# EC Investment Holding Pte Ltd *v* Ridout Residence Pte Ltd and Anor (Orion Oil Ltd and others, interveners)
# [2013] SGHC 139

**Case Number** : Originating Summons No 1357 of 2009

**Decision Date** : 19 July 2013

**Tribunal/Court** : High Court

**Coram** : Quentin Loh J

**Counsel Name(s)** : Lee Eng Beng ,SC (Rajah & Tann LLP) for the plaintiff; P Balachandran (M/S Robert Wang & Woo) for the first defendant; Alvin Yeo, SC (Wong Partnership LLP) for the 2nd Intervener; Oon Thian Seng (Oon & Bazul LLP) for the 3rd Interveners; Lim Yew Jin (IPTO) for the Official Assignee.

**Parties** : EC Investment Holding Pte Ltd — Ridout Residence Pte Ltd and Anor (Orion Oil Ltd and others, interveners)

*TRUSTS – Trust Estate*

19 July 2013 Judgment reserved.

**Quentin Loh J:**

**Introduction**

1 The current proceedings raise questions regarding the priority of unsecured trust creditors *inter se* as well as *vis-à-vis* the trust beneficiary. The parties are seeking orders on the distribution of S$4,248,240.91 remaining in court, which is now contested over by Ridout's unsecured creditors, who collectively and individually claim priority over the Official Assignee ("the OA").

**Background to the dispute**

2 The present Originating Summons had been filed in 2009 by EC Investment Holding Pte Ltd ("ECIH") seeking specific performance for the sale of 39A Ridout Road ("the Property"), pursuant to an Option to Purchase granted by the 1st Defendant, Ridout Residence Pte Ltd ("Ridout"), on 5 June 2009 ("the 1st OTP"). The 2nd Intervener, Thomas Chan, also sought specific performance for the sale of the Property pursuant to an Option to Purchase granted some 4 months later on 7 October 2009 with Ridout ("the 2nd OTP").

3 Ridout was a trust vehicle created by one Mr Agus Anwar ("Anwar"), its sole director and shareholder, who has now been adjudged to be bankrupt.

4 In *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and another (Orion Oil Ltd and another, interveners)* [2011] 2 SLR 232, I dismissed ECIH's claim for specific performance, granting specific performance to Thomas Chan but ruled that ECIH was entitled to damages. The transfer of the Property to Thomas Chan was duly completed on 17 December 2010, and following this, Thomas Chan paid the balance purchase sum of S$14,728,240.91 into court after discharging all sums due to the 2nd Defendant, Hong Leong Finance Limited ("HLF"), including HLF's mortgage over the Property. On appeal, the Court of Appeal in *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and*

*others and another appeal* [2012] 1 SLR 32 (the "CA judgment") upheld my decision agreeing with some, but not all my grounds. Importantly, the Court of Appeal also held that Ridout held the Property on trust for Anwar.

5 On 3 January 2011, the 1st Intervener, Orion Oil took out an Originating Summons (OS No 1 of 2011) to enforce its charge over the sale proceeds of the Property, which it had registered on 24 September 2008. The Deed of Charge Over Proceeds had been executed in consideration of a S$10,000,000 loan made to Anwar. By agreement of the parties, I ordered the sum of S$10,500,000 to be paid out to Orion Oil, leaving the balance to which these present proceedings pertain.

**Parties' Claims to the Balance Purchase Price**

6 ECIH filed Summons No 455 of 2012 claiming damages against Ridout comprising the following components:

(a) a sum of $17 million, being the difference between ECIH's agreed purchase price of $20 million, and the purchase price of $37 million paid by Thomas Chan for the Property;

(b) a sum of $1.5 million being the option fee paid by ECIH to Ridout; and

(c) a sum of $600,627 in stamp duty paid in relation to the sale of the Property to ECIH, if IRAS declines to refund the same.

7 Thomas Chan's claim against Ridout (Summons No 475 of 2012) is for late completion interest under the terms of the 2nd OTP. Under Clause 8.2 of the Law Society of Singapore's Conditions of Sale 1999 ("Clause 8.2"), which is incorporated into the terms of the 2nd OTP, Thomas Chan is entitled to the sum of $3,275,935.81 as interest for late completion of the sale of the Property.

8 The 3rd Intervener, TYF Realty Pte Ltd ("TYF"), claims (under Summons No 455 of 2012) S$230,000 pursuant to Clause 14 of the 2nd OTP ("Clause 14") which provides for the estate agent's service fee or commission upon the successful sale of the Property. It contends that Clause 14 gave Ridout's solicitors irrevocable authority to deduct this service fee from the sale proceeds so that TYF would have been entitled to direct payment upon completion of sale.

9 The OA's claim was made on behalf of Anwar's estate for the benefit of his creditors following a bankruptcy order on 3 March 2011, since it is attested that Ridout held the Property on trust for Anwar as recognised by the CA judgment at [4] *supra*.

10 The claimants, ECIH, Thomas Chan and TYF, and the OA are agreed that their claims should take precedence over the OA's claim by subrogation, which allows trust creditors to step into the shoes of Ridout *qua* trustee, thereby latching on to the Ridout's right to indemnity from the assets held on trust for Anwar, if I should find that the remedy of subrogation is available to these claimants.

**Remedy of subrogation of the trustee's right to be indemnified by the trust assets**

11 ECIH, Thomas Chan and TYF claim the remaining sum paid into court on the basis that they can subrogate to the right of the trustee, Ridout, to be indemnified out of the trust assets for the liability incurred by Ridout to them. This, they say, gives them priority over the beneficial interest of the OA in the trust assets.

12 Our courts have not considered the question of whether an unsecured creditor of a trustee has a right to be subrogated to the trustee's right of indemnity. Nonetheless, it is clear that this remedy exists in the common law: see *e.g.*, *Octavo Investments Pty Ltd v Knight* [1979] 144 CLR 361 ("*Octavo*") at 367 and 369-370, *Vacuum Oil Co Pty Ltd v Wiltshire* [1945] 72 CLR 319 and *Dowse v Gorton* [1891] AC 190. Since this has not been commonly discussed in local jurisprudence, a brief look at the basic principles may be helpful. While a typical agent who acts on behalf of his principal does not incur any personal liability if acting within his scope of authority, a trustee is in a different position because he acts as principal in connection with the administration of the trust and incurs personal liabilities to creditors whether or not acting in accordance with his powers and duties: John Mowbray, *Lewin on Trusts* (Sweet & Maxwell, 18th ed, 2008) ("*Lewin on Trusts*") at para 21-10.

