

## Case Note

### THE AVOIDANCE OF UNREGISTERED CHARGE AND EXTENSION OF TIME TO REGISTER

*Media Development Authority of Singapore v Sculptor Finance  
(MD) Ireland Ltd*  
[2014] 1 SLR 733

This case note argues that the decision of the Court of Appeal in *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 in effectively overruling *Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 has provided much needed clarification on the concept of commencement of winding up. But the concept of the statutory trust over the assets of a company in liquidation that the latter espoused has some merit in providing the proprietary basis for the avoidance of an unregistered charge against a chargor in liquidation. It also argues that current practice on the registration of charges out of time where the chargor's insolvent liquidation is likely has failed to give sufficient weight to the avoidance policy underlying registrable but unregistered charges.

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#### I. *MDA v Sculptor Finance*

1 In *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd*<sup>1</sup> (“*MDA v Sculptor Finance*”), RSM Group Pte Ltd (“*RGPL*”) granted fixed and floating charges (“*Charges*”) to Sculptor Finance (MD) Ireland Ltd (“*Sculptor Finance*”), a company incorporated in Ireland, as security for the moneys that *RGPL* owed to companies in the *Sculptor Finance* group. The *Charges* were required to be registered, under s 131(1) of the Companies Act<sup>2</sup> within 30 days of their creation. Henceforth all references of statutory provisions are to this Act, unless otherwise stated. *Sculptor Finance* claimed that it did not register the *Charges* because it did not have advice on Singapore law when the *Charges* were created and was not aware of the need for registration. It

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1 [2014] 1 SLR 733.

2 Cap 50, 2006 Rev Ed.

only became aware of the need for registration when it appointed solicitors in Singapore in May 2012.

2 At that time, RGPL was in dire straits. The Media Development Authority of Singapore (“MDA”), an *unsecured* creditor of RGPL,<sup>3</sup> had taken proceedings against it and a judicial management application had been filed against it. Sculptor Finance filed an application to register its Charges out of time (“Application”) in July 2012 under s 137. Pending the hearing of the Application, the judicial management application was withdrawn and a winding-up application was filed against RGPL. Overriding MDA’s objection, Tay Yong Kwang J followed the current English approach and granted an extension of time under the “inadvertence” and “just and equitable” grounds subject to two provisos to protect the interests of the creditors of RGPL.<sup>4</sup> The Charges were duly registered and shortly *after* the company was wound up. MDA appealed against Tay J’s decision.

3 The Court of Appeal (“CA”) held that the appeal raised two issues and held against MDA on both of them. On the first issue, it held that MDA did not have *locus standi* to oppose the Application on the ground that the Charges were void against it under s 131(1). It has been held in *Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd*<sup>5</sup> (“*Ng Wei Teck*”) that on the presentation of a winding-up *petition* or, under current terminology, the filing of a winding-up *application*, a statutory trust arises to give an unsecured creditor sufficient interest in the subject matter of the unregistered charge to qualify as a “creditor” for the purposes of s 131(1). The CA disagreed with *Ng Wei Teck*, holding that the trust arises only on the making of the winding-up *order*. On the subsidiary issue of the nature of the statutory trust, the CA approved *Power Knight Pte Ltd v Natural Fuel Pte Ltd*<sup>6</sup> (“*Power Knight*”) and leaned in favour of the English position that such a trust is a purpose trust with the beneficial interests in suspense, but in any event the trust did not confer on the unsecured creditors any proprietary interest in the company’s assets.<sup>7</sup> MDA thus had no *locus standi* to oppose the Application before Tay J. The second issue was whether Tay J

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3 There was a dispute as to whether the Media Development Authority of Singapore (“MDA”) was a creditor of RGPL, which the Court of Appeal declined to decide, proceeding on the basis that MDA was a creditor as it appeared to have, at the very least, a claim that could be submitted for proof in RSM Group Pte Ltd’s liquidation: *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [36].

4 The judgment of Tay Yong Kwang J was reported at *Sculptor Finance (MD) Ireland Ltd v Media Development Authority of Singapore* [2013] 2 SLR 311.

5 [1998] 1 SLR(R) 778.

6 [2010] 3 SLR 82.

7 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [43], [50] and [53].

erred in exercising his discretion to allow the Application despite finding that there was a real possibility that RGPL would be wound up. The CA dealt with this issue very briefly. It noted the division of judicial opinion on whether an extension of time may be allowed where winding up was imminent and held that whichever approach was preferred, the court's decision was a matter of discretion and not of law.<sup>8</sup> The CA held that Tay J's approach was eminently sensible and practical, and struck a balance in protecting the interests of Sculptor Finance and the general body of creditors.<sup>9</sup> There was thus no reason for the CA to interfere with his decision.

