IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2017] SGHC 172

Originating Summons No 287 of 2017
Summons No 1317 of 2017

In the matter of section 131 of the Companies Act (Cap. 50) and Order 88 Rule 2 of the Rules of Court

And

In the matter of Siva Ships Intl. Pte Ltd (in liquidation)

Between

(1) Cameron Lindsay Duncan
(2) Luke Anthony Furler

… *Plaintiffs*

And

Diablo Fortune Inc

… *Defendant*

Originating Summons No 307 of 2017

In the matter of section 137 of the Companies Act (Cap. 50) and Order 88 Rule 2 of the Rules of Court

Between

Diablo Fortune Inc

… *Applicant*

And

(1) Luke Anthony Furler
(2) Cameron Lindsay Duncan

… *Respondents*

JUDGMENT

[Insolvency law] — [Avoidance of transactions] — [Unregistered charges] — [Lien over sub-freights and sub-hire]
[Insolvency law] — [Non-registration of charges] — [Extension of time to register]
[Conflict of laws] — [Choice of law] — [Insolvency]
[Arbitration] — [Stay of court proceedings] — [Arbitrability]

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Duncan, Cameron Lindsay and another
v
Diablo Fortune Inc and another matter

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High Court — Originating Summons No 287 of 2017 (Summons No 1317 of 2017) and Originating Summons No 307 of 2017
Audrey Lim JC
24 March; 4, 21 April; 4 May; 7 June 2017

18 July 2017 Judgment reserved.

Audrey Lim JC:

Introduction

1 Originating Summons No 287 of 2017 ("OS 287") is an application by the liquidators of Siva Ships International Pte Ltd ("the Company"), a company incorporated in Singapore. By way of OS 287, the liquidators of the Company ("the Liquidators") seek a determination that Diablo Fortune Inc ("Diablo")'s lien over sub-freights or sub-hire due from V8 Pool Inc ("V8") to the Company in relation to the charter of the vessel *V8 Stealth II* ("the Vessel") is void against the Liquidators pursuant to s 131(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("CA") for want of registration. Originating Summons No 307 of 2017 ("OS 307") is Diablo's application for an extension of time, under s 137 of the CA, to register the lien. At the same time, Diablo filed Summons No 1317 of 2017 ("SUM 1317") to stay the proceedings in OS 287 in favour of arbitration.

Background

2 The Company was engaged in commercial vessel operations. On 6 June 2008, it entered into a BIMCO Standard Bareboat Charter with Diablo in respect of the Vessel ("the Bareboat Charter") under which Diablo agreed to charter the Vessel to the Company for five years.[1] The Bareboat Charter was concluded in Singapore.[2] In July 2012, the Company and Diablo extended the charter period to 4 May 2017.[3] A key term in the Company and Diablo's agreement is Clause 30(a) of the Bareboat Charter, the relevant portion of which is as follows:[4]

> **30. Dispute Resolution**
>
> (a) [The Bareboat Charter] shall be governed by and construed in accordance with English law and any dispute arising out of or in connection with this [Charter] shall be referred to arbitration in London in accordance with the Arbitration Act 1996 ...

3 On 10 March 2010, the Company entered into a Standard Ship Management Agreement ("V Ships Agreement") with V Ships (Asia) Pte Ltd ("V Ships") for V Ships to provide technical and crew management services in respect of the Vessel for an annual sum of US$132,000.[5] The Company entered into a pooling arrangement with V8 on 9 February 2011 ("the Pool Agreement").[6] Under the Pool Agreement, the Company earned revenue from the Vessel by 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.[7] As

1 Bundle of Affidavits at Tab 1 (para 8), Tab 2 AD-1 (p 24).

2 Bundle of Affidavits at Tab 2 AD-1 (p 24).

3 Bundle of Affidavits at Tab 2 AD-3 (pp 48-49).

4 Bundle of Affidavits at Tab 2 AD-1 (p 33).

5 Bundle of Affidavits at Tab 1 LAF-4 (p 46).

6 Bundle of Affidavits at Tab 1 LAF-5 (pp 58–129).

part of the Pool Agreement, V8 agreed to pay the Company charter hire based on the actual earnings from the pooling arrangement divided based on the Vessel weighting system and after deducting the management fee due to Navig8.[8]

4 The Company subsequently incurred substantial losses and was unable to pay its debts. On 19 December 2016,[9] the Company filed a winding up application in Singapore. Around 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.[10] According to the Liquidators, at that time, the Vessel was on a voyage from Nigeria to Cartagena, Spain, which was due to be completed around 16 January 2017 ("the Voyage").[11] The next bareboat hire instalment for the sum of US$474,300 was due from the Company to Diablo on 4 January 2017 for the month ending 4 February 2017.[12]

5 On 30 December 2016, Diablo sent a notice to V8 purporting to exercise its lien under Clause 18 of the Bareboat Charter ("First Lien Notice").[13] Clause 18 states as follows:[14]

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7 Bundle of Affidavits at Tab 1 LAF-5 (p 65).

8 Bundle of Affidavits at Tab 1 (p 6).

9 *Ex parte* originating summons to CWU 279/2016.

10 Bundle of Affidavits at Tab 1 (pp 6–7).

11 Bundle of Affidavits at Tab 1 (p 7).

12 Bundle of Affidavits at Tab 1 (p 7).

13 Bundle of Affidavits at Tab 2 (p 7), AD-6.

14 Bundle of Affidavits at Tab 2 AD-1 (p 31).

> **18. Lien**
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> [Diablo] to have a lien upon all cargoes, sub-hires and sub-freights belonging or due to [the Company] or any sub-charterers and any Bill of Lading freight for all claims under this Charter, and [the Company] to have a lien on the Vessel for all moneys paid in advance and not earned.

6 Under the Pool Agreement, V8 agreed to make a distribution to the Company within the first week of each month for charter hire earned in the previous month.[15] According to the Liquidators, 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.[16] However, V8 did not make that payment to the Company in light of Diablo's First Lien Notice.[17]

7 The Company was wound up on 6 January 2017.[18] On 12 January 2017, the Liquidators informed Diablo's lawyer in the United States that the Vessel was subsequently sub-chartered and en-route to Cartagena, and it was assumed that the consignee was Repsol Petroleo SA ("Repsol").[19] Hence, around 13 January 2017, Diablo exercised its right of a lien over the Bill of Lading freight under Clause 18 of the Bareboat Charter by sending a notice to Repsol informing it of the same ("the Second Lien Notice").[20] Diablo was of the view that its exercise of lien was justified in that the Company, as carrier under the Bill of Lading, was entitled to receive Bill of Lading freight from Repsol.[21] As

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15 Bundle of Affidavits at Tab 1 (p 7).

16 Bundle of Affidavits at Tab 1 (pp 7–8).

17 Bundle of Affidavits at Tab 1 (p 8).

18 Order of Court in CWU 279/2016.

19 Bundle of Affidavits at Tab 2 (p 5).

20 Bundle of Affidavits at Tab 2 (p 9), AD-7.

21 Bundle of Affidavits at Tab 2 (p 10).

the Bill of Lading freight had been assigned to Diablo by virtue of Clause 18, Diablo was entitled to receive such freight from Repsol under the Second Lien Notice.[22]

8 Meanwhile, the Liquidators took the position that the completion of the Voyage (mentioned at [4] above) would be in the interest of the Company and its creditors.[23] To this end, V8 and the Company executed a settlement agreement on 18 January 2017 in relation to the completion of the Voyage ("Settlement Agreement").[24] In particular, the terms of the Settlement Agreement provide as follows:[25]

> (a) that the December Distribution amount, a further sum for the distribution amount for January 2017, and a sum of US$650,000 (being the working capital deposit paid by the Company to V8 under the Pool Agreement) was due and owing to the Company (with the sums payable being subject to other provisos in the Pool Agreement);
>
> (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 cargo on board the Vessel;
>
> (c) that V8 would withhold any sums covered by lien notice(s) received by V8 and which had not been withdrawn by Diablo;
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> (d) that 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*

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22 Bundle of Affidavits at Tab 2 (p 10).

