

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Civil Appeal No. P307 of 2016

HCA No. 5234 of 1985

BETWEEN

EMILE ELIAS

Appellant/Defendant/
Execution Debtor

AND

JOSEPH ELIAS

ROBERT ELIAS

(Executors and Trustees of Nagib Elias, deceased)

Respondents/Plaintiffs/
Execution Creditors

PANEL:

G. SMITH J.A.

M. DEAN-ARMORER J.A.

R. BOODOOSINGH J.A.

DATE OF DELIVERY: 28 January, 2022

APPEARANCES:

Mr. J Mootoo instructed by Mr. A. Byrne for the Appellant.

Ms. D Peake SC, Mr. R. Heffes-Doon instructed by Mr. S. Harrison for the Respondents.

I have read the judgment of Smith J.A. I agree with it and have nothing to add.

.....

M. Dean-Armorer

Justice of Appeal

JUDGMENT

Delivered by Smith J.A.

INTRODUCTION

1. The Appellant and the Respondents are siblings. They have been involved in this litigation against each other since 1985.

Pursuant to a judgment given since 1995, the Respondents sought to enforce an award of costs in their favour. This culminated in an Amended Summons of 27 April, 2016 whereby the Respondents essentially sought:-

- (a) An order that the order for costs made on 31 July 1995 operated as an equitable charge on two properties formerly owned by the Appellant.
- (b) An order that consequent upon the sale of those two properties, the Appellant do give an account of and/or pay over the proceeds of sale of the said properties to the Respondents (the tracing process).

2. On the Amended Summons of 27 April, 2016, Pemberton J granted the Respondents both of the orders mentioned above and ordered the Appellant to pay the costs of that summons.

3. The Appellant has appealed the decision of Pemberton J.

Originally, the Appellant was advancing three basic arguments, namely:

- (i) There was no enforceable equitable charge over the two properties which could be satisfied by the tracing process;
- (ii) The trial judge was wrong to amend what was a summons for sale to allow the tracing process;

(iii) The tracing process had to be pursued by a separate action and could not form part of the Amended Summons.

However, in oral submissions before us, counsel abandoned arguments (ii) and (iii) above.¹

Therefore the only issue which was being pursued on this appeal was whether there was an enforceable equitable charge on the two properties of the Appellant which could be satisfied via the tracing process.

This issue, though framed simply, produced extensive argument.

4. Interestingly enough, the main bone of contention revolved around the provisions in a very old statute, the Remedies of Creditors Act of Trinidad and Tobago Chapter 8:09, which dates back to 1845. Despite its antiquity, there was very little case law with respect to the specific questions to be resolved in this case. Further, the guidance from this limited case law was essentially obiter dicta.

Nevertheless, at the end of the day, I am satisfied that the trial judge's decision was correct and accordingly I would dismiss this appeal.

Background to the Amended Summons seeking the tracing process

5. This Appellant had challenged the validity of the last will of his father, Nagib Elias, in the original 1985 action. The Respondents in that action were the executors named in the will. In July 1995, Justice Crane gave judgment, pronouncing in favour of the validity of the will of Nagib Elias and also ordered this Appellant to pay the costs of that action.

¹ See the transcript of proceedings in the Court of Appeal on 14 July, 2021 at pages 40, 43 and 44

6. After an unsuccessful appeal, the costs were taxed. The costs of the High Court action were taxed at \$1,260,253.27. The costs of the appeal were taxed at \$318,229.00. The Registrar's allocaturs in respect of both sets of costs were issued on 12 February, 2012 (for the costs of the appeal) and 19 April, 2012 (for the costs in the High Court).
7. The Respondents registered and re-registered the judgment with costs to be taxed since 2003. And re-registered the judgment with the taxed costs since 2012.
8. In May 2015, the Respondents issued a summons for the sale of five properties, which allegedly belonged to the Appellant, to satisfy the judgment debt for costs. At the date of the summons for sale, the judgment debt with interest was over \$4.5 million dollars.
9. However, pursuant to searches done on the titles of those five properties which allegedly belonged to the Appellant, the Respondents discovered that they had all been sold before the date of the summons for sale. However, two of these properties were sold by the Appellant after the High Court judgment of Justice Crane in July 1995. One was sold in 1997 for \$200,000.00 and the other was sold in 2004 for \$200,000.00.
10. On the 25 April, 2016, the Respondents got the leave of the Court to amend the summons for sale to advance the tracing process in respect of the \$400,000.00 which the Appellant received from the sale of the two properties mentioned above.
11. As noted above, the 1995 judgment had been first registered in 2003 and re-registered in 2006, 2009 and 2012 with "costs to be taxed". However from October 2012, the judgment with the figures for taxed costs pursuant to the Registrar's allocaturs had been re-registered. It is