13 However, where a trustee incurs a liability towards a creditor in the proper discharge of the trust (a "trust creditor"), the trustee is entitled to an indemnity out of the trust property to meet that liability: *Re Grimthorpe* [1958] Ch 615 at 623:

> … persons who take the onerous and sometimes dangerous duty of being trustee are not expected to do any of the work at their own expense; *they are entitled to be indemnified against the costs and expenses which they incur in the course of their office; of course, that necessarily means that such costs and expenses are properly incurred and not improperly incurred.* The general rule is quite plain; they are entitled to be paid back all that they have had to pay out. [emphasis added]

This much is undisputed by parties. I would add that a trustee's indemnity is of two types – a right to be indemnified out of the trust property and a personal indemnity against the beneficiary which extends beyond the trust assets and is based on the principle that the *cestui que trust* who gets the benefit of the property should bear its burden. Several authorities have sought to explain that the former type of indemnity is effected by a lien or charge over the trust property and conferring an equitable interest in the trust fund to the extent of the amount of the liability: see *Jennings v Mather* [1901] QBD 109, at 113-114, approved on appeal by the English Court of Appeal in *Jennings v Mather* [1902] 1 KB 2 ("*Jennings*") and *Octavo* at 367. Further the trustee's right of indemnity takes priority over the claims of any beneficiary: see *Lewin on Trusts* at para 21-33; *Chief Commissioner of Stamp Duties (NSW) v Buckle* [1998] 192 CLR 226 ("*Buckle*") at [47] and [48]; *Re Firth* [1902] 1 Ch 342 at 345.

14 Typically, and especially if there is no direct dealing between the trust creditor and the beneficiaries, the trust creditor can only institute its claim against the trustee personally, and cannot do so against the assets of the trust: see *Jennings* at 5 and 7. While there may be instances where a trust creditor has a direct proprietary remedy against the trust assets, for example, by virtue of an express charge over the trust assets, the final position on this is not fully settled. In any case, this does not arise in the present case.

15 If the trustee does not or is unable to invoke that right of indemnity to pay the creditor, such a creditor, having no direct claim against the trust assets and not being able to levy execution against the trust assets, may obtain an order of court that he be subrogated to the trustee's right of indemnity. If the court grants this order, the creditor's *in personam* right against the trustee is elevated to a claim *in rem* over the trust assets, and the creditor gains priority over the beneficiaries of the trust assets because equity regards the creditor's claim as having primacy over that of the beneficiary: see *In re Johnson; Shearman v Robinson* (1880) 15 Ch D 548, *In re Pumfrey, Deceased* (1882) 22 Ch D 255, *In re Blundell* (1889) 44 Ch D 1 ("*In re Blundell*"), *In re Raybould* [1900] 1 Ch 199 and *Lewin on Trusts* at para 21-42. It is also clear that the subrogation is not a cause of action, but an equitable remedy which is not granted as a right but in circumstances where it is appropriate to do

so: see *Lerinda Pty Ltd v Laertes Investments Pty Ltd as Trustee for the Ap-Pack Deveney Unit Trust* [2009] QSC 251 at [7].

16 In our case, Ridout when administering the trust, entered into contracts with each of the three creditors: ECIH, Thomas Chan and TYF. Ridout has clearly breached each of these contracts and there is no doubt that Anwar, the beneficiary as well as the sole shareholder and director of Ridout, is the controlling and directing mind behind Ridout. All the acts complained of by these creditors and which caused these proceedings arose from contracts negotiated and signed by Anwar in his capacity as director of Ridout. On the facts, it is clear that Ridout will be entitled to an indemnity from the trust for liability caused by these breaches of contract and its right of indemnity will take priority over the claim of the beneficiary Anwar.

***Whether a winding up application must have been taken up against Ridout before its creditors can subrogate***

17 Before deciding on the priorities amongst the creditors, I have to first deal with a preliminary point. In its written submissions, Ridout raised the objection that a trustee is required to put a corporate trustee into liquidation before the creditor could enforce the remedy of subrogation, and that because ECIH and Thomas Chan have not taken any steps to present a winding-up application against Ridout, it is premature for them to claim the remedy of subrogation. Ridout relies on the following passage in *Levin v Ikiua* [2012] 1 NZLR 400 ("*Levin*") where the New Zealand High Court said (at [121]): [note: 1]

> [121] Professor Ford, Trading Trusts and Creditors' Rights, [(1981-1982) 13 Melb. U. L. Rev. 1 at 19, explains how the right of subrogation developed:
>
> > The right of a trust creditor to take advantage of a trustee's right to exoneration out of the trust estate appears to have been accorded under the practice of the Court of Chancery when supervising the distribution of a fund following a suit for administration of a deceased estate. It was not simply a matter of it being convenient for the court of equity to recognize the creditor's claim and to allow him to be paid without requiring him first to proceed at common law. When the Court of Chancery took into its own hands the administration of an estate, it restrained creditors from pursuing their legal remedy at common law [*Harrison v Kirk* [1904] AC 1 (HL) at 5 per Lord Davey]. When the Court made the decree for administration it operated as a judgment for all the creditors and the creditors then had to prove their debts under the administration decree. *A creditor who seeks the benefit of a trustee's right of indemnity* ***against a beneficiary personally*** *would have to make the trustee bankrupt*. [emphasis in italics added by counsel for Ridout; emphasis in bold italics added by this Court]

18 Counsel for ECIH, Mr Lee, contends that the passage in *Levin* cited above is merely dicta and says that there is no other authority for this proposition. Further, it is Mr Lee's argument that if a winding-up application should be taken up against Ridout, more costs would be incurred. However, Mr Lee has not cited any authority in this regard.

19 Counsel for Thomas Chan, Mr Yeo, makes two arguments resisting Ridout's proposition. First, Mr Yeo submits that the court in *Levin* did not lay down a firm rule that a trustee, against whom the remedy of subrogation is enforced, must first be wound up. Mr Yeo says that the court in *Levin* recognised that recourse by a creditor against a trustee through the right of indemnity would be necessary where the trustee does not have sufficient assets to meet the debt (at [121]), and that the need to subrogate only arises if the trustee was not prepared to exercise that right of indemnity

(at [124]). Mr Yeo says that both elements exist in the present case even without putting Ridout into liquidation. [note: 2] With respect, Mr Yeo's first argument is not quite right. While the court in *Levin* might have enunciated the circumstances where it was necessary to seek recourse of a trustee through his right of indemnity and to enforce a remedy of subrogation to that indemnity, this does not deal with the requirements necessary to invoke that remedy of subrogation.

20 In practice subrogation has usually been ordered by the court where the trustee is insolvent: see generally *In re Blundell* and *In re British Power Traction and Lighting Company Ltd* [1910] 2 Ch.D. 470. *Levin* appears to be the only authority stating that a trustee's creditor must put the trustee in liquidation before being able to enforce the remedy of subrogation of the trustee's right of indemnity against the trust assets. In coming to its decision, the High Court in *Levin* appeared to have been influenced by the passage from Ford's article cited in its judgment. That passage should therefore be carefully scrutinized in its context.