23 Bundle of Affidavits at Tab 1 (p 8).

24 Bundle of Affidavits at Tab 1 (p 8), LAF-8.

25 Bundle of Affidavits at Tab 1 LAF-8 (pp 136–137).

rata for any delays of the Voyage completion, out of any balance left after payment to Diablo and after withholding any sums covered by the lien notice(s); and

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

9 The Vessel arrived at Cartagena on 16 January 2017 and completed discharge of its cargo on 19 January 2017.[26] Hence, payment to the relevant parties under the Settlement Agreement was due on 24 January 2017.[27] On or about 23 or 24 January 2017, V8 paid US$232,931.87 to Diablo for hire for the period from 4 January 2017 to 19 January 2017.[28] However, V8 chose not to pay V Ships and the Company under the Settlement Agreement until the dispute over the validity of Diablo's lien was resolved.

10 The matter did not end there. Shortly after the Company and V8 entered into the Settlement Agreement, Diablo notified the Liquidators, around 19 January 2017, that it had commenced arbitration proceedings against the Company in London, pursuant to Clause 30(a) of the Bareboat Charter.[29] Although Diablo proceeded to appoint its arbitrator, the Company has not done so and no further steps were subsequently taken in the London arbitration.[30]

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26 Bundle of Affidavits at Tab 1 (p 9).

27 Bundle of Affidavits at Tab 1 (pp 9–10).

28 Bundle of Affidavits at Tab 1 (pp 10–11).

29 Bundle of Affidavits at Tab 1 (p 10).

30 Bundle of Affidavits at Tab 2 (p 14).

11 Further, in support of the lien and the First and Second Lien Notices, Diablo obtained a protective order from the Spanish Courts on 25 January 2017 ("the Spanish Injunction") against V8 and Repsol to prevent them from paying out monies to any parties pending the determination of the validity of Diablo's claim and/or the lien. Pursuant to the Spanish Injunction, Repsol paid US$892,952.80 into court in Spain, pending the outcome of Diablo's claim against the Company in the London arbitration.[31]

12 Finally, on 28 February 2017, the Liquidators obtained an order from the London High Court recognising the Singapore liquidation ("the Recognition Order").[32] The order also applied an automatic moratorium or stay on all proceedings, including the London arbitration.

Issues that arise from the present applications

13 The following issues arise from the present applications:

(a) whether a stay should be granted in favour of arbitration;

(b) whether Singapore law should govern the registration of charges and priorities in insolvency matters;

(c) whether the lien over sub-freights or sub-hire is a charge within the meaning of s 131(1) of the CA and should therefore be registered; and

(d) whether an extension of time should be granted to Diablo to register the lien under s 137 of the CA.

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31 Bundle of Affidavits at Tab 2 (p 18).

32 Defendant's written submissions in SUM 1317 at pp 5–6 (para 12).

Whether stay should be granted for arbitration

14 Diablo submits that the proceedings in relation to OS 287 should be stayed in favour of the London arbitration, as Clause 30 of the Bareboat Charter, which is wide enough to encompass a claim or dispute on the validity of the lien, provides that any dispute arising out of or in connection with the Bareboat Charter should be referred to arbitration in London. However, in my view, the present dispute is not covered by Clause 30 and is not arbitrable. The present dispute does not pertain to the validity of the lien as between Diablo and the Company, but whether it is a charge that is void as against the Liquidators, for want of registration under s 131 of the CA.

15 The Court of Appeal held in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd (in official liquidation in the Cayman Islands and in compulsory liquidation in Singapore)* [2011] 3 SLR 414 ("*Larsen Oil*") at [20] that a company's pre-insolvency management is unlikely to have contemplated including avoidance claims within the scope of an arbitration agreement. That is because the commencement of insolvency proceedings results in the company's management being displaced by a liquidator or judicial manager, and only such persons can pursue avoidance claims. This is notwithstanding the court's generous approach towards the construction of the scope of arbitration clauses and the assumption that commercial parties are likely to prefer a dispute resolution system that can deal with all types of claims in a single forum.

16 Although the case of *Larsen Oil* concerned avoidance claims, the same principle should apply to an application made pursuant to s 131(1) of the CA. A key principle that can be drawn from that case is that a distinction should be drawn between private remedial claims, which a company's pre-insolvency management has good reason to be concerned about, and claims that can only

be made by a liquidator or judicial manager of an insolvent company, which a company's pre-insolvency management is completely indifferent to.

17 By making an application pursuant to s 131(1) of the CA, the Liquidators are essentially seeking the avoidance of a charge on the basis of non-registration. Similar to the situation in *Larsen Oil*, the issue of the validity of the lien as against the Liquidators in the present case was only triggered after the Company's management was displaced by the Liquidators (see *Ng Wei Teck Michael and others v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 at [19]). This issue can only be pursued in the course of the liquidation of a company. Although s 131(1) refers also to the creditors of the company, such a reference is clearly made in the context of liquidation, during which the liquidators would distribute a company's assets on behalf of the creditors. As stated by the Court of Appeal in *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 ("*MDA v Sculptor Finance*") at [54], on liquidation of a chargor, the proper plaintiff to bring proceedings to avoid a charge for non-registration is the liquidator. This is consistent with the liquidator's role as the officer responsible for the ascertainment of liabilities and realisation of assets in the winding up of a company.

18 For the reasons stated in [15] to [17], an arbitration clause should not ordinarily be construed to cover a claim made pursuant to s 131(1) of the CA in the absence of express language to the contrary. In the present case, there is no express language in Clause 30(a) or anywhere in the Bareboat Charter suggesting that the parties intended to include disputes relating to the Company's insolvency within the ambit of the arbitration clause. This would suffice to dispose of this issue. Nonetheless, I am of the view that even if the arbitration clause did include such express language, a stay should not be

granted in favour of arbitration because a dispute arising under s 131(1) of the CA is non-arbitrable.

19 The Court of Appeal in *Larsen Oil* made the following observations at [45]–[46]:

> A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime. …
>
> … [T]he insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. *The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime* per se *as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement.*
>
> [emphasis mine]

20 The Court of Appeal also explained in *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2016] 1 SLR 373 ("*Tomolugen*") at [75] that "the essential criterion of non-arbitrability is whether the subject matter of the dispute is of such a nature as to make it contrary to public policy for that dispute to be resolved by arbitration". This principle is also enshrined in s 11(1) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), which states that "[a]ny dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless it is contrary to public policy to do so". It is established that the arbitration of claims which arise upon insolvency would run contrary to the objectives of the insolvency regime (*Tomolugen* at [77]). As the nature of the present dispute under s 131 of the CA involves the operation of the insolvency regime, public policy considerations apply for the protection of the

creditors of the company as a whole, thus making a dispute arising under s 131 of the CA non-arbitrable.

21 In fact, Diablo's counsel admitted that the matters Diablo intends to arbitrate in the London proceedings do not include the issues of whether a lien is a charge within the meaning of s 131 of the CA and whether it needs to be registered under the Singapore CA.[33] Instead, those matters essentially concern the substantive rights and claims under the Bareboat Charter between the Company and Diablo such as the underlying debt and quantum of Diablo's claim. I therefore dismiss Diablo's application to stay the proceedings in favour of the London arbitration.