accepted that the 2003 registered judgment would not have affected the sale of the first property in 1997. Further, the Respondents/judgment creditors have, correctly (in our view), not asked for relief against the purchaser of the second property in 2004, since at that time there was only a registered judgment with 'costs to be taxed.' The judgment for the actual taxed costs was only registered in October 2012.

As stated before, the Respondents/judgment creditors have only asked for the tracing process as against the judgment debtor personally in respect of the \$400,000.00 he received from the sale of the two properties in question, after the 1995 judgment.

ANALYSIS

12. The **Remedies of Creditors Act Chapter 8:09 ("ROCA")**, which was first enacted as an Ordinance in Trinidad in 1845, contains three provisions which are relevant to this discussion, namely sections 5, 7 and 8.

13. Section 5 provides that **"Every judgment or decree to be entered up against any person in the Court shall operate as a charge upon all lands... which that person shall at the time of entering up the judgment or decree, or at any time afterwards, be seized, possessed or entitled for any estate or interest whatever... and shall be binding as against the person against whom the judgment or decree shall be entered up, and against all persons claiming under him after the judgment or decree..."** (my emphasis).

14. By the clear terms of section 5 of the **ROCA**, a judgment creates a charge over the lands of a judgment debtor. This charge has been described as a "judgment charge".

15. Further, as has been aptly stated in Paget's Law of Banking 14th edition at paragraph 15.2, **"Every charge, whether over a legal or equitable interest, must be equitable, there being no such thing as a legal charge."** (The only exception being a charge by legal mortgage of land created by the 1925 U.K. Law of Property Act which does not apply to Trinidad and Tobago).

16. In summary, by section 5 of **ROCA** (quoted above), every judgment that has been entered or drawn up creates an equitable charge over the lands of the judgment debtor. There was no dispute that the 1995 judgment was entered up and therefore it created an equitable judgment charge under section 5 of the **ROCA** against the lands of the Appellant/judgment debtor.

17. The relevant parts of section 7 and 8 of **ROCA** state:

"7. No judgment or decree of the Court shall affect any lands as to purchasers, mortgagees or creditors, or have any preference against heirs, executors or administrators... any notice to any such purchaser, mortgagee or creditor, or to any such heir, executor or administrator notwithstanding, 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, decree, order or rule has been obtained or made, and the date of the judgment, decree, order or rule, 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, together with the year and the day of the month when the memorandum or minute is so left with him, in a book... and all persons shall be at liberty to search the same book on payment of the sum of..."

8. Every judgment to be registered in the manner directed by this Act shall entitle the creditor, by virtue of the judgment, decree, order or rule, 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, decree, order or rule 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, or the amount made payable by the decree, order or rule, and interest thereon.” (my emphasis)

18. Two important points to note about section 7 and 8 of **ROCA** are, first, the equitable judgment charge created by section 5 of **ROCA**, once registered as provided for in section 7 counts as notice in respect to all subsequent dealings with both the legal and equitable title of the lands subject to the judgment charge.

By virtue of such notice, the judgment charge, once registered takes priority over all subsequent dealings with the title to the lands subject to the charge.

19. Second, the statutory priority created by a registered judgment charge was not made the exclusive remedy available to the holder of a section 5 judgment charge. Nor was it stated to have replaced any other remedy open to the holder of a section 5 judgment charge.

That being the case, while the non-registration of a judgment charge, under section 7, meant that it could not be enforced against purchasers, mortgagees, creditors, heirs, executors and administrators (as mentioned in section 7 above), it did not take away any other remedies or processes that could be the subject of the equitable charge.

One such process is the equitable process of tracing that lay against the judgment debtor personally.