4 This note analyses the trilogy of *Ng Wei Teck*, *Power Knight* and *MDA v Sculptor Finance* and argues as follows. First, while in principle it is possible to develop the statutory trust as espoused in *Ng Wei Teck* consistently with the principles and rules on the assets and liabilities of a company, it is certainly open to the CA to reject that option and hold that the unsecured creditors have no beneficial interests in the assets of a company in liquidation. Secondly, the CA's exposition on commencement of winding up rectifies the mistake in earlier cases which treated the commencement of winding up as a uniform concept that applies equally to compulsory and voluntary winding up. Its significance extends well beyond s 131(1). Thirdly, the current English approach on the exercise of discretion to allow registration out of time when the company is insolvent and liquidation is likely is probably inconsistent with the avoidance policy of s 131(1). This author submits that the English approach should not be followed.

## II. The avoidance law in s 131(1)

5 Section 131(1) renders a registrable but unregistered charge void against two parties – the liquidator and any creditor of the company. It will be convenient to refer to them as the “liquidator ground” and “creditor ground” respectively. The CA in *obiter dicta* said that when a company was in liquidation the proper party to invoke s 131(1) to avoid a charge for non-registration was the liquidator.<sup>10</sup> It should be noted that this does not necessarily mean that the cause of action is vested in the liquidator. In *Smith v Bridgend County Borough Council*,<sup>11</sup> the House of Lords held that void against the liquidator meant void against the company in liquidation. On the facts in *MDA v Sculptor*

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8 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [58] and [59].

9 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [59].

10 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [54].

11 [2001] UKHL 58; [2002] 1 AC 336.

*Finance*, the “liquidator ground” was clearly inapplicable at both the hearing of the Application and in the appeal. In the former no liquidator had yet been appointed, while although a liquidator was in office in the latter, the Charges were already registered before RGPL was in liquidation.

6 With regards to the “creditor ground”, it is equally necessary to consider separately its applicability at the Application stage and in the appeal. Tay J did not address this issue, as the CA noted.<sup>12</sup> The reason might be because MDA’s arguments were concerned with how the court’s discretion to extend time for registration should be exercised when winding up was imminent or very likely. Hence, the only reference to *Ng Wei Teck* by Tay J was for the purpose of considering the impact of the case on the exercise of his discretion. In that regard Tay J said that *Ng Wei Teck* and *Power Knight* did not come into play if there was no winding up; thus, if the winding-up application was dismissed, an extension of time would not prejudice the unsecured creditors of RGPL.<sup>13</sup>

7 Before commenting on the CA’s treatment of *Ng Wei Teck*, it is necessary to explain the “creditor ground” and the context against which *Ng Wei Teck* was decided. Section 131(1) is descended from English and Australian provisions all of which trace their origin to s 14(1) of the Companies Act 1900.<sup>14</sup> All those provisions provided that if a registrable charge is not registered within a specified time, it is “void against the liquidator and any creditor of the company”. It is established law that the word “creditor” means a creditor who has acquired a *proprietary* right to or an interest in the subject matter of the unregistered charge. In other words, an unregistered charge is not void against an *unsecured* creditor. Two reasons have been given for this restrictive interpretation of the word “creditor”. First, when the company is a going concern, an “unsecured creditor could not have intervened to prevent payment being made to the lender whose charge was not registered”.<sup>15</sup> Secondly, an unsecured creditor could not have prevented the company from granting a new charge, duly registered, to substitute the unregistered charge.<sup>16</sup>

8 The restrictive interpretation of “creditor” is consistent with the legislative intention behind the enactment of s 14(1) of the Companies Act 1900. The reason given for requiring registration “is to take care that

12 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [34].

13 *Sculptor Finance (MD) Ireland Ltd v Media Development Authority of Singapore* [2013] 2 SLR 311 at [24].

14 c 48.

15 *Re Ashpurton Estates Ltd* [1983] Ch 110 at 123.

16 *Re Ashpurton Estates Ltd* [1983] Ch 110 at 123.

publicity is given to any mortgages which exist”.<sup>17</sup> Registration is not an essential element for a charge to be created. An unregistered charge is perfectly valid between the company and the chargee before the company’s liquidation. This must therefore mean that “creditor” can only mean a creditor with a proprietary interest in the subject matter of the unregistered charge. Further, if an unregistered charge is void against an unsecured creditor outside of liquidation, it will be otiose to provide further that the charge is void against the liquidator, who acts primarily in the interests of the unsecured creditors in an insolvent liquidation.