22 As a separate point, counsel for the Liquidators submits that Diablo has taken a "step in the proceedings" by making substantive arguments in OS 287 and by applying to extend time under s 137 of the CA to register the charge. Having found that the claim under s 131 of the CA is not covered by the arbitration clause and is not arbitrable, there is no need to consider whether a "step in the proceedings" had been taken before the stay application was filed. Nevertheless, I will deal with this point briefly for the sake of completeness.

23 A preliminary issue is whether s 6(1) of the IAA applies to "proceedings" instituted by way of an originating summons when the section makes reference to the entry of an "appearance" by a party to an arbitration agreement. I am of the view that it does. Section 6(1) applies to any party who "institutes *any* proceedings". The legislative scheme of the IAA does not contemplate different means of staying applications in respect of international

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[33] See affidavit of Anna Devereaux of 21 March 2017 at [18]; and minutes of the court hearing of 24 March 2017.

arbitration agreements depending on the way the proceedings are instituted (*ie*, by writ or by originating summons). There is no separate provision in the IAA that governs stay applications that are begun by originating summons and no reason that proceedings begun by originating summons should be treated differently from those begun by writ. Prior to the amendment to the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which removed the requirement for entry of an appearance to an originating summons, the entering of an appearance under s 6(1) of the IAA would have been relevant to proceedings begun by originating summons. However, the requirement to enter an appearance to an originating summons was removed on 1 January 2006 (via the Rules of Court (Amendment No 3) Rules 2005 (GN No S 806/2005)), although the consequential effect of this on s 6(1) of the IAA might not have been considered. Hence, I am of the view that s 6(1) should continue to apply to "proceedings" commenced by way of an originating summons, as in this case, although the requirement for an appearance is no longer required to engage s 6(1) of the IAA.

24 In any event, I find that Diablo has taken a step in the proceedings by applying to extend time to register the lien under s 137 of the CA. Diablo's application to extend time to register the lien is not done merely to preserve the status quo, unlike an application to extend time to file a defence (see *Carona Holdings Pte Ltd and others v Go Go Delicacy Pte Ltd* [2008] 4 SLR(R) 460 at [100]–[101]). An application under s 137 of the CA is a substantive application which, if granted, would negate the effect of s 131 in relation to the charge. The application also served as Diablo's means of defending the Liquidators' application in OS 287.

25 Finally, although Diablo commenced arbitration proceedings shortly after the Company was wound up, there is (contrary to Diablo's claims) no risk

of multiplicity of proceedings. Since the Liquidators' claim under s 131 of the CA is not a claim covered by Clause 30(a) of the Bareboat Charter, the claim is not arbitrable, and Diablo has admitted that its arbitration proceedings do not include the determination of the Liquidators' application under s 131. In any event, the Recognition Order made by the London High Court has resulted in a stay on all proceedings, including Diablo's London arbitration. I note that there is also the Spanish Injunction in force. The injunction, however, applies against V8 and not the Company, and V8 has made an application in the Spanish courts to lift the injunction.

Governing law on registration of charges and priorities in insolvency matters

26 I turn now to the issue of the law that governs the registration of charges and priorities in insolvency matters. I will deal with the question of whether a lien on sub-freights or sub-hire falls within the definition of a charge under s 131 of the CA later (see [32] below). Diablo submits that as English law governs the Bareboat Charter, the UK Companies Act applies to the registration of charges. Diablo also tendered to court its English lawyers' opinion on the English position with respect to the registration of a lien created by a clause in a charterparty, such as Clause 18 of the Bareboat Charter ("Diablo's UK opinion"). Diablo's UK opinion is that if the company giving the equitable assignment is incorporated in England, Wales, or Scotland, the lien, which has been determined by the English courts to be a charge on a book debt or floating charge, is registrable as a charge under s 860 of the Companies Act 2006 (c 46) (UK) ("the UK Companies Act 2006") and would be void as against the company's liquidator and creditors if not so registered. However, the same does not apply to the Company because it is a foreign company, *ie*, a company incorporated abroad.

27 In my view, a foreign company that is not subject to the registration requirements in England, Wales or Scotland may nevertheless be subject to the registration requirements in the country of its incorporation. I agree with the Liquidators that because the Company was incorporated in Singapore, the requirements under s 131 of the CA would apply regardless of, for example, the law of the place of creation of the charge instrument or the location of the property. This position is also reflected in ss 131(4) and 139 of the CA. The former contemplates the creation of charges in Singapore which may affect property outside Singapore and the latter, the extension of time for registering an instrument or document executed or made outside Singapore. Likewise, in *Re Weldtech Equipment Ltd* [1991] BCLC 393 at 395, Hoffman J held that even though the construction and effect of the charge in question were governed by German law, the provisions of s 395 of the Companies Act 1985 (c 6) (UK) ("the UK Companies Act 1985") nonetheless applied to all charges created by companies registered in England whatever might be the proper law of the instrument which creates the charge.

28 It is important to distinguish between the law governing the initial validity and/or creation of the security interest and the law governing the priority of such interests and distribution of assets in the insolvency of the Company. Diablo appears to have conflated the two. Issues that arise in respect of the latter are typically resolved by the *lex fori concursus*, the law of the State in which the insolvency proceedings are commenced.

29 The invalidity of a charge as against a liquidator due to non-registration is one such issue. It arises from, and only from, insolvency proceedings and affects the rights of the creditors of the Company. In *Ex parte Melbourn* (1870) LR 6 Ch App 64 at 69, it was held, albeit in the context of bankruptcy proceedings, that "the question of priority of the different creditors *inter se* must

be governed by the law of the country where the bankruptcy takes place, and where the assets of the debtor are being administered". This position also finds support in Ian F Fletcher, *Insolvency in Private International Law* (Oxford University Press, 2nd Ed, 2007) at para 2.86:

> The principal reason for effecting one of the recognized forms of security is that in the event of non-payment by the debtor—and particularly where the debtor is insolvent—the creditor is allowed to have recourse to the security in order to satisfy all or part of his claim against the debtor, instead of being restricted to lodging proof in the insolvency proceedings. *In order to achieve this objective, the security must be recognised by the* lex concursus *as having the characteristic of retaining its enforceability in the event of the bankruptcy of the debtor. …*
>
> [emphasis mine]

30 I also agree with the author's observations at para 3.76 where he notes that "[t]he same principles [set out above at [29]] also apply in cases where the debtor by whom the security has been granted is a company which subsequently undergoes insolvency proceedings". Essentially, once insolvency proceedings are commenced in a particular jurisdiction, the courts in that jurisdiction would generally apply the statutory insolvency scheme of that jurisdiction to matters arising from the insolvency. This principle was also recognised by the Court of Appeal in *Beluga Chartering GmbH (in liquidation) and others v Beluga Projects (Singapore) Pte Ltd (in liquidation) and another (deugro (Singapore) Pte Ltd, non-party*) [2014] 2 SLR 815 at [63] and [77], albeit in the context of cross-border insolvency.

31 Hence, the law governing the registration of charges and the priorities of security interest in insolvency proceedings must be determined by the law of the country where the winding up is commenced, even if the law governing the validity or creation of that interest is that of another jurisdiction. In the present case, the Company was incorporated in Singapore and winding up proceedings

were also commenced here. Therefore, s 131 of the CA would apply to the registration of the lien created by the Company as well as the effect or lack thereof as against the Liquidators. This, however, is based on the assumption that the lien is a charge within the meaning of s 131 of the CA. It is to this issue that I now turn.