20. Therefore, even though the Appellant sold the two properties in question after the judgment of 1995 and before the registration of the allocatur for costs (in 2012), he was still personally liable under the judgment charge of 1995 to the tracing process in respect of the proceeds of the sale of the two properties that were the subject of the judgment charge.
21. When considered on the whole, the equitable charge created in section 5 of **ROCA** was independent of the remedies provided for by the registration of the charge under sections 7 and 8 of **ROCA**.
22. The only direct authority on the “stand alone” nature of section 5 of **ROCA** that was cited to us was the dicta of Sir Rupert Jackson in the Privy Council decision of **De Zwarte Band and another v Kanhai and another** where at paragraph 56 he stated,

“ROCA section 5 looks to the future as well as the present. It provides that every judgment operates as a charge upon (a) property which the debtor owns at the time when judgment is entered and (b) any property which the debtor subsequently acquires. The section does not, however, say that any property to which the debtor subsequently ceases to be entitled drops out of the charge. Section 5 does not say, either expressly or by implication, that the judgment merely constitutes a floating charge upon the debtor’s assets for the time being. Indeed, such a security would be of little value, because the debtor could take rapid steps to release all valuable assets from the judgment charge.”

23. In fact, this statement illustrates valid intent and policy reasons for this interpretation of section 5 of **ROCA**.

With respect to the intent of the legislation, as the Privy Council observed, **“Section 5 does not say, either expressly or by implication, that the judgment merely constitutes a floating charge...”**. If section 5 of **ROCA** were not an independent and effective charge created upon the entry of a judgment it would have been considered in the nature of a floating charge, which would not have become fixed until the registration of the judgment under section 7.

With respect to the policy reasons, if section 5 of **ROCA** were not an immediate and effective charge, a debtor **“could take rapid steps to release all valuable assets from the judgment charge”** and in so doing, render the judgment charge a thing of no value.

24. The Appellant argued that the statutory charge in section 5 of **ROCA** only “confers” the rights of an equitable chargee to the judgment creditor upon registration of the judgment as provided for in section 7 and 8 of **ROCA**. Therefore, since the judgment debt for costs was only registered after taxation of the costs in 2012, the prior sale of the two properties in question in 1997 and 2004 were unaffected by the judgment entered in 1995.

25. If this were correct, the equitable charge in section 5 of **ROCA** would have been in the nature of a floating charge that would only have become a fixed charge upon registration under sections 7 and 8.

26. This argument is contrary to the observations of the Privy Council in the **De Zwarte Band** case. It would also be a difficult argument to justify in view of the valid statutory intent and policy considerations mentioned by Sir Rupert Jackson that were cited at paragraph 23 above.

27. The Appellant also tried to cite three cases to support his case that the section 5 charge was dependent upon registration under sections 7 and 8. However, as I will demonstrate in my brief summary of the cases

cited, the cases only dealt with the effect of the judgment charge when registered; they did not deal with the issue here, namely, the stand alone nature of the section 5 charge.

28. In **Escovalez v Bahadoorsingh**,² a judgment debtor purported to sell a parcel of land in 1994 after the registration of a judgment under section 7 of **ROCA** but before the determination of a summons for sale of the property in question. The judgment creditor later sold the property to a third party in 1995. It was decided that the sale of the property by the judgment debtor in 1994 was subject to the prior registered judgment and that the third party, to whom the judgment creditor had sold the property in 1995, got a title to the land free from the purported 1994 sale by the judgment debtor. A statement by the trial judge that “For the judgment to operate as a charge, it must be registered,” must be read to mean that a third party could claim priority over a “purchaser” of the land once his charge were registered under section 7 of **ROCA** before the sale to that purchaser. The court never considered whether the equitable charge created by the entry of the judgment under section 5 was a stand alone, independent and effective charge.

29. In **Deslauriers v Guardian Asset Management Limited**,³ the relevant facts were that the judgment creditor, Guardian Asset Management Limited had registered a judgment under section 7 of **ROCA** and took out a summons to obtain an order for the sale of the property in question. The issue that arose on this summons for sale was whether there was a discretion to stay the sale of the property pending attempts to redeem a mortgage on another property. On the facts, all the courts up to and including the Privy Council refused the stay. The Privy Council stated that, “**In summary therefore, the effect of sections 5 to 8 of the Remedies of Creditors Act is, upon registration of his judgment, to**

² unreported, CV 2012- 00801

³ [2017] UKPC 34

confer upon the judgment creditor all the rights of an equitable chargee of any land owned by the judgment debtor at the time of the judgment.”⁴ Once again there was no dispute that sections 5 to 8 of **ROCA**, taken together, gave all the powers of an equitable chargee to a judgment creditor but there was never any consideration of the stand alone nature of section 5 of **ROCA** as was the case here.

