Trinidad Home Developers Ltd v IMH Investments Ltd (Trinidad and Tobago) [2003] UKPC 85 (08 December 2003)

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Privy Council Appeal No. 49 of 2002

Trinidad Home Developers Limited (in voluntary liquidation)

Appellant

v.

IMH Investments Limited

Respondent

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 8th December 2003

Present at the hearing:-

Lord Hoffmann
Lord Hope of Craighead
Lord Scott of Foscote
Lord Walker of Gestingthorpe
Sir Kenneth Keith

*[Delivered by **Lord Hoffmann**]*

Trinidad Home Developers Ltd ("the company") has been in liquidation since 1988 but its affairs have not yet been wound up. It was, as its name suggests, a property development company. In 1978 the respondent, IMH Investments Ltd ("IMH"), granted the company a licence to use a process for building houses out of pre-fabricated concrete panels in which it held certain patents. The company agreed to pay a royalty of US$0.45 per square foot of concrete panel. The company duly paid the royalties until July 1985 and then stopped, leaving US$1,060, 954 outstanding.

On 23 June 1986 IMH issued a writ which (as amended) claimed payment of US$1,060,954, followed by a summons for summary judgment. The company filed affidavits in opposition and the matter came before Master Goopeesingh, who gave a reserved judgment on 13 January 1987. He held that there was no arguable

defence and gave IMH leave to sign final judgment.

However, the amount payable, as expressed in the Master's judgment and the order as drawn up, was not in the same terms as the writ. The writ had asked simply for payment in United States currency. Judgments in this form have been possible since *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443, a decision of the House of Lords which has been followed in Trinidad and Tobago. The fact that the judgment may express the obligation in US dollars does not necessarily mean that a defendant has to pay in that currency. It means that US dollars are the unit of account for measuring the sum which has to be paid. If the defendant pays in a different currency (e.g. dollars of Trinidad and Tobago) they must be the equivalent of the US dollar debt at the time of payment.

The Master, however, gave judgment for "an equivalent, in Trinidad and Tobago currency, to the sum of $1,060,954.45 United States currency". This could be read to mean that the unit of account was Trinidad and Tobago currency and the amount payable was the equivalent in that currency of US$1,060,954.45 at the rate of exchange prevailing at the date of the judgment. So the plaintiff would get less than $1,060,954.45 if the Trinidad and Tobago currency fell against the US dollar between the date of judgment and the date of actual payment. Whether this is what the Master meant is something to which their Lordships will have to return.

On 13 March 1987 IMH registered the judgment under the Remedies of Creditors Ordinance Chap. 6 No. 2, which has since been replaced by the Remedies of Creditors Act, Chap. 8:09 ("ROCA"). The relevant provisions remain the same and their Lordships will for convenience refer to the Act. Part II, entitled "Remedies of Creditors" starts with a group of sections under the sub-heading "Operation of Judgments". The first of these sections is 5:

> "Every judgment … entered up against any person in the Court shall operate as a charge upon all lands … to which that person shall at the time of entering up the judgment … be seised, possessed or entitled for any estate or interest whatever … and shall be binding as against the person against whom the judgment … shall be entered up, and against all persons claiming under him after the judgment …"

Section 7 deals with registration:

> "No judgment … of the Court shall affect any lands as to purchasers, mortgagees or creditors … unless and until a

> memorandum or minute containing the name and the usual or last known place of abode and the trade or profession of the person whose estate is intended to be affected thereby, and the title of the cause or matter in which the judgment … has been obtained … and the date of the judgment … and the amount of the debt, damages, costs or moneys thereby recovered or ordered to be paid, shall be left with the Registrar General, who shall forthwith enter the same particulars … in a book."

Section 8 deals with the remedies available to a judgment creditor by virtue of a registered judgment:

> "Every judgment to be registered in the manner directed by this Act shall entitle the creditor, by virtue of the judgment … to the same remedies in equity against the lands charged by virtue of this Act, or any part thereof, as he would be entitled to in case the person against whom the judgment … has been so entered up had power to charge the same lands, and had by writing under his hand agreed to charge the same with the amount of the judgment debt … and interest thereon."

IMH registered its judgment in the form in which it had been sought in the writ, that is to say, simply as US$1,060,954 rather than the form in which the Master's order had been drawn up. Having registered the judgment, IMH did nothing more to enforce it.