Whether lien over sub-freights or sub-hire is a charge under s 131 of the CA

Existing authorities

32 As s 131 of the CA applies to the Company, the issue that arises is whether a lien on sub-freights or sub-hire (herein called "Contractual Lien") falls within the meaning of a "charge" under that section. I only have to decide whether a Contractual Lien is a charge within the meaning of s 131 and if so, whether Diablo should be granted an extension of time under s 137 of the CA to register the charge. The parties agree that no determination is required on whether the First and Second Lien Notices were effective and on the quantum owing under the sub-freights or sub-hire.

33 The provisions of the UK Companies Act 2006 (*ie*, ss 860 and 874) which govern the registration of charges and the failure to register *vis-à-vis* liquidators and creditors of a company are essentially the same as s 131 of the CA. The Liquidators cited English authorities to support their position that a Contractual Lien is registrable. In *In re Welsh Irish Ferries Ltd* [1986] Ch 471 *("The Ugland Trailer")*, the owners let their vessel to a company under a charter, which contained a clause that "the owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this charter". In that case, it was common ground that the sub-freights were book debts of the company. In holding that the lien fell within s 95 of the Companies Act 1948 (c 38) (UK)

("the UK Companies Act 1948") as a charge on book debts of the company, Nourse J stated (at 478D–F) that:

> … The lien on sub-freights is the creature of an express contract. Its effect is to give the shipowner a limited right to require payment from the shipper of money which is owed by the shipper to the charterer. The charterer has a chose in action against the shipper. The limited right to that chose can only, as it seems to me, be acquired by the shipowner by virtue of some assignment, necessarily equitable, made by the charterer. …
>
> … It is established law that an equitable assignment of a chose in action by way of security creates an equitable charge on the chose … Accordingly, it would seem clear on analysis *that the lien creates an equitable charge on the sub-freights* …
>
> [emphasis mine]

34 Likewise, in the subsequent case of *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")*, Saville J sitting on the Queen's Bench Division of the English High Court held (at [50]) that the lien clause in the charter contained a charge created by the charterers within the meaning of s 395(1) of the UK Companies Act 1985, "namely a floating charge on a specified part of that company's property (namely sub-freights to become due to the charterers in respect of the vessel) within the meaning of s 396(1)(f) of the [UK Companies Act 1985]". More recently, the same court in *Western Bulk Shipowning III A/S v Carbofer Maritime Trading APS (The "Western Moscow")* [2012] 2 Lloyd's Rep 163 *("The Western Moscow")* held that the lien clause, which provided that "the Owners shall have a lien upon all cargoes, and all sub-freights, hire and sub-hire for any amounts due under this Charter …", created a charge over sub-freights and sub-hire.

35 The English authorities have held that a Contractual Lien gives rise to an equitable assignment by way of a charge, which is registrable under the UK

Companies Act and may be void for want of registration against a liquidator and creditors of the company. Such lien was characterised as a charge within the meaning of the UK Companies Act (see s 95 UK Companies Act 1948, s 395 UK Companies Act 1985, and s 860 UK Companies Act 2006), and registrable either as a charge on a book debt (*The Ugland Trailer*) or as a floating charge (*The Annangel Glory*). Diablo's UK opinion confirmed the above position.

36 Diablo submits, however, that this court should follow the position taken in Hong Kong instead. A Contractual Lien is not characterised as a charge under s 334 of the Hong Kong Companies Ordinance (Cap 622) ("HK CO"). Section 334(4) of the HK CO expressly states that "[f]or 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". A consultation paper by the Hong Kong Financial Services and the Treasury Bureau titled "*Second Public Consultation on Companies Ordinance Rewrite*" and dated 2 April 2008 sheds light on the reasons why a Contractual Lien is excluded from the definition of a charge under s 334(4) of the HK CO (at para 5.17):

> Regardless of whether the term "book debts" is to be defined in the [Companies Ordinance], we recommend that it be clarified that a lien on subfreights is not within this head or indeed any other head of registrable charge. Essentially a lien on subfreights is a provision in the charterparty (lease) of a vessel stating that the shipowners shall have a claim upon all amounts due under sub-charterparties for payments in respect of the headcharter. The provision gives the shipowner the personal right to intercept sub-charter payments before they reach the charterer but the provision nevertheless seems to lack the proprietary characteristics of a charge. Registration is also inconvenient from a commercial perspective since charterparties are usually negotiated by shipbrokers and not by lawyers and are normally of a relatively short duration.

37 The Hong Kong position draws its reasoning from Lord Millet's *dicta* in the Privy Council case of *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 ("*Agnew v CIR*") at [41], which I reproduce here:

> 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. Since the subfreights 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); 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. …

Analysis

38 In respect of this issue (*ie*, whether a Contractual Lien falls within the meaning of a charge under s 131 of the CA), I am grateful to the Young Amicus Curiae, Mr Matthew Teo ("Mr Teo") for his invaluable assistance, particularly

for his thorough research and clear submissions, which has been useful to my analysis.

39 Mr Teo's submissions address the issues of whether a Contractual Lien creates a security interest for the purposes of s 131 of the CA and whether such a lien can be characterised as a floating charge or a charge on book debt. He submits that the operation of a Contractual Lien and the rights granted thereunder have the characteristics of a floating charge, and that such lien creates a security interest for the purposes of s 131 of the CA. Hence, he takes the position that a Contractual Lien is registrable both as a charge on book debts and a floating charge.

40 The regime of the registration of charges in Singapore is modelled after English and Australian legislation (*MDA v Sculptor Finance* at [30]). Singapore's Companies Act (Act 42 of 1967) ("the Companies Act 1967"), which was enacted in 1967, is traceable to the UK Companies Act 1948. The Explanatory Statement to the Companies Bill 1966 (No 58 of 1966) states that the Bill follows closely the provisions contained in the Companies Act 1965 (No 79 of 1965) (M'sia) ("the Malaysian Companies Act 1965"). The Malaysian Companies Act 1965 was in turn based on the Companies Act 1961 (No 6839 of 1961) (Vic) of the State of Victoria which, according to the authors of "Modernising Company Law: The Singapore Experience" (2016) 34 *Company and Securities Law Journal* 157–165, was in turn a replica of the UK Companies Act 1948. The categories of charges under s 108(3)(*f*) and (*g*) of the Companies Act 1967 are essentially the same as those in s 95(2)(*e*) and (*f*) of the UK Companies Act 1948, and to date remains unchanged despite numerous amendments to the CA. That the list of registrable charges under s 131 of the CA is based on the UK Companies Act 1948 is also mentioned in the *Report of the Steering Committee for the Review of the Companies Act* (June 2011).

41 Hence, the English authorities, whilst not binding, are nevertheless highly persuasive. As Nourse J observed in *The Ugland Trailer*, a Contractual Lien is a creature of contract. The contract that is formed between the shipowner and charterer gives the shipowner a right which it would otherwise not have, namely the right to attach to sub-freights payable to the charterer where the hire due from the charterer to the shipowner has not been paid. In *Tradigrain SA v King Diamond Shipping SA (The "Spiros C")* [2000] 2 Lloyd's Rep 319 ("*The Spiros C*") at [11], Rix LJ stated that:

> It is well established that a lien over sub-freights gives to the shipowner a right, where his time charterer has defaulted, to step in and claim payment of such sub-freights to himself, provided that they have not already been paid …

42 Whilst the *effect* and *extent* of the right conferred by a Contractual Lien are widely accepted, the c*haracterisation* of the lien remains somewhat controversial. Before addressing the issue of the characterisation of a Contractual Lien, I turn first to the issue of whether sub-freights or sub-hire due to a company can constitute book debts of the company.

Are sub-freights or sub-hire due to a company the book debts of the company?