9 It is more difficult to explain the rationale for the “liquidator ground”, an avoidance provision. However, it is obvious that the “liquidator ground” is very different from typical avoidance provisions such as unfair preference or transaction at an undervalue. Sir Roy Goode QC acknowledged as much when he said that the “liquidator ground” does not fulfil the four minimum conditions which he has identified must be satisfied for a transaction entered into by a company to be upset under insolvency law.<sup>18</sup> Nevertheless, he argues that “there are sound policy reasons for the avoidance of unregistered securities”,<sup>19</sup> and his argument was quoted by the CA with approval.<sup>20</sup> He gives five reasons, and the third reason is as follows:<sup>21</sup>

[A]lthough unsecured creditors have no existing interest in the company’s assets outside of winding up ... they have an inchoate interest in that upon winding up the whole of the company’s property, so far as not utilised in discharging the expenses of winding up and the payment of preferential claims, becomes available for the general body of creditors, so that their rights become converted from purely personal rights into rights more closely analogous to that of beneficiaries under an active trust.

10 Compared to the other reasons which are more policy-oriented, this is a more technical legal argument. It is crucial to note that although a proprietary basis is used as partial justification for the “liquidator ground”, Goode did not say that the unsecured creditors have a proprietary interest in the assets of the company, or even that they were similar to beneficiaries under a discretionary trust. His statement on the

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17 United Kingdom, House of Commons, *Parliamentary Debates* (26 June 1900) vol 48 at col 1143.

18 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at paras 13-05 and 13-124. See discussion at para 30 below.

19 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 13-124.

20 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [31].

21 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 13-124.

nature of their rights is guarded, a point which the author will return to shortly.

11 The proprietary basis of s 131(1) impacts on the avoidance of an unregistered charge in the following way. If an unregistered charge is enforced before a winding-up application is filed against the company or the passing of a winding-up resolution, the charge is spent and there is nothing for s 131(1) to bite on.<sup>22</sup> On the other hand, if no enforcement action is taken or if it is taken but not completed when a winding-up order is made against the company or a winding-up resolution is passed, the unregistered charge is void against the company in liquidation. What is the position if the charge is enforced in the interim period? Do the unsecured creditors have, on the filing of a winding-up application, a proprietary interest in the subject matter of the unregistered charge so that the charge is void against them? This was the issue that arose in *Ng Wei Teck*.

### III. *Ng Wei Teck* and *Power Knight*

12 There were two strong arguments against the unsecured creditors in *Ng Wei Teck*. First, although the courts have consistently held that when a company is wound up the assets of the company are subject to a statutory trust to be applied in discharge of the company's liabilities in accordance with the statutory scheme of distribution, it has never been held that the unsecured creditors acquired a proprietary interest of any kind in the company's assets.<sup>23</sup> Indeed, it has even been said that their rights are limited to invoking the protection of the court to ensure that the liquidator discharges his statutory duties.<sup>24</sup> Goode lists as a principle of corporate insolvency law that "no creditor has any interest *in specie* in the company's assets or realisations".<sup>25</sup> Since this appears as the ninth principle in his book, it will be convenient to refer to this as the "ninth principle" in this note. This principle is the reason for the guarded statement in Goode's passage cited three paragraphs above. The tension between the ninth principle and the proprietary basis for the "liquidator ground" in s 131(1) is obvious, but it does not seem to have attracted discussion. Secondly, in any event, the statutory trust arises only on the making of a winding-up order, not the presentation of a winding-up petition.

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22 *Re Row Dal Constructions Pty Ltd* [1966] VR 249; *NV Slavenburg's Bank v Intercontinental Natural Resources Ltd* [1980] 1 WLR 1076.

23 See, eg, *Ayerst v C & K (Construction) Ltd* [1976] AC 167.

24 See, eg, *Calgary and Edmonton Land Co Ltd v Dobinson* [1974] Ch 102.

25 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 3-10.

13 Nevertheless, the unsecured creditors prevailed in *Ng Wei Teck*. It was held that on the presentation of a winding-up petition, the unsecured creditors of a company were in the nature of a *cestui que trust* with beneficial interests extending to all the company's property, including the subject matter of the unregistered charge.<sup>26</sup> Thus, at that point in time, an unsecured creditor would acquire sufficient interest in the subject matter of the unregistered charge so as to qualify as a "creditor" for the purposes of s 131(1).

