiable instruments and debentures issued by the Government, and it can be a valuable starting point.

Conclusion

76 There appears to be a strong reaction by the local shipping community to this decision. However, although this is the first local pronouncement of the effect of non-registration of liens on sub-freights, the result should hardly be surprising given that the decision is entirely in line with the English authorities which were first decided more than three decades ago. To place the decision in the correct perspective, it is essential to bear in mind that on a practical level, the issue of liens on sub-freights would almost only arise in the event of default by the charterer. When that occurs, the shipowner can usually avail itself of remedies other than the lien on sub-freights. As one author astutely observes, "when a charterer defaults, the shipowner's first thought is likely to suspend performance or to exercise a lien over the cargo": *Liens on Sub Freight Revisited* at 18. It would often be more difficult to ascertain the identity and contact details of the sub-charterers. In most cases, the reality is that by the time the shipowner is looking to exercise the lien on sub-freights, it would probably be too late to do so because by then the sub-freights would have been paid over to the charterer. Hence, in most cases, the consequences of non-registration are likely to be muted: see *Liens on Sub Freight Revisited* at p 18.

77 Nonetheless, it remains an uncontroversial fact that the requirement for registration for liens on sub-freights is hugely inconvenient and impracticable. It is also undeniable that the need for registration may have a negative impact on the local shipping industry. Therefore, in order to maintain Singapore's competitive edge as a leading maritime hub, it may be appropriate to examine suitable legislative reform to carve liens on sub-freights out from the reach of

s 131 of the Companies Act, in line with the Hong Kong experience, albeit *via* a different statutory route.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Judith Prakash Judge of Appeal

Tay Yong Kwang Judge of Appeal	Steven Chong Judge of Appeal

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