43 Book debts are debts that arise in the ordinary course of business of a company (*Jurong Data Centre Development Pte Ltd (provisional liquidator appointed) (receivers and managers appointed) v M+W Singapore Pte Ltd and others* ("*M+W Singapore*") [2011] 3 SLR 337 at [80]). They are debts that should be entered in such books as should be kept in the business and as would, if properly kept, sufficiently disclose the company's business transactions and financial position from time to time (*per* Long Innes J in *Motor Credits Ltd v WF Wollaston Ltd (in liq)* (1929) 29 SR (NSW) 227 at 244). The test of whether something is a book debt is whether the practice in well-kept books is to enter

the debt in question in the ordinary course of business (see *Paul & Frank Ltd v Discount Bank (Overseas) Ltd* [1967] Ch 348 ("*Discount Bank*") at 361F; *Malaysia National Insurance Bhd v Suruhanjaya Syarikat Malaysia* [2004] 4 MLJ 472 at [12]). To constitute a book debt, it is not necessary that the transaction or debt be actually entered into a book, hence a debt omitted from the book by accident would not cease to be a book debt (*Discount Bank* at 360F–361C). The debt must also be enforceable by action by the creditor directly against the debtor (*In re Law Car and General Insurance Corpn Ltd* [1911] WN 91). Hence, it is clear that sub-freights or sub-hire due to a charterer can constitute the charterer's book debts. This position was also accepted in *The Ugland Trailer* and in *Agnew v CIR* (at [41]) and recognised by Prof Fidelis Oditah QC in his article "*The juridical nature of a lien on sub-freights*" [1989] LMCLQ 191 ("*Oditah*"). I note also that when the parties appeared before me on 4 May 2017, it was common ground that the sub-freights and sub-hire would constitute book debts.

Can a Contractual Lien be characterised as a floating charge or charge over book debts?

44 Having determined that the sub-freights and sub-hire constitute book debts, I now consider the question of whether a Contractual Lien can and should be characterised as a charge under s 131 of the CA, specifically a floating charge or a charge over book debts.

45 A charge has been defined as a proprietary right or interest in the debts, given to the owners by way of security (Terence Coghlin *et al*, *Time Charters* (informa law from Routledge, 7th Ed, 2014) at para 30.33). *Goode on Legal Problems of Credit and Security* (Louise Gullifer ed) (Sweet & Maxwell, 5th Ed, 2013) at para 1–55 states that a charge "represents an agreement between creditor and debtor by which a particular asset or class of assets is appropriated

to the satisfaction of the debt, so that the creditor is entitled to look to the asset and its proceeds to discharge the indebtedness, in priority to the claims of unsecured creditors and junior incumbrancers".

46 A floating charge has been described as having the following characteristics: (a) it is a charge on a class of assets of a company present and future; (b) the class is one which, in the ordinary course of business of the company, would 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 its business in the usual way as far as concerns the particular class of assets in question (*In re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284 at 295; *Dresdner Bank AG and others v Ho Mun-Tuke Don and another* [1992] 3 SLR(R) 307 ("*Dresdner Bank AG*") at [31]).

47 A floating charge can be given over a class of assets such as book debts (*Re Lin Securities (Pte) Ltd* [1988] 1 SLR(R) 220 at [24]; *Agnew v CIR*). This raises the question as to whether s 131(3)(*g*) of the CA, which refers to a floating charge on the undertaking or property of a company, and s 131(3)(*f*) of the CA, which refers to a charge on the book debts of the company, are mutually exclusive. The law as it stands is unclear. Nonetheless, it is not necessary for me to determine this issue. That is because regardless of whether the Contractual Lien is a floating charge (which includes a charge over book debts) under s 131(3)(*g*) or a charge on book debts under s 131(3)(*f*), or both, the registration requirement would apply.

48 Two main competing theories have emerged in English jurisprudence in relation to the characterisation of a Contractual Lien. These theories were summarised by Clarke J in *The Western Moscow* at [36] as follows:

> There have been said to be two realistically possible juridical bases for the lien:
>
> (A) it operates as a form of equitable assignment by the charterer by way of *security* for payment of what is owed to the owner (which may or may not constitute an equitable charge); and
>
> (B) it confers a sui generis personal contractual right of interception analogous to an unpaid seller's right of stoppage in transitu.
>
> [emphasis mine]

49 Although a creature of contract, the English courts have treated a Contractual Lien as an equitable assignment (see *The Ugland Trailer*, *The Annangel Glory* and *Care Shipping Corporation v Latin American Shipping Corporation* [1983] 1 QB 1005 ("*The Cebu*"), and even recently in *The Western Moscow* (at [49] and [50]) and *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The "Bulk Chile")* [2012] 2 Lloyd's Rep 594 at [51]). As a Contractual Lien arises from contract between the shipowner and charterer only, the lien does not give the shipowner a direct claim against the shipper, but only a right to have the charterer restrained from receiving the sub-charter hire or ordered to direct its payment to the shipowner (*The Western Moscow* at [51]). As Nourse J explained in *The Ugland Trailer* (see [33] above), what the charterer has is a chose in action against the shipper and the limited right to that chose can only be acquired by the shipowner by an assignment, necessarily equitable, made by the charterer. The equitable assignment is an assignment by way of security for only what is owed by the charterer to the shipowner. Nourse J further held that since an equitable assignment of a chose in action by way of security creates an equitable charge on the chose, the lien creates an equitable charge on the sub-freights.

50 I agree with Nourse J's analysis as described above and likewise take the view that a Contractual Lien operates as an equitable assignment. Mr Teo

submits, and I agree, that this is necessary so as to vest the right to the sub-freights or sub-hire in the shipowner and would be consistent with the operation of such lien in situations of successive charterparties (which was the case in *The Cebu*).

51 Further, I find that a Contractual Lien possesses the characteristics of a floating charge. First, it creates a charge over a class of assets of the Company, namely the sub-freights or sub-hire due to the Company both present and future. Second, this class of assets is one which would change from time to time in the ordinary course of business of the Company. Third, the Contractual Lien creates a right to receive the sub-freights or sub-hire to satisfy any outstanding sum due under the charter, provided it has not already been paid (*The Spiros C* at [11]). Meanwhile, the charterer is free to collect the sub-freights or sub-hire and deal with it as its own in the ordinary course of business until outstanding sums are due and unpaid under the charter and the lien is exercised (*The Annangel Glory* at 48). This freedom of the chargor to remove the asset from the security without the consent of the chargee has been described as the "core factor" which characterises a security as a floating charge (*M+W Singapore* at [71], citing *Agnew v CIR* at [22]–[23]).

52 Further, I am of the view that a Contractual Lien also carries a security interest, which is crucial to its characterisation as a charge (see above at [45] and [48]). In *Electro Magnetic (S) Ltd (under judicial management) v Development Bank of Singapore Ltd* [1994] 1 SLR(R) 574, the Court of Appeal explained the meaning of "security" in the following manner (at [11]):

> … The term "security" has not been defined in the [Companies Act]; it should therefore bear the natural and ordinary meaning. A security over a property consists of some real or proprietary interest, legal or equitable, in the property as distinguished from a personal right or claim thereon. …

53 W J Gough, the author of *Company Charges* (Butterworths, 2nd Ed, 1996) ("*Gough*"), further explains at p 3 that the term "security" confers a right to resort to property arising out of a proprietary interest held by the creditor in that property, for the repayment of a debt. Hence, for a Contractual Lien to be characterised as a charge, it must grant the shipowner a proprietary right in the form of "security" for payment of what is owed to it, as opposed to a personal right to intercept the payment.

54 In *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 ("*Re Spectrum Plus*"), the House of Lords held at [139] as follows:

> Under a floating charge, … the 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 [chargor] … to decide how to run its business.

