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CASE COMMENTS

CHARGING ORDERS - THE LAST WORD

Bank of China v. *The First National Bank of Boston*[1]

THE charging order introduced as a method of levying execution on land by the Rules of the Supreme Court 1970 ("R.S.C."), O. 50 r. 1 spawned a rash of cases in the late 1980s.[2] There was doubt as to its nature and even the source of its lawful origin was obscure.[3] Further when it appeared on the scene no step was taken to ensure that it could fit in with the provisions of other relevant legislation such as the Land Titles Act[4] and the Bankruptcy Act.[5] So the inevitable problems arose.

Bank of China v. *The First National Bank of Boston*[6] is one case where issues as to the basic nature of the charging order and following from this the applicability of sections 41, 114 and 117 of the Land Titles Act (hereinafter referred to as the "Act") were raised. The facts are straightforward. Gono Hartono was the owner of the land in question. The land was registered land under the Act. The Bank of China was the equitable mortgagee. On 3 July 1980 a caveat was lodged in respect of this equitable mortgage. The caveat expired on 3 July 1985 through lapse of time. Meanwhile the First National Bank of Boston, as the judgment creditor of Gono Hartono, obtained a charging order *nisi* over the property and on 2 December 1985 lodged

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1 [1992] 1 S.L.R. 441.

2 *Bank of China* \. *First National Bank of Boston* [1988] 3 M.L.J. 401 (High Court); *Official Assignee of Lint Chiak Kim* v. *United Overseas Bank Ltd.* [1988] 3 M.L.J. 189; *United Overseas Bank Ltd.* v. *Forward Oversea Credit Ltd.* [1988] 1 M.L.J. 496; *Arab Bank Ltd.* v. *Ng Soo Jin* [1988] 3 M.L.J. 250.

3 For a full account of the manner in which land may be rendered liable in execution and the position of the charging order *vis-à-vis* the writ of seizure and sale see Tan, "Execution against Land in Singapore — Some Problems" [1987] 1 M.L.J. xv; and Tan, "Further Thoughts on the Charging Order" [1989] 2 M.L.J. lx. My comments in this note are restricted to the Court of Appeal judgment in *Bank of China v. First National Bank of Boston (supra,* note 1).

4 Cap. 157, 1985 Rev. Ed.

5 Cap. 20, 1985 Rev. Ed.

6 *Supra,* notes 1 and 2.

a caveat protecting it. The charging order *nisi* was made absolute on 26 January 1986 and on 26 Febuary 1986 the Bank of China lodged a second caveat in respect of its equitable mortgage. In the dispute which subsequently arose between the equitable mortgagee and the judgment creditor the nature of the charging order and the interplay between the charging order and the Act were in issue. Lai J. gave judgment for the First National Bank of Boston. He held that the charging order created a judicial charge on the land. According to the learned judge, it did not come within sections 114 and 117 of the Act which govern writs of execution[7] and it was not a registrable charge under section 59 of the Act. Being an interest in land it was capable of protection by a caveat and priorities were governed by section 41. In the circumstances the First National Bank of Boston had priority.

From this decision the Bank of China appealed. The appeal raised three issues: (1) whether the interest under the charging order was an unregistered interest under section 41 of the Act, (2) whether under section 41 the charging order which was protected by an earlier caveat had priority over the interest of the equitable mortgagee, and (3) whether R.S.C., O. 50 r. 1 is *ultra vires* the powers of the Rules Committee constituted under section 80(3) Supreme Court of Judicature Act.[8] The Court of Appeal allowed the appeal.

Under the R.S.C. (Amendment No.3) 1991 rr. 23 and 25-27 the charging order has been removed. The writ of seizure and sale is once again the only manner of levying execution on land.[9] So with this decision the Court of Appeal performed the last rites for the charging order. It left the scene with its legality intact. The Court of Appeal confirmed that while it existed it was a charge on the land which although not registrable as a charge under section 59 of the Act was an interest in land that was capable of protection by the caveat under section 104 of the Act. In these circumstances it would be ungenerous if not churlish to carp at the Court of Appeal for taking such a robust approach to the construction of sections 41 and 117 of the Act. Before this ruling of the Court of Appeal ambiguity surrounded the manner of the introduction of the charging order as well as the type of interest that it created. Further, earlier case law had left the question of the judgment debtor's property which the judgment creditor may take in execution in some uncertainty. The decision of the Court of Appeal in the *Bank of China* case must be seen in the light of these factors.

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7 S.114 of the Act provides for the registration of a writ of execution and s. 117 provides that the interest which may be sold in execution under a writ is the interest which belongs to the judgment debtor at the date of registration of the writ except that interests created before the registration of the writ and which are protected by a caveat at least three clear days before the sale shall bind the purchaser.