30. In **Trinidad Home Developers Ltd v IMH Investments Ltd**⁵, the Privy Council considered that **“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”**⁶ was to be regarded as a process of execution for the purposes of a liquidation under the Companies Act of Trinidad and Tobago Chapter 81:01.

Lord Hoffmann set out a detailed expose of the historical differences between the Trinidad legislation and the U.K. legislation, however, the courts were all considering a charge that was validly registered under section 7 of **ROCA** and there was no need to consider whether the section 5 charge was an independent and effective charge.

31. As stated at paragraph 11 above, the Respondents/judgment creditors have, rightly (in our view), not asked for relief against the purchasers of the two properties in question. However, they have pursued a remedy based upon the stand alone charge created by the 1995 judgment which remained effective as against the judgment debtor himself. As section 5 of **ROCA** provides, **“Every judgment or decree to be entered up against any person in the Court shall operate as a charge upon all lands and rents of or to which that person shall at the time of entering up the judgment or decree, or at any time afterwards be seized, possessed or entitled for any estate or interest whatever...”**

⁴ See paragraph 52

⁵ [2003] UKPC 85

⁶ See paragraph 37

and shall be binding as against the person against whom the judgment or decree shall be entered up..." (my emphasis).

By virtue of the existing judgment charge against the Appellant/judgment debtor, the Respondents/judgment creditors could resort to the equitable tracing process against the Appellant/judgment debtor in respect of the proceeds of the sale of the two properties in question.

32. This was enough to decide this matter but in addresses to us an interesting side issue arose with respect to whether an unregistered judgment could affect third parties.

It should be noted that this issue was academic to this matter since the Appellant/judgment debtor was not a third party to the judgment charge but the direct subject of the judgment charge. Nevertheless, it raised interesting issues which I felt ought to be addressed. However, I will attempt to address this issue in a more summary manner.

33. In oral submissions, the Respondents/judgment creditors argued in a general way that a judgment that was registered under section 7 of **ROCA** was notice to and effective against third parties. This distinguished it from an unregistered judgment charge under section 5 of **ROCA**.

34. However, this is not an accurate statement. An unregistered judgment charge under section 5 can affect some third parties.

35. Section 5 of **ROCA** in its entirety provides:

"Every judgment or decree to be entered up against any person in the Court shall operate as a charge upon all lands and rents of or to which that person shall at the time of

entering up the judgment or decree, or at any time afterwards, be seized, possessed or entitled for any estate or interest whatever, whether in possession, reversion, remainder or expectancy, or over which that person shall at the time of entering up the judgment or decree, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom the judgment or decree shall be entered up, and against all persons claiming under him after the judgment or decree, and shall be also binding as against his next of kin, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion or other interest in or out of any of the said lands and rents." (my emphasis)

36. As can be seen from the highlighted parts of section 5 above, a judgment charge shall be binding against not only the judgment debtor himself but also the following third parties:

- (a) all persons claiming under the judgment debtor; and
- (b) next of kin and persons whom the judgment debtor can disinherit.

37. I agree with the Respondents/judgment creditors that persons in category (a) above, namely, all persons claiming under the judgment debtor, refer to those persons whose interests are subservient to or dependent upon the title of the judgment debtor such as equitable lessees, licensees and some covenantees.

38. Category (b) above is more straightforward, namely, next of kin and persons whom a judgment debt may disinherit. They are also third parties with equitable claims that are dependent upon or subservient to the judgment debtor's title.

39. Section 7 of **ROCA** is directed to an entirely different and very specific category of third parties, namely, purchasers, mortgagees, creditors, heirs, executors and administrators.

Except for creditors, these are people who can acquire a legal title in property that would be independent of and/or not subservient to the judgment debtor (such as the purchasers of the properties from the judgment debtor in this case).

40. More importantly, a section 5 judgment charge, whenever created, will not affect those purchasers, mortgagees, creditors, heirs, executors and administrators unless the charge is registered under section 7 of **ROCA**. It is only upon registration of the judgment charge that a judgment creditor will gain priority over those persons listed in section 7 of **ROCA**. Therefore, as was the case in this matter, even if a judgment debtor sells a property after a section 5 judgment charge is created, if that charge is not registered under section 7 of **ROCA**, it will not affect the purchaser of the property. It is only after registration under section 7 that a section 5 judgment charge can affect purchasers, mortgagees, creditors, heirs, executors and administrators. This is a major distinguishing feature between the third parties affected by section 5 of **ROCA** and those third parties to whom section 7 of **ROCA** is addressed.