55 *Gough*, however, is of the view that there is no present and immediate equitable proprietary interest conferred on the chargee prior to crystallisation. The author states (at 347) that:

> 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. …

Gough's position appears to be supported by local case authority. In *Re City Securities Pte* [1990] 1 SLR(R) 413, Chao Hick Tin JC (as he then was) observed 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".

56 In spite of the differing views on whether a floating charge confers an immediate or a future equitable proprietary interest, a Contractual Lien has been acknowledged as a form of security by the Federal Court of Australia in *Daebo Shipping Co Ltd v Ship Go Star* (2012) 294 ALR 635 at [94]. More recently, Clarke J in *The Western Moscow* made the following observations of the juridical nature of a Contractual Lien at [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: see *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. …

57 I agree with the views of Clarke J. Clause 18 of the Bareboat Charter gives the shipowner a dormant right that attaches to sub-freights or sub-hire once it comes into existence, even if it did not exist at the date of the charter. In my view, it provides an immediate security interest at the date of the charter, although it may not create any proprietary interest in the sub-freights or sub-hire at that point in time.

58 Despite Lord Millett's *dicta* to the contrary in *Agnew v CIR*, I am of the view that a Contractual Lien is capable of crystallisation "by notice from the owner so that, upon notice, gives rise to a property right" and gives the owner a direct claim against the shipper (*The Western Moscow* at [50]). Upon

crystallisation, the security becomes a fixed security such that the charterer's management over the sub-freights or sub-hire comes to an end. To be effective, the notice must be given before the sub-hire or sub-freights is paid, otherwise the lien fails to bite on anything (see also *The Spiros C* at [11]; *Samsun Logix Corporation v Oceantrade Corporation* [2008] 1 Lloyd's Rep 450 at [35]).

59 As mentioned at [48], the alternative characterisation of a Contractual Lien is that of a personal contractual right. Both Lord Millett in *Agnew v CIR* at [41] (see above at [37]) and *Oditah* adopt this view. According to *Oditah*, a lien on sub-freights is a right to intercept the freights before they are paid and there is no tracing remedy for the lienee. *Oditah* at p 195 states as follows:

> … 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. …

60 In my view, the above is not entirely accurate. Before a floating charge crystallises, a chargor is free, in the ordinary course of business, to remove the asset from the security without the consent of the chargee (*M+W Singapore* at [71]). Any asset which is disposed of to a third party before the charge crystallises, even if the third party has notice of the charge, does not make that party a constructive trustee of the asset. The third party dealing with the chargor company in the course of its business can ignore the charge (*Gough* at pp 179–180). Likewise, a person authorised to receive sub-freights and who receives it before a Contractual Lien is exercised (by the shipowner) would not be a

constructive trustee of the sub-freights. Until the lien crystallises by notice, the chargor (charterer) can deal with the sub-freights in the usual course of his business. That is the characteristic of a floating charge.

61 Once a floating charge crystallises, it becomes a fixed charge and the company cannot deal with any part of the charged property except subject to the charge (*Dresdner Bank AG* at [60]). If the asset on which the charge crystallises is transferred from the account debtor to a third party (and not to the chargor), the charge generally follows it but may be defeated by a *bona fide* purchaser of the asset without notice of the existence of the charge (*Walter Woon on Company Law* (Sweet & Maxwell, Revised 3rd Ed, 2009) at para 13.54). Likewise in the case of a Contractual Lien. As Nourse J stated in *The Ugland Trailer* (at 478H), if the shipper were to pay a third party (and not the charterer) 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. This statement was considered in detail by Clarke J in *The Western Moscow* (at [48]), where he agreed with Nourse J assuming that such payment was properly regarded as freight or hire paid. *Oditah* does not dispute that third parties can be bound after the lien is validly exercised. He states (at p 195) that "[i]t is only if the third party receives the sub-freights after the lien had been perfected by notice to the charterer's agents or to the shipper that the shipowner will have any rights against him", subject to being defeated by a *bona fide* purchaser for value or the rule in *Dearle v Hall* (1823) 3 Russ 1. Thus, it is incorrect to say that there is no ability to follow the sub-freights or sub-hire into the hands of a third party.

62 Clarke J in *The Western Moscow* disagreed (at [47]–[52]) with Lord Millett's view in *Agnew v CIR* that the shipowner's inability to enforce a Contractual Lien against the recipient of the sub-freights arises from the fact that his right to do so depended on an underlying property right that the lien did

not give. Clarke J explained that such a lien clause can amount to an agreement to assign future debts by way of security, which gives rise to rights in equity. He further stated (at [51]) that if the right was only some form of *sui generis* contractual right (as held by Lord Millett), then it is one of restricted use as it would give the shipowners no direct claim against the sub-charterer. This position finds support from Nourse J in *The Ugland Trailer*, where he made the following observations at 478G–H:

> Mr. Millett, for the owners, submitted that the shipowner's inability to follow the sub-freight into the hands of the charterer demonstrates that the lien gives the shipowner no proprietary right in the sub-freight, with the result that an essential element of a charge is missing. I think that that 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.

63 Finally, it is instructive to refer to Graeme Bowtle, "*Liens on Sub-Freights*" [2002] LMCLQ 289 where the author aptly describes the effect of crystallisation in the following manner (at p 292):

> If the charge crystallizes before the cargo interests pay the sub-freight, then the charge becomes a fixed charge and the owner has a proprietary right in the debt. But until crystallization, which in the case of an assignment of a book debt will require notice being given to the cargo interests, the owner has no equitable proprietary interest in the book debt. With respect to Lord Millett, this is precisely the effect of the lien on sub-freights. If the owner gives notice to the cargo interests before payment, the "lien" crystallizes and the owner acquires a proprietary interest in the sub-freight so that the owner can claim the amount due from the cargo interests even if they have paid it to the charterer or a third party. If the sub-freight is paid before the owner has given such notice, then this inchoate right ceases to exist.

64 In the final analysis, I prefer the approach of the line of decided English cases and hold that a Contractual Lien operates as an equitable assignment by way of a charge. This was also the view arrived at by Mr Teo. Ultimately, the question of classification of a "charge" is one of substance and not of form (see *Dresdner Bank AG* at [31] and [37]). Hence, if *in substance*, the nature of the rights and obligations which the parties intended to grant each other via a Contractual Lien is consistent with the rights and obligations intended by a grant of a charge, the proper characterisation of the Contractual Lien should be that of a charge.

65 In my view, a Contractual Lien possesses the characteristics of a floating charge and should thus be classified as such. As I hold that a Contractual Lien is a form of security interest which amounts to a floating charge, it can similarly amount to a charge on a book debt. It is undisputed that sub-freights and sub-hire due to a charterer can constitute the charterer's book debts (see [43] above) and that charges can be created on book debts (see *Agnew v CIR* (floating charge) and *Re Spectrum Plus* (fixed charge)). Hence I hold that a Contractual Lien falls within the meaning of a charge under s 131 of the CA, either as a floating charge under s 131(3)(*g*) or a charge on book debts under s 131(3)(*f*).

66 Diablo has also argued that a Contractual Lien is not a charge because the nature of the notice that crystallises a Contractual Lien is different from one that crystallises a floating charge.[34] The manner of providing notice to crystallise a floating charge is generally stipulated in the contract between the chargor and chargee. In a Contractual Lien, the lien may not only be exercised by way of notice between the parties to the charterparty (*ie*, the shipowner and charterer)

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[34] Diablo's further submissions via letter dated 12 May 2017, paras 13–20.

but can be exercised on a person (*eg*, sub-charterer) not a party to the charterparty.