21 The passage comes from a short section in H.A.J. Ford's article titled "Rights of Trust Creditors where Trustee has right to recoupment or exoneration against the Beneficiary Personally" which reads (Ford at 18-19, citations omitted):

> If a trustee has a right of recoupment ***against a beneficiary personally*** the trust creditor who obtained a judgment against the trustee could possibly obtain satisfaction by garnishee proceedings.
>
> Simply because a trust creditor is sometimes allowed to stand in the shoes of a trustee so as to be able to be given the benefit of the trustee's right to indemnity ***against the trust estate*** , it does not follow that a trust creditor should be subrogated to the trustee in respect of a right of exoneration ***against a beneficiary*** . The right in relation to indemnity ***against the trust estate*** stems from the practice of the Court of Chancery in administration actions in the distribution of a fund under administration by the Court. There appears to be no similar procedure for a right of subrogation in respect of a trustee's right ***against a beneficiary*** personally although it is not easy to see why, as a matter of policy, there should not be a right of subrogation.
>
> The right of a trust creditor to take advantage of a trustee's right to exoneration ***out of the trust estate*** appears to have been accorded under the practice of the Court of Chancery when supervising the distribution of a fund following a suit for administration of a deceased estate. It was not simply a matter of it being convenient for the court of equity to recognize the creditor's claim and to allow him to be paid without requiring him first to proceed at common law. When the Court of Chancery took into its own hands the administration of an estate, it restrained creditors from pursuing their legal remedy at common law. When the Court made the decree for administration it operated as a judgment for all the creditors and the creditors then had to prove their debts under the administration decree.
>
> A creditor who seeks the benefit of a trustee's right of indemnity ***against a beneficiary personally*** would have to make the trustee bankrupt.
>
> [underlined portion of the passage cited by the court in *Levin*; emphasis in bold italics added by this Court]

22 From the emphases added to the full passage cited from Ford's article, it is clear that Ford was contrasting the creditor's remedy of subrogation to the trustee's right of indemnity of the trust assets on the one hand, and of the trustee's right of indemnity from the beneficiary personally on the other. Ford's point was that the Chancery cases only go so far as establishing a right for trust creditors to

claim *against the trust estate* through subrogation, and it does not follow from this that the trust creditors can similarly claim *against a beneficiary personally* through subrogation. This is also in accordance with the position in *Ex parte Garland* (1804) 10 Ves. 111 which sets out the rule that the trust creditor can only reach into the section of the estate set aside for the administration of the trust, and in line with the general position of equity that trustees enter into contracts in their own personal capacity: see *Re Johnson* (1880) 15 Ch D 548 at 552 *per* Jessel MR and *Octavo* at 367.

23 When the passage is viewed in its context, it becomes clear that the need to make the trustee bankrupt is only necessary when seeking to subrogate to a trustee's right of indemnity *against a beneficiary personally*. The reason for this was given by Ford in an earlier section of the same article, where Ford explains that: "In many cases in which a trustee has been held to have a right of indemnity against a beneficiary personally, the trustee has first exhausted his right to indemnity out of the trust estate." If this is correct, then Ford's understanding is that all trust creditors have, *ex debitio justitiae*, a claim *against the trust estate* via subrogation into the shoes of the trustee. The requirement of bankruptcy only applies if the trust creditors seek further recompense against the beneficiary of the trust. Thus, *Levin* appears to have been, with respect, premised on a misreading of Ford, and does not present any impediment to ECIH, Thomas Chan and TYF.

24 Mr Yeo's second argument is that the need to make a trustee bankrupt or apply to wind it up before enforcing the remedy of subrogation is not a hard and fast rule because the remedy of subrogation is also available if "it is reasonable to assume that obtaining a judgment against the trustee would be pointless". In this regard, Mr Yeo relied on *Zen Ridgeway Pty Ltd v Adams* [2009] QSC 117 ("*Zen Ridgeway*") at [13] where the Queensland Supreme Court said that "the right of access to the trust assets by way of subrogation is inchoate unless the trustee is insolvent or it is otherwise reasonable to assume that obtaining a judgment against the trustee would be pointless".

25 The court in *Zen Ridgeway* in turn cited *Re Wilson* [1942] VLR 177 at 183 ("*Re Wilson*") as authority for this proposition. In *Re Wilson*, one Thomas Wilson devised and bequeathed all his property to his trustees to manage and/or sell. Wilson also directed that the trustees should be free from all responsibility and be fully indemnified out of his estate in respect of any loss arising in relation to such management and working of the said lands or in the administration of the estate generally. In the course of so carrying on the business, the trustees had incurred indebtedness to the plaintiff. The plaintiff then took out an originating summons asking for an order for the administration by the Court of the real and personal estate of the deceased and for consequential orders for accounts, sale of the real and personal estate and payment into Court of all moneys in the hands of the trustees.

26 The trustees, in resisting the action, relied on *Owen v Delamere* [1872] LR 15 Eq 134 ("*Owen*") which they say stood for the proposition that until the plaintiff pursues his claim against the trustees who are his principal debtors to judgment he cannot claim to be subrogated to their rights and so claim against the estate to the extent to which they are entitled to an indemnity. The Supreme Court of Victoria in *Re Wilson* disagreed, finding instead that the court in *Owen* did not rule as such. The Supreme Court of Victoria in *Re Wilson* then went on to find at 181-183 that:

> If all that appears is that the trustees have, in the administration of the estate, incurred a debt to the plaintiff' for which they are personally liable, but in respect of which they have a right to be indemnified out of the estate, the creditor has shown no reason why he should not be left to pursue his common law remedy, and has shown no reason why equity should interfere in his favour by making an order for the administration of the estate. On the other hand if he has pursued his common law right to judgment and has failed to get that judgment satisfied he can come in and claim an order for administration of that part of the estate which the testator has authorised to be used in his business, provided always that the trustees have not lost their right

of indemnity against the estate.

> But if a creditor has demanded payment from the trustee and has failed to get satisfaction, and if the facts proved lead to the inference that judgment against the trustee will probably be difficult to execute, must the creditor be put to the useless, expenditure involved in an action at law before he will be allowed to proceed in a Court of equity for an order for administration? ...

27 The Supreme Court of Victoria then referred to the case of *In re Geary; Sandford v Geary* [1939] NI 152 where the court did not think it was necessary for the creditor to sue the executor in the first instance before taking proceedings for administration if he will only obtain a "fruitless judgment". The Supreme Court of Victoria then said at 183:

> There appears to be no reason in principle why a creditor must pursue his common law rights to judgment before he will be allowed to be subrogated to the trustees' indemnity against the estate. It is one thing to refuse him an order for administration as a matter of discretion if no more appears than the fact of the debt, but if he has demanded payment from his debtor and has failed to receive payment and the circumstances are such as to lead to the reasonable conclusion that a judgment, if obtained, would be fruitless, it would be a harsh and unnecessary rule that required him first to proceed to judgment.