The Master granted leave to appeal to the Court of Appeal and a stay of the order pending an appeal. IMH cross-appealed against the form of the order, asking that it should be expressed in US dollars in accordance with the prayer in the writ. But the appeal took a long time to come on. Meanwhile, on 1 June 1988, the company resolved to go into voluntary liquidation. The directors made a declaration of solvency but by 1992 it was apparent that the company would not have sufficient assets to pay its debts.

The appeal and cross-appeal were eventually heard and judgment given on 12 February 1993: *Trinidad Home Developers Ltd v IMH Investment Ltd (No 2)* (1993) 46 WIR 365. The company's appeal was dismissed and IMH's cross-appeal was allowed. So the form of order was corrected to reflect the claim for payment in US dollars which IMH had originally made.

Having secured its judgment, IMH applied to the liquidator for payment. The liquidator said that after payment of secured and

preferential creditors, he was left with assets worth less than $3million (Trinidad and Tobago currency). The claims of unpaid creditors (including IMH) exceed $34 million.

IMH claimed to be entitled, by virtue of sections 5 and 7 of ROCA, to an equitable charge (which their Lordships will call a judgment charge) over the company's lands which gave it preference over unsecured creditors. The liquidator rejected this claim on various grounds of which two remain in issue. The liquidator says:

(1) The judgment was not properly registered. It specified the debt as a sum in US dollars when the order (at the time of registration) was for payment in currency of Trinidad and Tobago.

(2) The judgment charge has become unenforceable by virtue of the provisions of section 254 of the Companies Ordinance, Chap. 31, No. 1.

On 1 June 1994 the liquidator issued a summons asking for directions on these questions. The summons was argued before Bharath J on various dates in February-April 1995 and judgment given on 11 February 1998. He answered the first question in favour of IMH and the second in favour of the company. Both sides appealed. On 28 November 2001 the Court of Appeal dismissed the company's appeal on the registration point but allowed IMH's appeal on the section 254 point. The result was that IMH's claim to a judgment charge was upheld. The company appeals to the Privy Council on both points.

The Court of Appeal disposed summarily of the first point. Nelson JA, who gave a judgment with which the other two members of the court agreed, said that it was plain that the Master's order was intended to create an obligation using US dollars as the unit of account. In their Lordships' opinion the language used by the Master was rather less than plain, but when they take into account the background to the order, they arrive at the same conclusion as the Court of Appeal. The contractual obligation was expressed in US currency and the writ sought payment in US currency. No one appears to have suggested that, if IMH was entitled to judgment, it should be in anything other than US currency. The Master said nothing to indicate that he was not giving judgment according to the prayer in the writ. Their Lordships therefore think that the registration was in accordance with the true meaning of the Master's order.

The second point is rather more difficult. Their Lordships set out

the relevant parts of section 254:

> "(1) Where a creditor has issued execution against the goods or lands of a company or has attached any debt due to the company, and the company is subsequently wound up, he shall not be entitled to retain the benefit of the execution or the attachment against the liquidator in the winding up of the company unless he has completed the execution or attachment before the commencement of the winding up …
>
> (2) For the purposes of this section, an execution against goods shall be taken to be completed by seizure and sale, and an attachment of a debt shall be deemed to be completed by receipt of the debt, and an execution against land shall be deemed to be completed from the date of the order for sale or by seizure as the case may be, and in the case of an equitable interest, by the appointment of a receiver."

IMH's submission, which persuaded the Court of Appeal, is that section 254 has no application to the grounds upon which it claims priority over other creditors. It is not seeking to retain the benefit of an execution. It has never attempted to execute against the company's property. It has not "issued execution" within the meaning of section 254(1) because it has not invoked the assistance of the court to enforce its judgment. The judgment charge was created automatically by statute at the moment it entered judgment. The only action it has taken since then has been to leave a copy of the judgment with the Registrar General, who has of course nothing to do with the court.

IMH says that section 254 was intended to prevent a judgment creditor from asserting priority in a liquidation by virtue of an incomplete attempt to enforce the judgment. Hence the references to the creditor having "issued execution" and not retaining "the benefit of the execution". But a judgment charge is not execution. It is simply a proprietary interest created by way of security. The fact that it was created by statute rather than consensually does not mean that IMH should be in a different position from that of any other holder of a registered equitable charge. The charge was subsequently registered because registration is necessary to protect the security against third parties, as in the case of many security interests. But that does not make registration the issue of execution.