67 In my view, this does not affect the nature of a Contractual Lien as a charge. Where an agreement creates a floating security, parties are free to designate any event they choose as causing the charge to crystallise (*The Asiatic Enterprises (Pte) Ltd v United Overseas Bank Ltd* [1999] 3 SLR(R) 976 at [16]). The right to give a notice to crystallise the Contractual Lien finds it basis in the lien itself, which is a contract between the shipowner and charterer. In any event, the basis for giving notice to crystallise a floating charge is not one of the characteristics that define a floating charge (see [46] above). The notice is merely a manner of crystallising the interest – it does not define whether an instrument amounts to a floating charge or change the nature of such instrument.

Conclusion

68 In coming to my decision, I had regard to the commercial considerations of registering a Contractual Lien and the impracticability and inconvenience of such registration. Given the nature of charters, a charterparty can be for a relatively short duration or for only one voyage. A shipowner may have to register a charge, against the same corporate charterer, for each charter to ensure it does not fall foul of the consequences of its liquidation. Nourse J, being fully aware of the implications (including practical inconvenience that may be caused), nevertheless held that Parliament had not clearly intended to exclude such liens from the requirements of registration under the UK Companies Act. Likewise, I find that there was no clear intention of Parliament to reduce or limit the effect of the general words of s 131 of the CA, unlike the HK CO, which expressly carves out a Contractual Lien from being regarded as a charge for purposes of registration. This is despite the body of English authorities, since

the UK Companies Act 1948 (and the Singapore equivalent) was enacted, establishing that a Contractual Lien is a registrable charge, and despite the fact that a deliberate policy decision was made to introduce s 131(3A) of the CA (via the Companies (Amendment) Act 1989 (Act 40 of 1989)) to exclude from registration requirements certain charges on a book debt.

69 It is pertinent to note that although s 93 of the Companies Act 1989 (c 40) (UK) would have removed the obligation to register a Contractual Lien as a charge, by providing expressly that such lien should not be treated as a charge on book debts or a floating charge, this provision was never brought into force. This was reiterated in 2004 by the UK Law Commission, which proposed that it be made clear that "contractual liens over sub-freights are not charges and therefore are not registrable" (United Kingdom Law Commission, *Registration of Security Interests: Company Charges and Property other than Land*, Consultation Paper No 164 (June 2002) at [5.42]).

70 Counsel for the Liquidators and Diablo also brought to my attention the Personal Property Securities Act ("PPSA") found in various jurisdictions such as Australia, New Zealand, and Canada. The background to the PPSA in New Zealand ("PPSA (NZ)") is set out in *Waller v New Zealand Bloodstock Ltd* [2006] 3 NZLR 629 at [13]; the key features of the PPSA (NZ) are the "adoption of a unitary concept of security (under which the legal forms by which security is obtained become largely irrelevant) and establishment of priority rules which depend primarily on time of registration". As no authorities were cited on whether a Contractual Lien falls within the ambit of the PPSA, I did not see it appropriate to examine the PPSA, or to consider it in determining the issue at hand. In any event, the PPSA regime is unhelpful, as it comprises specific rules based on considered and expressed legislative intent, with no equivalent in

Singapore. For the same reasons, Diablo's submission that the characterisation of such a lien in the USA as a "maritime lien" is unhelpful to my analysis here.

71 In the final analysis, this issue highlights the tension between maritime and insolvency practitioners. From the standpoint of admiralty practitioners, there is no commercial reason why Contractual Liens should be registered, as registration is impracticable and inconvenient. That may be the case in relation to a shipowner *vis-à-vis* a charterer. However, from the perspective of insolvency practitioners, the registration of Contractual Liens would give creditors notice of the lien, which would in turn help them better decide whether to extend credit or enter into transactions with the chargor. Moreover, a shipowner with a Contractual Lien should not, without registering its security interest, be able to rank in priority to other claims and steal a march on other creditors by claiming payment due to itself upon the winding up of the charterer.

72 Peter Millett QC (as he then was) argued in *The Ugland Trailer* (at 474D) that "[r]egistration under section 95 would serve no useful purpose. The whole object of registration is to warn unsuspecting customers that the debtor has charged his assets, whereas anyone who deals with a corporate charterer will know that it must have created liens on sub-freights". I disagree. In insolvency, the interests of all creditors, *vis-à-vis* each other, must be taken into account. One should bear in mind the object of s 131 of the CA, which plays an important role in the protection of unsecured creditors, and the mischief it was intended to remedy. The Court of Appeal in *MDA v Sculptor Finance* at [31] explained the reason and policy underpinning this rule, citing from Roy Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011), as follows:

> … In the first place, [this] avoidance rule reflects the law's dislike of the secret security interest, which leaves the debtor's

> property apparently unencumbered … Secondly, the registration provisions help to curb the fabrication or antedating of security agreements on the eve of winding up. Thirdly, although unsecured creditors have no existing interest in the company's assets outside winding up, and thus no immediate *locus standi* to complain of want of registration, they have an inchoate interest in that upon winding up the whole of the company's property, so far as not utilised in discharging the expenses of winding up and the payment of preferential claims, becomes available for the general body of creditors, so that their rights become converted from purely personal rights into rights more closely analogous to that of beneficiaries under an active trust. Fourthly, there may well be unsecured creditors who were misled by want of registration into extending credit which they would not otherwise have granted. But it would be both expensive and impractical to expect the liquidator (or administrator) to investigate each unsecured creditor's claim to see whether he did or did not act on the assumption … So a broad-brush approach which in effect assumes detriment to unsecured creditors at large is justified. Finally, the registration provisions serve a general public notice function as well as being a perfection requirement, and the avoidance provision can be … a powerful inducement, to comply with the law's requirements …

73 While practical inconvenience may result from requiring the registration of Contractual Liens, I am of the view that a Contractual Lien is a charge that falls within the ambit of ss 131(3)(*f*) and 131(3)(*g*) of the CA. Whether Contractual Liens should be excluded from the priority regime in insolvency is a matter that should be left to Parliament to determine.

Whether an extension of time under s 137 CA should be granted

74 As s 131 of the CA applies to the Contractual Lien, the fact that the Contractual Lien has not been registered under that section renders it void against the Liquidators and creditors of the Company. Therefore, Diablo's alternative submission is that it should be granted an extension of time to register the lien as its failure to do so was due to inadvertence or some other sufficient cause. There was never a deliberate intention to avoid or circumvent Singapore law. Diablo states that based on its experience, it has never been the

case or the industry practice for a Contractual Lien to be registered with the local authority as a matter of course. Hence, it was unaware of any requirement to register the lien as a charge under Singapore law.

75 The Liquidators submit that Diablo's claim that it was unaware of the registration requirements is disingenuous and contrary to the position taken by the protection and indemnity clubs ("P&I clubs") in the United Kingdom. The Liquidators point to various articles published between 2010 and 2015 by the P&I clubs. These articles set out the registration requirements for Contractual Liens, and state the English position. They also state that in some jurisdictions, it would be necessary for the shipowner to register such a lien to avoid it being considered void against a liquidator. The Liquidators noted that two of the articles were published in 2012 by Diablo's own London solicitors, confirming the need for shipowners to register such liens.[35] It was thus surprising that Diablo, an experienced player in the shipping industry, was unaware of the registration requirements.