28 It thus appears to me that there is some strength in Mr Yeo's argument. In fact, the Australian position boosts procedural expediency by allowing judgment creditors to reach the trust assets without having to take the redundant step of first executing their judgment debts against the trustee when it appears pointless to do so. All that the trust creditors would have to do is to bring an *in personam* claim against the trustee and prove their debts against the trustee. Insofar as the present case is concerned, have the claimants shown reason why they should not be left to pursue their common law remedy of winding up Ridout before applying to be subrogated to Ridout's right of indemnity? I find that they have. Ridout's asset and liability positions are clear. Ridout has no assets other than the Property which has since been sold and the proceeds of which have been paid into court. Ridout's creditors are also all known because an order was made on 15 September 2010, which was advertised, that any party having a claim to the monies paid into court shall apply to court by 31 January 2012, and no claimants other than those in this action have applied to court pursuant to my order of 15 September 2010. Thus, I agree with Mr Lee and Mr Yeo that it is pointless in these circumstances to have Ridout wound up before its creditors can enforce their remedies of subrogation since the fact that Ridout cannot satisfy all the claimants' claims is clear, and imposing this rule will only result in unnecessary time and costs being wasted. This is neither consistent with common sense nor public policy.

***Whether Agus Anwar's bankruptcy has any effect on the parties' claims***

29 Another preliminary point I must deal with is whether Anwar's bankruptcy has any effect on the parties' claims. The OA contends that the trust assets, which are the property of Anwar, were vested in the OA on 3 March 2011 when Anwar was adjudged a bankrupt by virtue of s 76(1)(a) of the *Bankruptcy Act* (Cap 20, 2009 Rev Ed), and that, subject to any amount which relates to any proprietary interest which anyone had in the Property or the sale proceeds before 3 March 2011, the trust assets are vested in the OA for the benefit of Anwar's creditors. [note: 3] The OA further argues, on the authority of *Zen Ridgeway* at [13] (see [24] above), that the creditors' right to access trust assets by subrogation to the trustee's right of indemnity is inchoate and only comes into existence when a court orders such a remedy. The OA also says that *Zen Ridgeway* does not stand for the proposition of law that a creditor's remedy of subrogation relates back to the date when the trustee incurs liability.

30 However, when the decision in *Zen Ridgeway* is read in full, it is clear that the OA's argument is, with respect, untenable. In *Zen Ridgeway* at [10], the court cited the following passage from the High Court of Australia in *Buckle* at 246-247:

> The term 'trust assets' may be used to identify those held by the trustee upon the terms of the trust, but, in respect of such assets, *there exist the respective proprietary rights, in order of priority, of the trustee and the beneficiaries*. The interests of the beneficiaries are not 'encumbered' by the trustee's right of exoneration or reimbursement. Rather, the trustee's right to exoneration or recoupment '*takes priority* over the rights in or in reference to the assets of beneficiaries or others who stand in that situation' (*Vacuum Oil Co Pty Ltd v Wiltshire* (1945) 72 CLR 319 at 335). A court of equity may authorise the sale of assets held by the trustee so as to satisfy the right to reimbursement or exoneration. In that sense, there is an equitable charge over the 'trust assets' which may be enforced in the same way as any other equitable charge (*Hewett v Court* (1983) 149 CLR 639 at 663). However, *the enforcement of the charge is an exercise of the prior rights conferred upon the trustee as a necessary incident of the office of trustee. It is not a security interest or right which has been created*. [emphasis added]

31 It thus appears clear to me that both ECIH's and Thomas Chan's remedy of subrogation to Ridout's right of indemnity date back to the date where Ridout first incurred such liability. Since ECIH's and Thomas Chan's right to damages against Ridout arose on 15 September 2010 when I ordered damages to be awarded to them, their remedy of subrogation relates back to 15 September 2010, and this precedes Anwar's bankruptcy order on 3 March 2011. Therefore, since the trustee's right of indemnity against the trust assets operates by way of an equitable lien or charge over the portion of the trust assets co-extensive with the amount of liability incurred by Ridout, both ECIH and Thomas Chan have a valid competing equitable interest to the trust assets which pre-date Anwar's bankruptcy.

32 TYF's position is, however, different. Its right of indemnity in relation to the judgment sum in Suit 856 of 2011 in the District Court only arose on 3 May 2011 when the District Court made the order for damages, and this came after Anwar's bankruptcy order on 3 March 2011. [note: 4] This being the case, the equitable interest in the trust assets arising out of Ridout's right to be indemnified out of the trust assets only arose on 3 May 2011. Consequently, on this issue, TYF's remedy of subrogation only dates back to 3 May 2011 and TYF's judgment debt in the District Court stands *pari passu* with the debts of Anwar's other creditors at best.

33 During oral submissions before me on 30 July 2012, TYF raised a new argument that it had a separate equitable interest in the trust assets arising from a purported equitable assignment of part of the trust assets to it by virtue of Clause 14 of the 2nd OTP. This argument, if successful, would rank TYF ahead of Anwar's general creditors and even ahead of Ridout's right of indemnity out of the trust assets because it would have created a competing equitable interest in the trust assets operative from 8 October 2009, the date of the completion of sale, which predates Anwar's bankruptcy order on 3 March 2011 and my judgment dated 15 September 2010. This separate argument is considered below at [52].

### *Whether the creditors enforcing their remedy of subrogation rank pari passu or in order of time*

34 Having found that there are no procedural or substantive objections to the subrogation to Ridout's right of indemnity against the trust assets by ECIH and Thomas Chan, I next move on to consider how these competing creditors rank to be paid off from the remaining trust assets since the

parties' claim amounts in total exceed the trust assets remaining. Between trust creditors, there appears to be only two possible bases of priority: ranking *pari passu*, or ranking in order of time, so that the liability which arose first would be met first. The learned authors of *Lewin on Trusts* note that there is no authority on the point, although they also note that the South Australian Court of Appeal has intimated a preference for distribution *pari passu*: see *Re Suco Gold Pty Ltd (In Liquidation)* (1983) 33 SASR 99 ("*Re Suco Gold*") at 109. The learned authors of *Lewin on Trusts* also note that competing equities do not always rank in order of time and a distribution *pari passu* would on occasion avoid difficult and cumbersome enquiries (at para 22-30).

35 I note at this juncture that Thomas Chan and TYF have made alternative arguments as to why they are entitled to be paid out of the trust assets in priority to ECIH. Thomas Chan claims a right of equitable set-off against Ridout for the late completion interest in relation to the sale of the Property to him, while TYF claims that Ridout has equitably assigned a portion of the trust assets to it. Thomas Chan's alternative argument, even if successful, does not *necessarily* rank him ahead of ECIH because this right of set-off is against Ridout and not against Anwar, and Thomas Chan would still need to be subrogated to Ridout's right of indemnity to reach the trust assets. On the other hand, as explained above at [33], TYF's alternative argument, if successful, would give them an equitable interest independent of Ridout's right of indemnity against the trust assets and rank them ahead. The present claimants are also in agreement that they should all rank *pari passu* but ahead of the OA should Thomas Chan's and TYF's alternative arguments fail. [note: 5] On this premise, I would first consider the alternative arguments adopted by Thomas Chan and TYF Realty because if their alternative arguments fail, all these creditors would rank *pari passu* in being paid out.