This is a powerful argument. Nelson JA summed it up:

> "If execution is any process of the court issued in order to enforce a judgment, then in the instant case, no execution

> has been issued or begun and a fortiori no execution has been completed, as contemplated by section 254 of the Companies Ordinance. Accordingly the respondent's reliance on section 254 is misconceived. There is no issue of execution and accordingly no question of retention of the benefit of execution."

Their Lordships agree that the creation and registration of an equitable charge would not ordinarily be described as the issue of execution. But section 254, in its application to execution against land, must be interpreted against the background of the remedies against land which ROCA provides. The language must be construed in that particular context.

Their Lordships will consider first the origins of sections 5, 7 and 8 of ROCA. They are derived from section 13 of the English Judgments Act 1838 and first became part of the law of Trinidad and Tobago in 1845: see sections 3 and 5 of Ordinance 19 of 1845. But there have always been important differences between the English and Trinidad and Tobago legislation. Section 13 of the 1838 Act made the judgment charge subject to provisos, first, that the creditor could not take proceedings to enforce the charge until a year after the judgment had been entered and, secondly, that the charge was to give no preference in bankruptcy if the debtor became bankrupt within the same period. Neither of these provisos, which contain a code for the protection of creditors in bankruptcy, was incorporated into the 1845 Ordinance or subsequent Trinidad and Tobago legislation.

Further divergences occurred later. In England the automatic judgment charge was found in practice to be a great nuisance to conveyancers. They had to search not only the register kept by the Senior Master of the Court of Common Pleas at Westminster (section 19) but also the registers of judgments in Lancaster and Durham (section 21), which could affect land anywhere in the country: see the complaint of Mr Hadfield, moving the second reading in the House of Commons of the Judgment Act 1864 (1864 174 Parl. Deb. (3rd Series) 101). So the 1864 Act provided by section 1 that no judgment should affect any land -

> "until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority's in pursuance of such judgment …"

The writ of elegit was the ancient remedy (created by the Statute of Westminster the Second, 1285) for levying execution upon a legal estate in land. In the case of an equitable interest, the remedy was

the appointment of a receiver by way of equitable execution and an order for sale. After 1864, therefore, the English law was that the judgment charge, although in theory created by the judgment, had no effect until execution had been issued and the process of execution registered.

Section 13 of the 1838 Act and the associated statutory provisions were eventually repealed and replaced by section 195 of the Law of Property Act 1925:

> "(1) Subject as hereinafter mentioned a judgment entered up in the Supreme Court … against any person (in this section called a "judgment debtor") shall operate as an equitable charge upon every estate or interest (whether legal or equitable) in all land to or over which the judgment debtor at the date of entry or at any time thereafter is or becomes … beneficially entitled …
>
> (2) Every judgment creditor shall have the same remedies against the estate or interest in the land so charged or any part thereof as he would have been entitled to if the judgment debtor had power to charge the same, and had by writing, under his hand, agreed to charge the same, with the amount of the judgment debt and interest thereon.
>
> (3) Provided that —
>
> (i) A judgment … shall not operate as a charge on any interest in land … unless or until a writ or order, for the purpose of enforcing it, is registered in the register of writs and orders at the Land Registry;
>
> (ii) No judgment creditor shall be entitled to take proceedings to obtain the benefit of his charge until after the expiration of one year from the time of entering up the judgment;
>
> (iii) No such charge shall operate to give the judgment creditor any preference, in case of the bankruptcy of the judgment debtor, unless the judgment has been entered up one year at least before the bankruptcy."

In Trinidad and Tobago, on the other hand, the judgment charge continued (subject to the modifications already noted) as under the original English Act of 1838. No doubt the single register kept by the Registrar of Deeds (under section 5 of the 1845 Ordinance) and afterwards by the Registrar General under ROCA made the process

of searching less burdensome. But other relevant changes occurred. In the English legislation, no special procedure for executing the judgment charge was provided. The judgment creditor was simply given the ordinary remedies which the holder of an equitable charge would have under the general law. Part II of ROCA, on the other hand, includes a detailed code of execution. A judgment creditor can proceed to execution in two ways. He can obtain an "order for execution" under section 18, which is enforced by the Marshal, in the first instance against the "personal goods and chattels and effects" of the debtor: section 22. If the Marshal's return discloses insufficient personal goods to satisfy the judgment, the creditor is entitled to an "order for sale" of any beneficial interest of "the execution debtor" in any lands: section 28. Alternatively, under section 37, a judgment creditor whose judgment has been registered may proceed directly to execution against the debtor's land by filing an affidavit giving particulars of land to which the debtor is beneficially entitled.