14 As explained above, and as the CA pointed out, those propositions were inconsistent with the orthodox position. Even so, Lee Eng Beng has argued that the result in *Ng Wei Teck* is correct.<sup>27</sup> Had the result been otherwise, it would have "led to a most undignified race between the security holder [of the unregistered charge] and the unsecured creditor".<sup>28</sup> The former would be motivated to enforce its security after a winding-up application is filed against the chargor, in the hope that the enforcement will be completed before a winding-up order is made against the company, while the unsecured creditors would seek to prevent that result by procuring the appointment of a liquidator. There is force in Lee's argument, but it raises its own question. A security holder upon discovering that its charge is unregistered before a winding-up application has been filed against the company has three options. It may apply to court for an order to register the charge out of time, request for a new charge from the company, or enforce its security. Each of these involves a race with the unsecured creditors of the company. If the result in *Ng Wei Teck* is correct for the reasons given by Lee, it may be asked why the race before the filing of a winding-up application should not be similarly prevented? This author submits that as s 131(1) uses the company's liquidation as the event to avoid an unregistered charge, it is unavoidable that creditors will race to gain the upper hand before liquidation.

15 *MDA v Sculptor Finance* is not the first case to examine *Ng Wei Teck*. The nature of the statutory trust was subject to close scrutiny in *Power Knight*. That case was not concerned with s 131(1) as the charge was registered. However, the chargee ("PK") did not lodge a caveat to protect its interest in the charged property.<sup>29</sup> After the company was wound up, its liquidators claimed that the unsecured creditors were, by virtue of the statutory trust which arose on the filing of the winding-up application, vested with all the beneficial interest in the charged

26 *Ng Wei Teck Michael v Oversea-Chinese Banking Corp Ltd* [1998] 1 SLR(R) 778 at [31].

27 Lee Eng Beng, "Unsecured Creditor *versus* Unregistered Charge" (1998) 10 SAclJ 241 at 242.

28 Lee Eng Beng, "Unsecured Creditor *versus* Unregistered Charge" (1998) 10 SAclJ 241 at 242.

29 Land Titles Act (Cap 157, 2004 Rev Ed) s 115.

property and they lodged caveats against the charged property to protect that interest. PK commenced an action demanding that the caveats be removed. The main issue was whether the unsecured creditors had a beneficial interest in the charged property which would justify the caveats remaining on the register.

16 As *Ng Wei Teck* had held that the statutory trust extended to *all* the chargor's property, including the subject matter of the unregistered charge, counsel for the liquidator argued that the charged property fell within the ambit of the statutory trust as well. This result is unpalatable as it would give unsecured creditors a beneficial interest in the charged property in competition with the security which the secured creditor had obtained from the company as part of the bargain between themselves, and which was duly registered. Judith Prakash J avoided this result by reasoning from first principles and interpreting *Ng Wei Teck* narrowly. Her Honour invoked the established law that only free assets of the company are available for distribution to the unsecured creditors of a company in liquidation.<sup>30</sup> Next, she held that *Ng Wei Teck* did not decide to the contrary and stood only for the proposition that an unsecured creditor has *standing* to invoke s 131 when a winding-up petition is presented against the chargor.<sup>31</sup> She thus concluded that an unsecured creditor has no interest in a charged property where the charge is registered and, consequently, the unsecured creditors' caveats must be removed.

17 There is without doubt much to be said for the result in *Power Knight*. It is submitted respectfully that the treatment of *Ng Wei Teck* may benefit from an alternative analysis. The delineation of the free assets of a company in liquidation is not entirely a matter of general law. Transactions which are set aside as a result of avoidance provisions may lead to recoveries which augment the free assets of the company, which was exactly what happened in *Ng Wei Teck*. Hence, it is not clear that *Ng Wei Teck* may be left out of consideration when delineating the free assets of the company.

18 A slightly different approach that could have been adopted in *Power Knight* is to reason that, notwithstanding its broad statements, *Ng Wei Teck* could not have decided that the statutory trust extends to property which the company does not own beneficially. For example, assets which the company held on trust for the benefit of third parties could not have fallen within the statutory trust.<sup>32</sup> The aforesaid is, however, subject to an exception, *viz*, the subject matter of an

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30 *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 at [27].

31 *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 at [38].

32 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 3-09.

unregistered charge. This exception is needed as otherwise the unsecured creditors would, when the company is wound up, have no proprietary basis in that subject matter to avoid the unregistered charge under the “liquidator ground”. Under this approach, the statutory trust in *Ng Wei Teck* would not extend to the charged property in *Power Knight* as the charge was registered, the unsecured creditors would have no proprietary interest in the charged property and their caveats would have to be removed.