**Thomas Chan's Right of Equitable Set-off**

36 I now deal with Thomas Chan's alternative argument that he is entitled to rank ahead of the other claimants and the OA because he has a right of equitable set-off against Ridout. This argument is premised on Thomas Chan's claim for late completion interest against Ridout pursuant to Clause 8.2.

***Whether Clause 8.2 is considered a penalty clause in the present case***

37 A preliminary issue I have to address is whether Clause 8.2 is a penalty clause in the present case. Counsel for Ridout, Mr Balachandran contends that Clause 8.2 should be struck down for invalidity because "the liquidated damages rate of 10% on the purchase price of $37 million is so excessive in the circumstances that it amounts to a penalty". [note: 6] Mr Balachandran referred to the Court of Appeal's decision in *Hong Leong Finance Ltd v Tan Gin Huay and another* [1999] 1 SLR(R) 755 where the court cited with approval the seminal decision of *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79:

> 18 In considering whether the default interest payable under these provisions was a penalty we take as a convenient starting point, the decision of the House of Lords in *Dunlop Pneumatic Tyre Company, Limited v New Garage and Motor Company, Limited* [1915] AC 79 at 86-87, where Lord Dunedin authoritatively laid down a series of "rules" or guidelines for ascertaining whether a stipulated sum is liquidated damages or a penalty, which, so far as relevant, are as follows:
>
> > In view of that fact, and of the number of the authorities available, I do not think it advisable to attempt any detailed review of the various cases, but I shall content myself with stating succinctly the various propositions which I think are deducible from the decisions which rank as authoritative:
> >
> > 1 Though the parties to a contract who use the words "penalty" or "liquidated damages"

> may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
>
> 2 ...
>
> 3 The question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach (*Public Works Commissioner v Hills* [1906] AC 368 and *Webster v Bosanquet* [1912] AC 394).
>
> 4 To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:
>
> (a) It will be held to be penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in *Clydebank Case* [1905] AC 6.)
>
> (b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (*Kemble v Farren* 6 Bing 141). This though one of the most ancient instances is truly a corollary to the last test.

38 Mr Balachandran submits that Clause 8.2 is in substance a penalty clause in the present case because Thomas Chan had only paid the sum of $1.85 million in November 2009 pursuant to the 2nd OTP, and the late completion interest of $3,275,935.81 which he is now claiming is "excessive and unconscionable". With respect, I am unable to agree. First, this sum is not higher than the total purchase price of the Property. Secondly, I cannot accept the argument that Thomas Chan did not anticipate a drop in the market price of the Property when the 2nd OTP was granted in October 2009 and therefore would not anticipate a substantial loss of 10% of the purchase price when he signed the 2nd OTP. Market forces are inherently unpredictable and the court will not act on conjecture. Thirdly, no evidence was led as to Thomas Chan's views on the movements in the Property's market price. Mr Balachandran also points to the fact that Thomas Chan has since sold the Property for a staggering price of $60.6 million, netting an incredible profit of $23.6 million. However, this is an irrelevant consideration as the court cannot judge the construction of the liquidated damages clause with the benefit of hindsight; instead the circumstances at the time of the making of the contract must be considered. Finally, there is ample authority that Clause 8.2 is a genuine pre-estimate of damages and not a penalty clause: see *e.g.*, *Chan Ah Beng v Liang and Sons Holdings (S) Pte Ltd* [2012] 3 SLR 1088 at [56] and *Cathay Theatres Pte Ltd v LKM Investment Holdings Pte Ltd* [1999] SGHC 171 at [107]. Therefore, I find that Clause 8.2 is not a penalty clause and Thomas Chan's claim is not invalid or unenforceable.

***The law on equitable set-off***

39 Having found that Clause 8.2 is not invalid or unenforceable for being a penalty clause, I now turn to Thomas Chan's alternative argument of equitable set-off. The right of equitable set-off was

dealt with in some detail by the Court of Appeal in *Pacific Rim Investments Pte Ltd v Lam Seng Tiong and another* [1995] 2 SLR(R) 643 ("*Pacific Rim*"). In *Pacific Rim*, the Court of Appeal, after reviewing the historical origins and development of the right of equitable set-off, made the following observations about the nature of a right of equitable set-off:

> (a) equitable set-off is a substantive defence rather than a procedural defence, that is, it is a form of self-help remedy available to the person with that right (the debtor) who is not obliged to await legal proceedings to be brought by the other party (the creditor) to deduct his cross-claim, and its existence provides justification for the debtor to withhold payment to the creditor in the absence of legal proceedings (at [19] and [35]);
>
> (b) the exercise of equitable set-off is only permitted if equitable considerations support such an exercise, that is, the courts will only recognise cross-claims that arise out of the same transaction or cross-claims which are closely connected with the plaintiff's claim such that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into account the defendant's cross-claim (at [35]); and
>
> (c) the right to equitable set-off may be expressly excluded by contract (at [36]).

40 In *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 Sundaresh Menon JC (as he then was) had occasion to revisit the issue of equitable set-off where he observed at [26] that:

> … the court should not get bogged down in the nuances of differently expressed formulations, save that there must be a close and inseparable relationship between the claims. Beyond this, the outcome can be left to be governed by notions of fairness and whether the circumstances are such that it would be manifestly unjust to allow one claim to be enforced without regard to the other...

41 In the present case, Thomas Chan says that he has a right of equitable set-off because his claim for late completion interest as liquidated damages arises out of the very transaction in which Ridout is entitled to payment of the proceeds of the sale of the Property. [note: 7] I agree.

***Whether Thomas Chan's right of equitable set-off applies in the present case***

42 However, the factual complication that has arisen in the present case is that Thomas Chan did not exercise this right when, after discharging HLF's mortgage, he paid the balance purchase price less the option fee of S$1 million into court pursuant to my order made on 15 September 2010. The question then arises whether Thomas Chan's right of equitable set-off has thus been extinguished, or whether, as Mr Yeo contends, that right is merely "suspended".

43 I pause here to reiterate briefly the relevant factual context. On 15 September 2010, I had made the following orders (see [164] and [166] of my judgment dated 15 September 2010):

> (a) HLF's mortgage together with all outstanding interest and costs shall be paid out of the proceeds of sale payable by Thomas Chan in the first instance without prejudice to his rights to seek recovery from any of the parties hereto or otherwise; and
>
> (b) after discharging the mortgage and all sums outstanding thereunder to HLF, Thomas Chan shall pay the balance of the purchase price ("the Balance Sum") into court pending further order. Any party having a claim to these funds shall make an application to court and serve the papers

on the relevant parties.