Their Lordships now turn to the origins and purpose of section 254 of the Companies Ordinance Chap 31, No 1. In the case of individual bankruptcy there have for many years been successive English statutes which have, in one form or another, provided that holders of certain forms of security should not be entitled to priority against other creditors. They go back to a statute of James I (21 Jac 1, c 19, s 9) by which a creditor of a bankrupt who had security for his debt by a judgment, statute or in certain other ways and —

> "whereof there is no execution … served and executed upon any the Lands, Tenements, Hereditaments, Goods, Chattels and other Estate of such Bankrupts before such time as he or she shall or do become Bankrupt"

was required to share rateably with the other creditors.

The statute of James I was amended and successively replaced by provisions in bankruptcy consolidation statutes of 1826 (6 Geo 4, c 16, s 108) and 1849 (the Bankruptcy Consolidation Act 1849, s 184). In the latter statute, the material words were:

> "… no Creditor having Security for his Debt … shall receive upon any such Security … more than a rateable Part of such Debt, except in respect of any Execution or Extent served and levied by Seizure and Sale upon or any Mortgage of or Lien upon any Part of the Property of such Bankrupt before the Date of the Fiat or the filing of a Petition for Adjudication of Bankruptcy"

At the time of the 1849 Act, a judgment creditor still had a judgment charge merely by virtue of the judgment and registration. In *In re Boyle, a Bankrupt* (1853) 3 De G M & G 515 the Chancery Court of Appeal held that this was a "lien" within the meaning of section 184 of the 1849 Act and therefore conferred priority on bankruptcy even though there had been no execution. But the Bankruptcy Act 1883 replaced section 184 by a new section 45:

> "(1) Where a creditor has issued execution against the goods or lands of a debtor, or has attached any debt due to him, he shall not be entitled to retain the benefit of the execution or attachment against the trustee in bankruptcy of the debtor unless he has completed the execution or attachment before the date of the receiving order …
>
> (2) For the purposes of this Act, an execution against goods is completed by seizure and sale; an attachment of a debt is completed by receipt of the debt; and an execution against land shall be deemed to be completed by seizure, or, in the case of an equitable interest, by the appointment of a receiver."

By this time, the judgment charge in England was no longer automatic. It operated upon the land only if a writ or order for enforcing the judgment had been issued and registered. In *In re Overseas Aviation Engineering (GB) Ltd* [1963] Ch 24 there was a division of opinion in the Court of Appeal over whether this meant that the benefit of the charge was lost if the process which had been issued and registered was not completed before the bankruptcy. Lord Denning MR and Harman LJ said that the creditor lost his security. Russell LJ disagreed. He said that the "writ or order for enforcing the judgment" in section 195(3)(i) of the 1925 Act was not an issue of execution. But the main reason which he gave for this somewhat counter-intuitive view was that otherwise section 195(3)(iii) would be superfluous. It was unnecessary to provide that the judgment charge should not be effective if bankruptcy supervened within a year if the completion of execution was also required and subsection (3)(ii) said that no execution could take place within the year.

Their Lordships consider that this argument from redundancy loses much of its force when it is remembered that both section 195(3)(ii) and (iii) date from the original 1838 Act, when the judgment charge operated automatically upon the judgment and no issue and registration of execution was needed to bring it into effect. But however that may be, it has no application to Trinidad and Tobago,

where the relevant provisions have never formed part of the law.

Section 45 of the 1883 Act was re-enacted as section 40 of the Bankruptcy Act 1914. In 1928, on the recommendation of a committee chaired by Mr Wilfrid Greene KC (*Company Law Amendment Committee 1925-1926* Cmd 2657, at p 41) it was applied to corporate insolvency by section 69 of the Companies Act 1928, re-enacted as section 268 of the Companies Act 1929. This section was substantially reproduced as section 254 of the Companies Ordinance. But the Ordinance contains a significant addition. Whereas the UK statute (by reference to the elegit procedure) specified only "seizure" as the completion of execution against a legal estate in land, section 254 says that it shall also be taken to be completed "from the date of the order for sale". This is an adaptation of the UK statute to the specifics of the remedies available to a judgment creditor against land in Trinidad and Tobago, namely an order for sale under section 28 or 38 of ROCA.