#### IV. Nature of statutory trust

19 If the above argument was accepted, it would be possible to develop the statutory trust as enunciated in *Ng Wei Teck* consistently with the general principles of corporate insolvency law, except for some modification to the ninth principle as mentioned above. However, that is clearly not the only or even preferred approach. The only imperative in this area of law is that whichever concept is adopted must be consistent with the principles and rules on the assets and liabilities of the company. Indeed, as the statutory trust is inferred from the statutory scheme of liquidation and superimposed on the rules constituting that scheme, as can be seen in *Ayerst (Inspector of Taxes) v C & K (Construction) Ltd*,<sup>33</sup> its existence is not essential to the law of liquidation. In *Commissioner of Taxation of the Commonwealth of Australia v Linter Textiles Australia Ltd*,<sup>34</sup> the Australian High Court held that the statutory trust did not exist, and in *Power Knight* Judith Prakash J, although preferring the English approach, commented that this approach has its own attraction.<sup>35</sup> That said, if it is decided to adopt the concept of the statutory trust, this author submits respectfully that the principles of equity on the different shades of ownership are flexible enough to accommodate the statutory trust as enunciated in *Ng Wei Teck* without upsetting the principles and rules on the assets and liabilities of the company. An advantage of this approach is that it will resolve the tension between the ninth principle and the proprietary basis for the “liquidator ground” in s 131(1).

20 The above possible development of *Ng Wei Teck* has been firmly rejected. Doubts were first cast in *Power Knight*, where Judith Prakash J expressed her disagreement with the proposition in *Ng Wei Teck* that the unsecured creditors of a company in liquidation have a proprietary

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33 [1976] AC 167. In *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 at [44], Judith Prakash J described this case as “the leading modern authority on the statutory trust”.

34 (2005) 220 CLR 592.

35 *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 at [49].

interest in the company's assets. Her Honour said, approving English cases such as *Mitchell v Carter*<sup>36</sup> and *Buchler v Talbot*,<sup>37</sup> as follows:<sup>38</sup>

[T]he 'statutory trust' is a purpose trust, with the beneficial interest 'in suspense'. The company holds the legal title to its property on trust for the purposes of the statutory scheme administered by the liquidator. Since this scheme is intended to be for the benefit of the unsecured creditors, it may loosely be said that the statutory trust is 'in favour of' the unsecured creditors. However, this is a misleading use of language, for it then becomes natural to regard the unsecured creditors as ordinary beneficiaries having beneficial interests in the company's assets, when in fact, during the course of the winding up, they have only a hope of obtaining such interests.

21 The above passage was cited with approval by the CA.<sup>39</sup> Whilst the CA reserved its position by stating that it was not necessary for it to decide whether the English or Australian position is to be preferred,<sup>40</sup> it is clear that the CA leaned heavily in favour of the former. The reason it was not necessary for the CA to decide was because "neither approach supports the proposition that the unsecured creditors have proprietary interests in the company's assets on winding up or on presentation of a winding-up application".<sup>41</sup> Thus, the CA held that an unsecured creditor cannot claim the standing to avoid an unregistered charge by virtue of the statutory trust.

22 As noted above, there is some tension between the argument that the proprietary basis is a partial justification for the "liquidator ground" in s 131(1) and the statement that unsecured creditors have no proprietary interests in the assets of a company in liquidation. A possible way to reconcile the two is to accept highly extenuated forms of property interest as satisfying the proprietary basis. That was what Goode did when he said that, on the company's liquidation, the rights of unsecured creditors "become converted from purely personal rights into rights more closely analogous to that of beneficiaries under an active trust",<sup>42</sup> which according to him was sufficient to provide the proprietary basis for the "liquidator ground".

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36 [1997] 1 BCLC 681 at 686, *per* Millet LJ.

37 [2004] 2 AC 298 at [28], *per* Lord Hoffmann.

38 *Power Knight Pte Ltd v Natural Fuel Pte Ltd* [2010] 3 SLR 82 at [51].

39 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [52] and [53].

40 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [53].

41 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [53].

42 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 13-124.