These orders were upheld by the Court of Appeal on 28 September 2011: see *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd and others and another appeal* [2012] 1 SLR 32. To be fair, there were no arguments addressed as to whether anyone had an equitable lien or equitable set-off or challenged the existence of such rights before I made those orders. What was evident to me then was that there would be multiple claimants over the balance and allowing any party to hold it would not have been desirable, hence I made the orders that I did.

44 Pursuant to my order of 15 September 2010, Thomas Chan duly paid the balance sum into court on 28 December 2010, but this was not before he had expressly reserved his right to claim late completion interest as liquidated damages against Ridout in a letter sent by his solicitors to Ridout's solicitors dated 16 November 2010 where Thomas Chan's solicitors stated:

> We refer to the Court Judgment dated 15 September2010 (the "Judgement")
>
> ...
>
> Pursuant to Paragraph 166 of the Judgment, please note that the balance purchase price after deduction of the mortgage and all sums outstanding thereunder to HLF are to be paid in Court pending further order.
>
> *Please take note that the computation of the sum that is payable on completion does not take into account interest (as liquidated damages) that our client is entitled to pursuant to Condition 8.2.1 of the Law Society's Conditions of Sale 1999. In this regard, our client's right to claim for such interest (as liquidated damages) is expressly reserved*. [emphasis added]

45 Mr Yeo says that this evidences Thomas Chan's intention to suspend, not waive, his right to equitable set-off against Ridout. Mr Yeo further contends that for a waiver to be established there must be an unequivocal representation of such a waiver which is clearly absent in the present facts before me. Finally, Mr Yeo contends that the fact that he did not object to Orion Oil's claim against the sum paid into court does not signify a waiver of his right to set-off because the remaining sum after satisfying Orion Oil's claim well exceeded the amount owed to Thomas Chan and Thomas Chan saw no need to object to Orion Oil's claim.

46 Counsel for ECIH, Mr Lee, contends otherwise. Mr Lee, relying on *Pacific Rim* at [35], says that an equitable set-off is a substantive defence which must be exercised before making payment, and that Thomas Chan has lost this right by paying the balance sum into court. Mr Lee also says that this payment into court must be taken to be payment over to Ridout for Thomas Chan's claim in subrogation to succeed, because otherwise Ridout as trustee has no right of indemnity against the balance sum paid into court. Mr Lee also raised a second counter-argument that throughout proceedings between the parties, Thomas Chan has always conducted himself on the basis that he only had a right to damages against Ridout rather than a right of equitable set-off. Further, Thomas Chan never intimated, reserved, or raised any right of set-off till the hearing on 30 July 2012 even though there were four distinct opportunities for him to have done so.

47 To resolve this issue, the nature and operation of a right of equitable set-off must be closely examined. Rory Derham, in his book *Derham on the Law of Set-Off* (4th ed) ("Derham"), describes the specie of equitable set-off in our local jurisprudence as a "substantive equitable set-off", and describes the nature of such a right of set-off as follows (Derham at para 4.30, some citations omitted):

> Notwithstanding various judicial statements which on their face may suggest the contrary, *the view that the defence is substantive does not mean that it operates as an automatic extinguishment of cross-demands. The availability of an equitable set-off operates in equity to impeach the title to a demand* (*Rawson v Samuel* (1841) Cr & Ph 161 at 179). It affects the conscience of a creditor, so as to impugn the creditor's right to assert that any moneys are owing by the debtor to the extent of the debtor's cross-claim. *At law the cross-demands remain in existence and retain their separate identities until extinguished by judgment or agreement*. But as far as equity is concerned, it is unconscionable for the creditor, even before judgment, to assert that moneys are due to it from the debtor, or to proceed on the basis that the debtor has defaulted in payment, if and to the extent that circumstances exist which support an equitable set-off… [emphasis added]

48 The notion that the claimant's claim is not extinguished prior to judgment for a set-off is reflected in one of the grounds for the decision of the House of Lords in *Aries Tanker Corporation v Total Transport Ltd* [1977] 1 WLR 185 ("*Aries Tanker*") (see also Derham at para 4.31). In *Aries Tanker*, the respondents were the owners of a tanker which was let to the appellant charterers on a voyage charter to carry petroleum to Rotterdam from the Arabian Gulf. On discharge at Rotterdam there was short delivery of the cargo, prompting the appellants to withhold $30,000 from the sum they paid in respect of the freight. The respondents, who did not accept the validity of the deduction, issued a writ claiming payment of the unpaid amount of freight, and the appellants argued as a defence that they had an equitable set-off in respect of the withheld sum. The House of Lords did not accept the appellants' argument because the time bar for the enforcement of their damages claim had set in under the applicable Hague Rules, with the result that their claim had ceased to exist and could not be introduced for any purpose into legal proceedings (at 188). This was so even though the appellants had asserted their claim within the relevant time period by deducting the amount of their claim from the freight amount paid to the respondent (at 188-189).

49 From the discussion above, it is clear that a right of equitable set-off remains separate and distinct from the claim against which the set-off is claimed, until extinguished by judgment or agreement. The right of equitable set-off does not operate as an automatic extinguishment of cross-demands. Before any legal proceedings are brought by a claimant against the defendant, the only function of the defendant's right of equitable set-off is to impeach the claimant's title to a demand and make it unconscionable for the claimant to assert that moneys are due to it from the debtor before judgment and to act on that basis by, for example, terminating a sale and purchase agreement for non-payment of the purchase price. When legal proceedings are subsequently brought by the claimant against the defendant, the defendant can then invoke its right of equitable set-off to reduce the quantum of the claimant's claim, and if accepted by the court the right of set-off is thereby extinguished by judgment. However, if a defendant's right of equitable set-off is not invoked before the claimant's claim is fully satisfied, the defendant cannot subsequently claim to "backdate" the right of equitable set-off to the time when it was first came into being because such right of equitable set-off does not operate as an *automatic* extinguishment of cross-demands. Insofar as a right of equitable set-off has been described as a "self-help" remedy by the Court of Appeal in *Pacific Rim*, this term could be understood as meaning that a debtor is entitled to withhold payment of the debt to the extent of the amount of set-off even before the declaration of such a right by a court (see Derham at para 4.33), but it does not mean that the right of equitable set-off has, without more, automatically reduced the scope of the claimant's claim. This is not to say that the defendant's right of equitable set-off is extinguished – if the claimant subsequently brings another claim against the defendant which is sufficiently closely connected, the defendant can once again invoke this right of equitable set-off (assuming the time bar for his late completion interest has not set in). Until then, however, if there is no such claim, then the defendant's claim can still be brought as a separate action against the claimant.