8 Cap. 322, 1985 Rev. Ed.

9 R.S.C. (Amendment No. 3) Rules 1991 (S.532/91), rr. 25 and 26.

The central problem is what may properly be regarded as capable of being the subject matter of a charging order. If the charging order were a writ of execution under the Act it would be governed by section 117 of the Act which provides that the interest that the judgment creditor may take in execution is what belonged to the judgment debtor at the date of the writ of execution. Although section 117(2) expands on the meaning of "belong" by providing that interests created before the registration of the writ but not protected by a caveat three days before the sale to the purchaser shall not be effective against such a purchaser it is clear that the general law approach to what may be taken in execution underlies section 117. On the other hand, if the charging order were an ordinary unregistrable charge or mortgage then *vis-a-vis* prior unregistered dealings it would rank in priority according to the dates of the lodgment of the caveats in respect of those interests. [10] Thus the whole issue is whether the matter is one of ordinary priorities or whether it is governed by section 117.

The Court did not find it necessary to deal with the issue of *ultra vires.* It decided that the charging order created a charge on the land which was not registrable under section 59 but which was capable of protection by a caveat under section 104. Accordingly section 41 dealing with priorities of unregistered interests applied. The Court refused to confine "unregistered interest" in section 41 to those of "purchasers" as defined in section 2. The words are plain and unambiguous and the Court saw "no reason for restricting or limiting these words only to interests acquired by a purchaser ... the list of unregistered interests was not closed and has never been closed and it was not the intention of the legislature that only those unregistered interests that could be created at the time the Act was enacted should be entitled to protection by the machinery of the caveat."[11] With respect, this clear and unambiguous statement is welcome and should lay to rest any doubt as to the type of interests that may be protected by the caveat and so be brought within the ambit of section 41. The list should be an open one as the types of interests that may be recognised in general law as interests in land are not static.[12]

Although the charging order was within sections 104 and 41 it was also a way of levying execution on land albeit not a writ of execution. The

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10 Under s.41 of the Act.

11 *Supra,* note 1 at p. 444.

12 The rights of the deserted wife in the matrimonial home is one good example of what was at one time arguably a proprietary interest but which is now clearly not so while the licence grounded on proprietary estoppel arguably has become more accepted as having a proprietary flavour. The other attempt to limit the application of s.41 by taking the view that the interest of a judgment creditor under a charging order is not a competing interest within the section mentioned by Chan J. in *City Development Ltd.* v. *Goh Yoke Hian* [1990] 3 M.L.J. 8 is also rendered unnecessary by the Court of Appeal's decision. See *supra,* note 1 at p. 452.

manner whereby execution may be levied on land under the Act is that of the writ of execution, *viz.*, the writ of seizure and sale as no amendments were made to the Act to accommodate the charging order. If the judgment creditor had proceeded to levy execution by a writ of execution section 117 would apply. But where he proceeds under the charging order then section 41 will apply possibly with differing results. This situation is certainly untenable. Consequently the Court was constrained to limit the application of section 41 *vis-a-vis* the charging order by applying the spirit of section 117 to the charging order. Thean J., delivering the judgment of the Court, said:

> The charging order, however, made by the High Court under O. 50 r.1 is not a writ of execution within the meaning of section 113 and the process of a charging order as a mode of execution is not one contemplated in section 117 of the Act. Nonetheless effect must be given to the charging order consistent with that section. It cannot be intended that Ord. 50 r. 1 should provide a mode of excution which is inconsistent or at variance with section 117 ... section 41 must therefore be read subject to section 117.... [13]

This is without doubt an example of judicial law making but one which removes what would otherwise be a whimsical consequence and so is more than justifiable.

The Court of Appeal could have taken the bull by the horns and dealt with the issue of the legality of the charging order. But had it ruled that the charging order was outside the powers of the Rules Committee[14] the consequence would be most unacceptable not least because every charging order would then be invalid and sales of property made under earlier orders might be impugned.

Happily events have been overtaken by the Rules of the Supreme Court Amendment (No. 3) 1991 which has laid the charging order to rest. The writ of execution is once more the only way to levy execution on land.[15] Erstwhile seemingly intractable problems occasioned by the incompatibility of the charging order as a mode of execution against land with existing legislation relating to land and bankruptcy will disappear as the existing legislation has always catered for the writ of execution.