## V. Commencement of winding up

23 The second aspect of *Ng Wei Teck* with which the CA disagreed was the proposition that a statutory trust arose on the presentation of a winding-up petition. The CA held that that proposition was correct only with regards to a *voluntary* winding up but not a *compulsory* winding up. *Ng Wei Teck* cited a few authorities which stated that on the commencement of winding up an unsecured creditor qualifies as a “creditor” for the purposes of s 131(1), and the reason for that was that the unsecured creditors acquired rights against the company under a statutory trust or scheme.<sup>43</sup> The CA pointed out that the winding up in those cases were voluntary winding ups. Save for a voluntary winding up under s 291(1), which we will turn to shortly, a voluntary winding up commences on the passing of a winding-up resolution.<sup>44</sup> This is the only critical date in a voluntary winding up. It is “a final act which places the company into voluntary winding up”.<sup>45</sup> In contrast, there are two critical dates in a compulsory winding up, *viz*, the filing of a winding-up application and the making of a winding-up order, and winding up is deemed to commence on the former date. However, although the law has regarded it as necessary for the commencement of winding up to relate back to this date, it is the latter which is the equivalent of the passing of a winding-up resolution in a voluntary winding up. Two examples will be given here. First, the statutory scheme for dealing with the assets of the company, and consequently the statutory trust, comes into operation on the making of a winding-up order.<sup>46</sup> Secondly, the date on which the provability of claims against the company is determined is the date of the making of a winding-up order.

24 The concept of commencement of winding up therefore depends on whether the winding up is a compulsory winding up or a voluntary winding up. But *Ng Wei Teck* was not the only case which applied the commencement of winding up in a rule which was meant only for a voluntary winding up to a compulsory winding up. The same thing occurred in *Good Property Land Development Pte Ltd v Société Générale*<sup>47</sup> (“*Good Property*”) in relation to insolvency set-off. *Good Property* has caused substantial difficulty in subsequent cases.<sup>48</sup> As the commencement of winding up is a fundamental concept in the law of

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43 See, eg, *Re Anglo-Oriental Carpet Manufacturing Co* [1903] 1 Ch 914 at 918; *Re Ehrmann Brothers Ltd* [1906] 2 Ch 697 at 709, *per Romer LJ*; and *Re Ashpurton Estates Ltd* [1983] Ch 110 at 123, *per Lord Brightman*.

44 Companies Act (Cap 50, 2006 Rev Ed) ss 291(6) and 255(1).

45 Lee Eng Beng, “Unsecured Creditor *versus* Unregistered Charge” (1998) 10 SAclJ 241 at 243.

46 *Ayerst v C & K (Construction) Ltd* [1976] AC 167 at 176–177.

47 [1996] 1 SLR(R) 884.

48 *Panorama Development Pte Ltd v Fitzroya Investments Pte Ltd* [2003] 1 SLR(R) 93; *Re Lehman Brothers Finance Asia Pte Ltd* [2013] 1 SLR 64.

winding up, failure to appreciate that the concept takes on different significance depending on whether the winding up is a voluntary winding up or a compulsory winding up is liable to lead to more difficulties in future. The detailed explanation of the CA on the differences is therefore a most positive development.

25 Before leaving this issue, it should be pointed out that the commencement of winding up in a voluntary winding up is not invariably the date of the passing of the winding-up resolution as usually assumed. This is because the Act allows for a modified form of creditors' voluntary winding up. If the directors of a company, *inter alia*, lodge a declaration with the Registrar of Companies that the company cannot by virtue of its liabilities continue its business and that meetings of the company and of its creditors have been summoned, the directors may appoint a provisional liquidator.<sup>49</sup> If that is done before the passing of the winding-up resolution, the winding up commences at the time when the aforesaid declaration is lodged with the Registrar.<sup>50</sup>

26 The judgment of the CA suggests that a common term is needed to describe the time at which a winding-up resolution is passed or when a winding-up order is made. This author submits that we may usefully adopt the English definition of "goes into liquidation" in the new Insolvency Act now being drafted. Section 247(2) of the English Insolvency Act 1986<sup>51</sup> states that "a company goes into liquidation if it passes a resolution for voluntary winding up or an order for its winding up is made by the court at a time when it has not already gone into liquidation by passing such a resolution". This term is used in about 20 sections and a few rules in the Insolvency Act 1986 and Insolvency Rules 1986 respectively.<sup>52</sup> This may not seem substantial. But the usefulness of the common term goes beyond those provisions. It is relevant to principles and rules at common law, for example, the rule that a statutory trust arises when a company goes into liquidation, or the principle that Goode suggests, that when a company goes into liquidation, its unsecured creditors acquire rights analogous to that of beneficiaries under an active trust. This term will be used in the remaining parts of this note.