50 Understood in this manner, it becomes apparent that Mr Yeo's argument must fail. In the hearing before me in July 2010, Thomas Chan did not raise any argument in relation to the late completion interest he is now claiming and understandably so given that Thomas Chan's right to specific performance of the 2nd SPA was not yet declared by the court. This being the case, when the order was made for Thomas Chan to pay the balance of the purchase price for the Property into court in view of all the competing claims to the Property, it extinguished Ridout's claim against Thomas Chan for the Property's purchase price even though the money has not been paid into Ridout's hands. In this sense the issue of whether Thomas Chan had any right of equitable set-off never arose. Over and above that, the position may have been different if, in the circumstances of this case, the right to an equitable set-off had been asserted during final submissions or at the very least if Thomas Chan had asked the court to preserve his right to assert an equitable set-off immediately upon handing down of my judgment in [2011] 2 SLR 232 and before completion and payment into court. The subsequent letter of 16 November 2010 does not assist Thomas Chan on its terms and because it was made after my order. In this premise, the outcome in law is that Thomas Chan has lost the opportunity to invoke his right of equitable set-off vis-à-vis Ridout's right to seek the balance purchase price for the Property from Thomas Chan.

51 It only remains for me to say that Mr Yeo is right to say that Thomas Chan has not *waived* his right of equitable set-off against Ridout and that Mr Lee's argument that Thomas Chan has "lost" this right by paying the balance sum into court is wrong; this right was just never invoked when the order satisfying Ridout's claim for the balance purchase price was made, but it remains as a separate claim which can be enforced at some later date.

**TYF's claim to equitable assignment**

52 I next move on to TYF's alternative argument that it had a superior claim to the balance trust assets by virtue of an equitable assignment of the sum of $230,000. TYF has furnished several arguments in support of its proprietary claim to the service fee. The basic premise is that since specific performance had been ordered for the 2nd OTP, it must follow that Clause 14 remains enforceable. The thrust of TYF's claim, however, is that Clause 14 constituted an equitable assignment of a future chose in action which bound the proceeds of sale upon completion. If so, TYF would have a proprietary claim to the service fee via a floating charge which attached to the sale proceeds on 8 October 2009. TYF's claim would accordingly stand in priority to that of all the other trust creditors in the present proceeding. The principal authority cited in support of this is Lai Siu Chiu J's decision in *Marshall Realty Pte Ltd v Puspha Rajaram Lakhiani & another* [1998] SGHC 155 ("*Marshall Realty*"). Before I examine the substantive merits of TYF's claim, there are several preliminary issues which must first be addressed.

***Whether TYF's claim constitutes res judicata***

53 In DC Suit No 856 of 2011, TYF successfully prosecuted an *in personam* claim against Ridout for payment of the service fee. However, from the Statement of Claim filed in those proceedings it did not raise any proprietary claim to the service fee at that stage. Indeed, it did not do so in their written submissions for the present proceedings either. In oral submissions before me on 30 July 2012, counsel for TYF, Mr Yap, gratefully accepted the views of the OA to assert an *in rem* claim in priority to the other trust creditors. This argument however runs into difficulties because of the doctrine of *res judicata* enunciated in *Henderson v Henderson* [1843-60] All ER Rep 378 at [114] ("*Henderson*"):

> The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every

> point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

54 It would appear that on a strict application of this doctrine, TYF would now be estopped from raising its present claim – it has forgone not just one but two prior opportunities at which, exercising reasonable diligence, it could have brought the matter of equitable assignment before the attention of the court. However, the *res judicata* doctrine has since been re-stated so as not to be so oppressive to the interests of litigants. Mr Yap cited *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31:

> It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

This broad, merits-based approach in assessing the extended doctrine of *res judicata* by abuse of court process is now also the position of our courts, having been accepted in *Goh Nellie v Goh Lian Teck and Ors* [2007] 1 SLR(R) 453 at [52] and by the Court of Appeal in *Lai Swee Lin Linda v Attorney-General* [2006] 2 SLR(R) 565 at [62].

55 Mr Yap explained that the proprietary claim was unnecessary for TYF to succeed in the earlier proceedings and would in any event have been premature since TYF had to first establish that it was entitled to rely on Clause 14. With respect, I am unable to agree. In my view, establishing the validity of Clause 14 is pivotal to both of TYF's claims. If Clause 14 is operative, TYF would have standing to pursue both an *in personam* remedy against Ridout *and* an *in rem* claim to the service fee. Since the *loci* of both remedies reside in Clause 14, the claims are inextricable and both should have been raised in the earlier proceedings. If TYF's position had been that the proprietary claim was *unnecessary* to recover against Ridout, then this seems to be a concession insofar as the issue could have been raised before the District Court. In any event this does not cohere with Mr Yap's argument that the DC Suit was a necessary preliminary to TYF's joinder into the present proceeding. If this is correct then the issue of priority must have been alive at that stage – TYF's application to intervene was made on 26 January 2011 and its Statement of Claim in DC Suit No 856 of 2011 was filed *after* that date, on 15 March 2011, and it would have been necessary for TYF to put forward all its claims in light of the competing claims of other creditors. As a matter of law, the fact that an issue was *strategically unnecessary* for success in an earlier action does not function as a defence to the *res judicata* doctrine. In *Henderson*, Wigram VC was clear that the plea of *res judicata* applied to "every point which properly belonged to the subject of litigation" (see [53] *supra*). It is plain that there was a sufficient nexus between TYF's claim of equitable assignment and its action against Ridout, and as such it should rightfully have been brought before the District Court.

56 I wish also to express reservations as to whether the DC Suit was even necessary, given that TYF could have been joined into the present proceedings even if there had been no determination that it was entitled to a claim against Ridout, so long as it would have been "just and convenient" for this claim to be heard in conjunction with those of other creditors. Having prosecuted an action against Ridout, perhaps *ex abundanti cautela*, TYF's claims have been merged into the default judgment obtained. That judgment was obtained on certain bases and that binds TYF. The engagement of the *Henderson* rule is in that sense entirely of TYF's own doing and it is too late for TYF to raise this argument now.