There is no doubt that the expression "has issued execution" in the UK statute was more appropriate to English law, under which the issue and registration of execution was necessary to give effect to the judgment charge, than to the law of Trinidad and Tobago, under which the charge was valid merely by reason of entry of the judgment and registration. The purpose of the previous somewhat lengthy historical account of the development of the law in the two countries is to explain how these differences came about. The draftsman of the Ordinance may not have fully taken them into account.

Nevertheless, their Lordships think that the language of section 254 must be interpreted in the context of the Trinidad and Tobago legislation, so as to give effect to the evident purpose of the statute, even if this means giving it an application which it would not have had (or needed to have) in England.

The purpose of the statute was plainly to ensure that unless execution had been completed before the commencement of the winding up, the judgment creditor would lose the priority which he would otherwise have had over other creditors: see *In re Andrew* [1937] Ch 122; *In re Caribbean Products (Yam Importers) Ltd* [1966] Ch 331. In specifying the making of the order for sale as the completion of execution, the Ordinance therefore contemplates a process of execution which, if taken to the point of an order for sale before the commencement of the winding up, will confer priority, but otherwise not.

The basis of the decision of the Court of Appeal is that there is no

such process of execution which needs to be completed in order to confer priority. The statute simply beats the air. The priority conferred by the judgment charge under sections 5, 7 and 8 is independent of any process of execution and subsists whether or not execution has been issued or completed. Their Lordships asked Mr Crystal QC, who appeared for IMH, what purpose would be served by section 254 in relation to priorities over land if the construction adopted by the Court of Appeal was correct. He frankly acknowledged that it would have no practical effect whatever. A judgment creditor who had actually commenced execution (for example, by obtaining an order for execution under section 18) would lose "the benefit of the execution", but would still be entitled to priority by virtue of his charge.

Mr Crystal placed some reliance upon *In re Boyle, a Bankrupt* (1853) 3 De G M & G 515, to which their Lordships have already referred. That case was decided at a time when English law approximated as closely as it ever did to the law of Trinidad and Tobago. But the Chancery Court of Appeal decided that the judgment charge under the 1838 Act was unaffected by failure to carry it into execution before the bankruptcy of the debtor. But Mr Crystal accepted that, first, the 1838 Act was different in having its own provision for the protection of creditors in bankruptcy, namely the requirement that bankruptcy should not supervene within a year, and secondly, the terms of the 1849 Act there under consideration were different from those of section 254. Their Lordships do not think that *Boyle's* case gives any guidance.

Mr Crystal also said that if one regarded the entry of judgment and its registration as part of the process of execution, it would mean that a stay of execution, such as the Master granted in this case, would prevent registration. But their Lordships think that this is a purely linguistic point. The effect of a stay of execution, like any other order, is dependent on the context against which the words are used. There can be no doubt that the order was not intended to inhibit registration and it would not be so construed.

Their Lordships do not think it is right to frustrate the apparent purpose of the legislation unless the language makes it impossible to do otherwise. They see no reason why the entire procedure for entry of the judgment, followed by its registration and the resort by the judgment creditor to the remedies provided by ROCA, culminating in an order for sale, should not be regarded for the purposes of section 254 as a process of execution. Although the judgment charge confers the same priority as an ordinary consensual equitable charge, it is a charge created in aid of the enforcement of the judgment. It can therefore be regarded as being

not only a judgment but, in so far as it creates an automatic charge, part of the process of its own execution.

In *Bristol Airport plc v Powdrill* [1990] 1 Ch 744 the question was whether creditors who had detained an aeroplane belonging to a company in administration had thereby taken steps to enforce their lien. Counsel argued that since the lien only came into existence by virtue of the detention (under section 88(1) of the Civil Aviation Act 1982) it could not also be an enforcement of that lien. Sir Nicolas Browne-Wilkinson V-C described the argument (at pp. 763-764) as "artificial and unconvincing":

> "There is no legal reason why the same act should not have a dual effect as being both the perfection of the security and a step taken to enforce it."

Their Lordships think that likewise, in the particular context of ROCA, the entry and registration of judgment not only creates the security over the land but also counts as part of the process of execution.

Their Lordships will therefore allow the appeal and restore the order of the late Bharath J. The respondents must pay the costs before their Lordships' Board.