27 It would be useful to summarise briefly what the CA has decided and their impact as discussed above before we turn to the issue of allowing registration out of time. First, there is no statutory trust over the assets of the company when a winding-up application is filed against

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49 Companies Act (Cap 50, 2006 Rev Ed) s 291(1).

50 Companies Act (Cap 50, 2006 Rev Ed) s 291(6).

51 c 45.

52 This includes r 4.90(1) of the English Insolvency Rules 1986 (1986 No 1925) on insolvency set-off.

it. The trust arises only when the company goes into liquidation. Secondly, the statutory trust does not confer beneficial or proprietary interests on the unsecured creditors. The effect of those propositions is that first, although the CA did not overrule *Ng Wei Teck* expressly, that is clearly the outcome of the judgment. Secondly, an unsecured creditor has no *locus standi* to oppose an application to register an unregistered charge out of time. The “creditor ground” can only be invoked by a creditor with a proprietary interest in the subject matter of the unregistered charge. An unsecured creditor has no interest in the company’s assets, whether inside or outside of winding up, that qualifies it to invoke that ground.

28 Consequently, MDA had no *locus standi* to oppose the Application before Tay J. This is an interesting aspect of the case. It is hard to find a case where an unsecured creditor appeared at an application to extend time to register to oppose it, at any rate before the company has gone into liquidation. Quite apart for the creditor’s lack of standing, another reason is that, as the CA pointed out, an application to extend time would be made either *ex parte* by the company or by the chargee in which case the company would be joined as the only respondent.<sup>53</sup> It is not the practice to advertise for creditors and to make one of them a respondent. However, as the CA added, “pursuant to the court’s powers to have all relevant evidence put before it, arising from its discretion under s 137 of the Act to consider the solvency of the company regardless of whether winding-up proceedings have commenced”,<sup>54</sup> a court may as a matter of practice allow an unsecured creditor to be heard at an application.

## VI. Insolvency and discretion to extend time to register

29 As stated above, on how the discretion to extend time to register should be exercised where winding up is imminent or a real possibility, Tay J followed the approach espoused by Hoffmann J in *Re Braemar Investments Ltd*<sup>55</sup> (“*Braemar Investments*”). Although the CA did not express an opinion on which approach should be adopted, its approval of Tay J’s exercise of discretion was an implicit endorsement of *Braemar Investments*. In that case, Hoffmann J explained that the significance where liquidation appeared imminent was the likelihood of prejudice to the unsecured creditors of the company due to its insolvency. But as the

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53 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [56]. See also *Re Flinders Trading Co Pty Ltd* (1977) 2 ACLR 482 at 485 (affirmed (1978) 3 ACLR 218) and *Re Ashpurton Estates Ltd* [1983] Ch 110 at 123.

54 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [56].

55 [1989] 1 Ch 54.

hearing of an application to extend time was *ex parte*, and in order to preserve the interests of both the unsecured creditors of the company and the unregistered chargee, if an extension of time was granted it would be made subject to the proviso that if the company was wound up subsequently, its liquidator would be at liberty to apply to set aside the order granting an extension of time to register within a specified period of his appointment.<sup>56</sup> That approach was foreshadowed in *Re Ashpurton Estates Ltd*<sup>57</sup> (“*Ashpurton*”). In the earlier case of *Re Resinoid & Mica Products Ltd*<sup>58</sup> (“*Resinoid*”), Lord Denning MR and Davies LJ accepted that the imminence of liquidation was a ground on which an application to extend time *ought* to be refused. In particular, Lord Denning referred to and affirmed the practice mentioned in *Re LH Charles & Co Ltd*,<sup>59</sup> viz, that no extension would be given unless there was evidence that the company was solvent and its winding up was not impending. However, although *Resinoid* was acknowledged to be binding, *Ashpurton* held that *Resinoid* decided that the imminence of liquidation was *only* a relevant factor in the exercise of discretion.<sup>60</sup> The importance of solvency was clearly downgraded and the effect of that can be seen in two subsequent cases, *Braemar Investments* and *Barclays Bank plc v Stuart Landon Ltd*.<sup>61</sup> Although liquidation was imminent in both cases when the application to extend time to register was first heard, Hoffmann J in the former affirmed the registrar’s order to grant an order extending time to register, and in the latter the English Court of Appeal allowed an appeal by the unregistered chargee and granted it an extension of time to register.