***The merits of TYF's claim***

***The merits of TYF's claim***

57 It is settled law that where the assignor becomes possessed of the property described in the assignment, beneficial interest in the property passes to the assignee immediately – see *Holroyd v Marshall* (1862) 10 HLC 191 and *Tailby v Official Receiver* (1888) 13 App Cas 523 at 546 of which Lord McNaghten opined that:

> Long before *Holroyd v. Marshall* was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from *the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done*, and in accordance with the maxim which Lord Thurlow said he took to be universal, "that whenever persons agree concerning any particular subject, that, in a Court of Equity, as against the party himself, and any claiming under him, voluntarily or with notice, raises a trust. [emphasis added]

58 This doctrinal position was also expressly recognised by Lai Siu Chiu J in *Marshall Realty* at [17]-[18]. It would therefore appear, at first glance, that equitable interest in S$230,000 automatically passed to TYF upon Thomas Chan's payment of the sale proceeds into court. The difficulty TYF faces is that, although the money has been specifically set aside as the sale proceeds, it has not actually been *paid to* Ridout or even earmarked for such payment – instead, the money has been paid into court for the determination of any equities and interests therein. The effect of the payment into court is two-fold – first, it discharges Thomas Chan's liability to make payment under the sale agreement; secondly, it puts dispositive control over the sale proceeds in the hands of the court. It would be inaccurate, at this point, to say that Ridout has any proprietary interest in the money paid into court, since this is entirely contingent on this court making a finding that the money should be paid out to Ridout. Upon completion of sale, Ridout acquired a chose in action in the form of a contract debt for the sale proceeds, and this has yet to fructify as an equitable interest in an ascertained sum of money. *A fortiori*, it would be inaccurate to say that TYF has any proprietary interest in any part of the monies in court – beneficial interest in the sale proceeds can only be divested when the specific sum of money is ascertained, *ie* when Thomas Chan either sets aside a sum of money specifically earmarked for payment to Ridout, or actually pays Ridout the purchase price for the Property. TYF has nothing more than the assigned chose in action for a sum of S$230,000.

59 The merit of TYF's claim to the assigned sum of S$230,000 therefore turns on the determination of an issue which also troubled Lai Siu Chiu J in *Marshall Realty*, *viz* the nature of the assignee's interest before the chose in action actually materialises. Following the decision of the English Court of Appeal in *Re Lind* [1915] 2 Ch 345 ("*Re Lind*"), the assignee appears to have more than a mere contractual right, such that his interest survives the trustee's bankruptcy. Phillimore LJ opined at p 363–364 that:

> ... The assignment does, however, operate as a contract to assign if and when the property comes into existence, and to use the words of [Jessel M.R.], "when it come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."
>
> This is intelligible and workable if nothing happens between the date of the assignment (construed as a contract to assign) and the date when the property comes into existence; but if in the intervening period something happens which may affect the contract, as, for instance, a statutory discharge of the assignor from all his obligations, does the contract to assign still

become in due course a complete assignment?

If the assurance rest in contract and if by consequence the only way in which equity fastens upon the property be by the operation of the doctrine of specific performance, then the liability under the contract would be, as it seems to me, discharged by bankruptcy.

...

In order that the assignment may survive and have its effect it must give to the assignee something more than a mere right in contract, something *in the nature of an estate or interest*. [emphasis added]

60 Phillimore LJ does not appear to go so far as to say that the assignee has a *proprietary* interest in the property prior to the materialisation of the chose. Indeed, Lai Siu Chiu J, after having examined the commentary on *Re Lind*, concluded at [22] that:

It is unfortunate that the Court in *Re Lind* did not elaborate on the kind of property right or interest in the future chose that is conferred on the assignee by the equitable assignment. I am unable to agree with the view in *Chitty* that the assignee acquires an equitable interest in the future chose; it is hard to see how an equitable interest in property can be created by a person other than the property's legal owner. What is clear, however, is that even prior to the materialisation of a future chose, the equitable assignee has some property right or interest *in the future chose*. Once the future chose comes into existence, this property right fastens onto the chose and the equitable interest in the chose passes to the assignee. [emphasis added]

61 It would therefore appear that the exact content of the assignee's interest during the interval between the assignment and the point at which the chose becomes capable of performance remains regrettably unclear. The authorities *are* clear, however, that in situations where there is an assignment of a chose in action which leaves some outstanding interest – as in the present case – the assignee cannot bring an action in his own name against the debtor (see *Cator v Croydon Canal Co* (1841) 4 Y & C Ex 593 at 593-594). Instead, the assignor must be joined as a party so that the court may make a final adjudication which binds all interested parties: see *In re Steel Wing Company, Limited* [1921] 1 Ch 349 at 357 and *Deposit Protection Board v Dalia* [1994] 2 AC 367 at 381. Beyond this, the authorities do not recognise the assignee's equitable interest except for Phillimore LJ's non-commital dicta in *Re Lind*. TYF's present claim goes beyond this to assert a direct proprietary claim to the sum of S$230,000, and as such has a high hurdle to surmount.

62 Indeed, the full implications of TYF's claim are thrown into sharp relief when it is kept in mind that as an assignee its interest is necessarily derivative of Ridout's – the corollary of TYF's claim, then, is that if it succeeds then Ridout must also have acquired a proprietary claim to the proceeds of sale upon completion. This would be tantamount to a hitherto unprecedented extension of the vendor-purchaser constructive trust (see *Walsh v Lonsdale* (1882) 21 Ch D 9) to sale proceeds. Given that the determination of this issue is not strictly necessary for the disposal of TYF's proprietary claim, I will go no further than to say that it represents an invitation for the court to break fresh ground and as such will require more substantial and full argument than those in the submissions currently before me.

63 As a result, I find that TYF is barred from asserting its equitable interest, if any, and should also rank as an unsecured creditor to be subrogated into Ridout's indemnity against the trust estate for the purposes of *pari passu* distribution.

**Conclusion**

## Conclusion

64 For the reasons set out above, I find and hold that ECIH, Thomas Chan and TYF are entitled to step into the shoes of Ridout by way of subrogation and claim the indemnity that Ridout possesses against the trust property, *i.e.*, the balance of the proceeds of sale remaining in court, which stands ahead of the OA who represents the unsecured creditors or AA.

65 As the amount remaining in court is clearly insufficient to satisfy the claims of ECIH, Thomas Chan and TYF, and in the circumstances of this case, the just and fair order to make is that they share *pari passu*: see *In re Suco Gold* at 882. As opined in *Lewin on Trusts* at para 22-30, in this and similar situations, "competing equities do not always rank in order of time and a distribution *pari passu* would on occasion avoid difficult and cumbersome queries."

66 ECIH, Thomas Chan and TYF shall try and agree the respective quanta of their claims for the purposes of assessing the basis for the *pari passu* calculation; if they fail to do so, the parties have liberty to apply and come before me for an assessment of their claims. There will also be liberty to apply generally, including liberty to apply for an order of payment out when the foregoing has been settled.

67 The parties are to file, within 14 days from the date of this judgment, their written submissions on the appropriate costs orders to be made; these written submissions are to include the sums to be so awarded.

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[note: 1] Paras 2-3 of the First Defendant's reply written submissions (24 July 2012)

[note: 2] Para 11 of Second Intervener's further written submissions (6 August 2012)

[note: 3] Paras 3-7 of the OA's written submissions (2 July 2012)

[note: 4] JUD7787/2011 (3 May 2011)

[note: 5] See para 39 of the Plaintiff's written submissions (2 July 2012), para 48 of the Second Intervener's further written submissions (6 August 2012) and para 42 of the Third Intervener's written submissions (23 July 2012)

[note: 6] Para 22 of the First Defendant's written submissions (2 July 2012)

[note: 7] Para 21 of the Second Intervener's further written submissions (6 August 2012)