For the Rules Committee the quickest and least problematic route out of the morass is to expunge the charging order and reinstate the writ of seizure and sale. But there must have been some merits in the charging order as a form of execution, *e.g.*, the judgment debtor need not have to

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[13] *Supra*, note 1, at p. 451.
[14] Under s.80 of the Court of Judicature Act, *supra*, note 8.
[15] O. 47 rr. 25 and 26.

sell his land forthwith. Whether the advantages of the charging order over the writ of seizure and sale make it a more efficient and yet equitable manner of levying execution is something which is still worth exploring. The fault in these past years lay not with the charging order itself but with the lack of proper legislation accompanying its introduction.

The Court of Appeal did more than reconcile the seemingly intractable contradiction between section 41 (applicable to the charging order) and section 117 (applicable to the writ of execution) of the Act. It took the opportunity to state its views on the position of a judgment creditor with a writ of execution under the Registration of Deeds Act. [16]

Under the general law the rule is that the judgment creditor takes only that interest which the judgment debtor has beneficially vested in him, *i.e.* as against judgment creditors the maxim *nemo dat qui non habet* applies. *Ng Boo Bee* v. *Khaw Joo Choe*[17] a Court of Appeal decision reflected this view in the context of the Registration of Deeds Act. It held that where the judgment debtor had earlier conveyed the land in question then despite the non-registration of that deed of conveyance the judgment creditor took only that which the debtor had beneficially vested in him regardless of time of registration of the instruments concerned. However, prior to this decision the Court of Appeal in *Fung Sin Wa* v. *Moi Chan Hen*[18] had held that as a writ of execution was an assurance for value within section 6 an earlier equitable mortgage in respect of which there was no registered memorandum had no effect against it. This decision was approved of by the Privy Council in *United Overseas Bank Ltd.* v. *Chung Khiaw Bank Ltd.*[19] where the facts were on all fours with those in *Fung Sin Wa.* However, in merely distinguishing *Ng Boo Bee* on the facts while choosing to follow *Fung Sin Wa* the Privy Council left the law as to the meaning of beneficial interest in the context of land governed by the Registration of Deeds Act in some doubt. The possibility that the priority section of the Registration of Deeds Act (now section 14) might have affected the general rule regarding judgment creditors and what may be taken in execution is arguable[20] but the Court of Appeal in the instant case has made it clear that it holds the view that the judgment creditor takes only that which the judgment debtor has vested in him beneficially and in determining the meaning of beneficial ownership the Court of Appeal will disregard non-registration of the deed dealing with the earlier encumbrance if the deed was validly executed.[21] In short their

16 Cap. 269, 1989 Rev. Ed.

17 (1921) 14 S.S.L.R. 90.

18 (1898) 5 S.S.L.R. 29.

19 [1970] 1 M.L.J. 185.

20 See Tan, "The Effect of Registration of Deeds Act on the Priority of Judgment Creditors and Prior Encumbrancers" [1970] 2 M.L.J. lviii.

21 See *supra*, note 1 at pp. 447-451. In Chan J.'s decision in *City Development Ltd.* v. *Goh Yoke Hian, supra,* note 12, this line was approved of.

view is that the priority section does not affect the substantive point as to what interest the owner actually has. Section 6 makes an exception and the Court of Appeal of course acknowledged that insofar as the prior encumbrance is an equitable mortgage or charge section 6 would be applicable as was held in *Fung Sin Wa* and *Chung Khiaw Bank.* In stating its opinion that *Ng Boo Bee* is still good law *apropos* land under the Registration of Deeds Act the Court of Appeal clearly takes the view that the beneficial interest vested in the judgment debtor is that which he has after effecting valid dealings regardless of the absence of registration of instruments effecting those dealings. *Ng Boo Bee* involved an earlier unregistered deed of conveyance but presumably if the prior dealing were a lease for over seven years and the deed was not registered the Court of Appeal would take the view that the judgment debtor's beneficial interest is subject to the unregistered lease. The judgment creditor thus takes subject to the lease and section 14 is not applicable as it is not a question of priorities. Is there a real conceptual difference or would this be judicial lawmaking again?

As the law now stands with the reinstatement of the writ of seizure and sale, the expunging of the charging order, and the Court of Appeal's views on the status of *Ng Boo Bee,* the law as to the interest in land that a judgment creditor may take in satisfaction of a judgment debt is made less uncertain. This is also to be welcomed. Seemingly the only exception to the general approach is where the earlier encumbrance on the judgment debtor's land is an equitable mortgage or charge in respect of which there is no registered memorandum so that as against the judgment creditor claiming under a registered writ of execution (a purchaser) section 6 of the Registration of Deeds Act applies. Apart from this remaining wrinkle all other erstwhile problems have been ironed out. Complete eradication of the inconsistencies in the law awaits legislative action.

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