30 This author submits that English law on the exercise of discretion to allow registration out of time when the company is insolvent is unsatisfactory. The exercise of discretion on whether to extend time to register in s 137 must be guided by the fact that s 131(1) is an avoidance provision. As stated above, s 131(1) does not fit neatly within the general framework of avoidance provisions. For example, it does not satisfy two very important conditions that Goode identified must be satisfied before a transaction entered into by the company can be upset under insolvency law.<sup>62</sup> Non-registration of a registrable charge does not result in a diminution in the assets available to the general body of creditors, and there is no requirement that the company must have been unable to pay its debts at the time of or in consequence of the non-registration. As such, Goode justified the avoidance of registrable

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56 *Re Braemar Investments Ltd* [1989] 1 Ch 54 at 60.

57 [1983] Ch 110 at 131.

58 [1983] Ch 132 at 133–134, *per* Lord Denning MR and 134, *per* Davies LJ.

59 [1935] WN 15.

60 *Re Ashpurton Estates Ltd* [1983] Ch 110 at 131, *per* Lord Brightman.

61 [2001] EWCA Civ 140; [2001] 2 BCLC 316.

62 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 13-05.

but unregistered charges by giving five reasons which are unique to it,<sup>63</sup> and his arguments were approved by the CA.<sup>64</sup>

31 This author submits that although the conditions of diminution of assets and insolvency are irrelevant at the time registration should have been effected, they are relevant when an application is made to court to register out of time. An analogy may be drawn with preference law here. While the creditors of a *solvent* company are not prejudiced by the company's paying of one creditor in priority over all the others, there is clear prejudice if that is done when the company is insolvent, or if the payment makes the company insolvent. Similarly, to allow an unregistered charge to be registered out of time when a company is insolvent and liquidation is imminent will prejudice the unsecured creditors of the company. It will:<sup>65</sup>

... undermine the legislative intent by giving the unregistered chargee an unfair advantage over the general body of unsecured creditors who are entitled to prevent the enforcement of the charge if they procure the timely appointment of a liquidator before the security is realised.

32 A further reason why courts should generally not extend time is that the unsecured creditors have acquired an interest, although not proprietary, in the assets of an insolvent company which should be given effect to. As Street CJ said in *Kinsela v Russell Kinsela Pty Ltd*:<sup>66</sup>

But where a company is insolvent the interests of the creditors intrude. They become prospectively entitled, through the mechanism of liquidation, to displace the power of the shareholders and directors to deal with the company's assets. It is in a practical sense their assets and not the shareholders assets that, through the medium of the company, are under the management of the directors pending either liquidation, return to solvency ...

33 The above was cited with approval in *Liquidators of Progen Engineering Pte Ltd v Progen Holdings Ltd*.<sup>67</sup> Although it was concerned with justifying the imposition of a duty on directors of a company to take into account the interests of creditors when the company is insolvent or in financial difficulty, it is equally apposite for generally refusing to extend time to register an unregistered charge under s 137. It dovetails with Goode's suggestion that when a company is wound up the

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63 R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 4th Ed, 2011) at para 13-124.

64 *Media Development Authority of Singapore v Sculptor Finance (MD) Ireland Ltd* [2014] 1 SLR 733 at [31].

65 Tan Cheng Han, "Unregistered Charges and Unsecured Creditors" (1998) 114 LQR 565 at 567. See also *Re Flinders Trading Co Pty Ltd* (1978) 3 ACLR 218 at 234, *per* Walters J.

66 (1986) 10 ACLR 395 at 401.

67 [2010] 4 SLR 1089 at [41].

rights of its unsecured creditors become analogous to that of beneficiaries under an active trust.

## VII. Conclusion

34 The clarification in *MDA v Sculptor Finance* that the concept of commencement of winding up depends on whether the winding up is a compulsory winding up or a voluntary winding up is a most welcome development. The statements on the nature of the statutory trust that arises when a company goes into liquidation are instructive and will provide guidance to lower courts. There is also much to be said for overruling *Ng Wei Teck*. However, this author submits that the trilogy of *Ng Wei Teck*, *Power Knight* and *MDA v Sculptor Finance* illustrates that the avoidance law on unregistered charges, especially in the interim period, requires rethinking. Is the prospect of a race between a security holder of an unregistered charge and an unsecured creditor in that period objectionable, and if the answer is yes, can s 259 be relied on to avoid the charge as Lee has suggested?<sup>68</sup> Another important issue is the weight to be given to the solvency of a company and the likelihood of liquidation in an application to register out of time. This author has suggested that the current English practice on this fails to take into account the interests of the unsecured creditors at that stage of the company's existence, and that the approach in *Resinoid* is to be preferred.

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68 Lee Eng Beng, "Unsecured Creditor *versus* Unregistered Charge" (1998) 10 SAclJ 241 at 244–245.