76 I am not persuaded that Diablo knew about the requirements for registration, at least not about the requirements under Singapore law, even if there is a body of legal opinion published by the P&I clubs and even if Diablo was in the shipping industry. It was not until sometime in mid-January 2017, after the Liquidators raised the issue of registration with Diablo, that Diablo decided to obtain legal advice on Singapore and English law. Based on Diablo's UK opinion, there was no requirement to register the lien in England, Wales or Scotland. With respect to the requirement to register the lien in Singapore under s 131 of the CA, Diablo's Singapore counsel had reported that there were no

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[35] Affidavit of Luke Anthony Furler dated 21 March 2017, filed in OS 307, at [22] to [28].

decided cases on this. I also take into account the fact that matters concerning ships may involve multiple jurisdictions with different registration requirements for charges and which may apply different treatments to a Contractual Lien (*ie*, whether it constitutes a charge). Hence, on the authorities of *In re The Mendip Press (Limited)* (1901) 18 TLR 37 (Ch D) and *In re Heathstar Properties Ltd* [1966] 1 WLR 993, I accept that not being aware of the requirement for registration suffices as inadvertence for the purposes of s 137 of the CA.

77 However, even if Diablo had satisfied one of the limbs in s 137 of the CA, this is insufficient in itself to obtain an extension of time. Diablo must go on to persuade the court to exercise the discretion in its favour (*MDA v Sculptor Finance* at [33]). The issue is whether the court should allow an application for extension of time where the company (chargor) has been wound up. There is no locally decided case on this point, and *MDA v Sculptor Finance* concerned a situation in which winding up was imminent.

78 However, the English authorities are instructive. In *In re Resinoid & Mica Products Ltd* [1983] 1 Ch 132 ("*Re Resinoid*"), Resinoid issued a notice convening a meeting of creditors with a view to commencing a creditors' voluntary winding up. After receiving the notice, the chargee of a legal charge granted by Resinoid applied to court to extend time to register the charge on the ground that the failure to register was due to inadvertence. The registrar refused the application. Subsequently, Resinoid went into voluntary liquidation. The chargee appealed. Although the chargee's application was made before the company was wound up and the chargee argued that the registrar should have extended the time for registration with a saving clause (at that time the company had not been wound up), the Court of Appeal refused to grant an extension of time because winding up had already commenced. The court stated at 133G–H as follows:

> In cases where time is extended *before* the winding up has commenced, it is the invariable practice of the court to insert words saving the rights of parties acquired prior to the time when registration is in fact made. If registration were allowed *after* the winding up has commenced, it would affect the rights of parties accrued beforehand. That cannot be allowed. I do not think it is permissible to extend the time for registration after the winding up has commenced.
>
> [emphasis in original]

In the subsequent case of *In re Ashpurton Estates Ltd* [1983] 1 Ch 110 ("*Ashpurton Estates*"), which had facts similar to *Re Resinoid*, the Court of Appeal decided in the same manner.

79 *Re Resinoid* and *Ashpurton Estates* concerned a creditors' voluntary winding up. In my view, the same principle would apply to a compulsory winding up including, as in the present case, a winding up made on the Company's application. Hence, where the company has been wound up, an order extending time would not ordinarily be made save in an exceptional case, such as fraud (as alluded to in *Ashpurton Estates* at 124B). As Diablo has not shown that there are any exceptional circumstances in the present case, I refuse the application for the extension of time.

80 While there may be a divergence in views among the English authorities on whether the court should take into consideration the insolvency of the company in determining whether to grant an extension of time, it would seem that this dissonance in opinion is present only when winding up of a company is imminent, and not when the company has already been wound up. Various cases in this respect were extensively examined by Brightman LJ in *Ashpurton Estates* and bears no repeating here.

81 Ultimately, in exercising my discretion, the overriding question must be whether it would be just and equitable to grant an extension of time to register

the charge. I am not persuaded that it would be just and equitable in the circumstances to do so. An extension of time to register the charge after a company has been wound up would prejudice its unsecured creditors. Once a company has been wound up, a chargee should not be allowed to obtain priority over unsecured creditors by virtue of an extension of time granted to register his charge. On the making of a winding up order, a statutory scheme is imposed to be administered by the liquidator for the benefit of unsecured creditors, although the statutory trust does not confer on the unsecured creditors any beneficial or proprietary interests in the company's property (*MDA v Sculptor Finance* at [50]–[51]).

82 As the Company has been wound up, the liquidators are thus bound by the statutory scheme to distribute the assets of the Company *pari passu* among the unsecured creditors of the Company. An extension of time for registration of the charge would give Diablo an unfair advantage over the general body of unsecured creditors, detract from the Liquidators' duty to administer the statutory scheme for the collective benefit of the unsecured creditors and thus prejudice the unsecured creditors of the Company.

83 Moreover, a proviso which Diablo is asking for in its application for extension of time (which is similar to the Preservation of Rights Proviso in *MDA v Sculptor Finance*) would protect the rights of an unsecured creditor "if, but only if, the company has gone into liquidation before registration is effected" because it is only at that point that "the existing unsecured creditors are interested in all the assets of the company, since the liquidator is bound by statute to distribute the net proceeds *pari passu* among the unsecured creditors, subject to preferential debts" (*Ashpurton Estates* at 123, cited in *MDA v Sculptor Finance* at [47]). As Lord Brightman noted in *Ashpurton Estates* (at 123G–H):

> It follows from this approach that the court must invariably refuse to extend the time for registration once the company has gone into liquidation. If an order extending time were made and the proviso included, registration would be of no assistance whatever to the unregistered chargee because the unsecured creditors at that stage would be protected by the proviso. Such an order after liquidation would be futile and will be refused.

84 Diablo also submits that, as the onus lies on the Company to register the lien as a charge, the Company should be not be permitted to rely on its own omission in failing to register to the prejudice and detriment of Diablo. Although the duty lies with the chargor to undertake registration, nothing precludes the chargee from so doing, as he is an interested person under s 132(1) of the CA. That said, where the company has been wound up, an order extending time would not ordinarily be made for the reasons stated above. In *Ashpurton Estates* and *Re Resinoid* (and by and large the other English authorities that dealt with the imminence of insolvency), the chargor did not register the charge. Indeed, in most cases, there is no impetus for a chargor to register a charge save for the risk of penal sanction under the CA.

85 Finally, Diablo submits that if the court decides that the lien falls within s 131 of the CA, Diablo would be a secured creditor over the Company's debts and assets. This means that the monies secured under the lien were never meant to be part of the Company's pool of assets for distribution to the general pool of creditors. In this regard, Diablo submits that the creditors would not, in any circumstance, have been entitled to receive any of the monies secured under the lien, unless other monies were procured to repay the debt owed to Diablo. In my view, Diablo would only have been a secured creditor, in a winding up of the Company, if the charge had been registered under s 131 of the CA. In addition, "crystallisation is merely a process in the enforcement of a floating charge and does not retrospectively change the nature of the security. … If the original floating charge was void under s 131 of the [CA] by reason of non-

registration of the charge it remains void even after crystallisation and cannot avoid the consequences of that section." (*Dresdner Bank AG* at [60]).

Conclusion

86 In conclusion, this was not a case in which a stay for arbitration should be granted. I therefore dismiss SUM 1317. I also hold that Diablo's lien amounts to a charge within the meaning of s 131 of the CA, but I refuse Diablo's application to extend time to register the charge. Hence, I allow the Company's application in OS 287 and dismiss Diablo's application in OS 307. I also award costs of OS 287, OS 307, and SUM 1317 to the Liquidators. I shall hear parties on costs.

Audrey Lim
Judicial Commissioner

Debby Lim (Shook Lin & Bok LLP) for the plaintiffs in OS 287 of 2017 and the respondents in OS 307 of 2017;
Felicia Tan and Justin Seet (Incisive Law LLC) for the defendant in OS 287 of 2017 and the applicant in OS 307 of 2017;
Matthew Teo (Rajah & Tann Singapore LLP) as amicus curiae.