41. The Appellant/judgment debtor argued that the equitable charge created by section 5 of **ROCA** affects the same third parties as the section 7 equitable charge, and this would make sections 7 and 8 otiose. Therefore, the Appellant/judgment debtor's argument was that the section 5 charge should not be held to be an independent, stand alone charge, but merely a floating charge that only comes into effect upon registration under section 7.

42. As I indicated above, the section 5 charge affects different third parties. Further, with respect to the specific third parties mentioned in section 7 (purchasers, mortgagees, creditors, heir, executors and administrators), these will not be affected by a section 5 charge, whenever created, unless the charge has been registered under section 7 of **ROCA** before the relevant transaction.

The Appellant's argument that the section 5 charge and the section 7 charge covers the same third parties and has the same effect on them is without merit.

CONCLUSION

43. For the reasons stated above, we dismiss this appeal and we will hear the parties on the issue of costs.

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G. Smith

Justice of Appeal

Delivered by Boodoosingh J.A.

44. This appeal concerns the important issue of whether registration of a judgment is a pre-condition for a judgment creditor to obtain remedies under the **Remedies of Creditors Act Chap. 8:09 (ROCA)** regarding the property of a judgment debtor. I am in the unenviable position of having a different view from my learned colleagues on the outcome of this appeal and I accordingly set out my reasons below separately from them.
45. Judgment was given on 31 July 1995 for the judgment creditors (the respondents to this appeal) in proceedings relating to a grant of probate issued to them as the executors of the estate of Mr Nagib Elias. Mr Emile Elias (the appellant) in those earlier proceedings had sought to invalidate the last will and testament of Mr Nagib Elias. The court upheld the validity of the will and ordered that the appellant pay a percentage of the judgment creditors' costs of the action. The appellant appealed and this appeal was dismissed on 2 November 1998. The court ordered the appellant to pay all of the judgment creditors' costs of the failed proceedings in the Court of Appeal and in the High Court.
46. The costs of the proceedings were taxed. On 15 February 2012, the Registrar issued her allocatur in the sum of \$318,229.00 in respect of the appeal; and on 19 April 2012 issued her allocatur in respect of the High Court proceedings in the sum of \$1,260,253.27.
47. On 29 April 2015, the respondents filed a summons in the High Court seeking, among other things, an order for the sale of five properties where the appellant had previously held the beneficial interest to recover the sums due under the judgment debt.

48. The sums owing at the date of the filing of the summons inclusive of interest, were \$915,249.40 in respect of the costs of the Court of Appeal proceedings and \$3,747,807.77 in respect of the High Court proceedings; a total of \$4,663,057.17.

49. By a report on title of 22 February 2016, however, it was learnt that the properties were not vested in the appellant, having been sold. By letter dated 1 March 2016 from attorneys-at-law for the appellant, deeds for two of the properties were produced showing that the appellant had disposed of these properties. This sale was confirmed by further searches and a report.

50. Following those reports on title commissioned by the court, leave was obtained to file an amended summons on 27 April 2016 which deleted the relief seeking an order for the sale of the five properties and to seek, among other things:

"(1) An order pursuant to section 5 of the [ROCA] that the judgment of the Honourable Mr Justice Crane...operates as a charge on the lands of the [Appellant];

(2) An order that the [Appellant] account for and/or pay over the proceeds of sale of the said lands so charged in the sum of \$400,000.00 to the [Respondent]".

51. The trial judge ruled that:

a. "Section 5 has the effect of creating an equitable charge over the lands of a Judgment Debtor"; and

b. "The charge does not miraculously lose its character upon a disposition of the property to be charged ... The Law of Trust

and Obligations secures the rights of the charge holder by enabling him to follow his interests in the proceeds of sale";

c. The fact that there is no specific procedure outlined in the ROCA for realising a chargee's right under section 5 does not prevent the judgment creditor from enforcing that right which is created by the ROCA in proceedings brought pursuant to the ROCA.

d. The respondents correctly proceeded by way of summons issued under the ROCA to recover the fruits of and to enforce the judgment in their favour.

ISSUES

52. The issues raised on this appeal are:

- a. Whether section 5 of the **ROCA** by itself, without reference to sections 7 and 8, creates an equitable charge in favour of a judgment creditor against a judgment debtor as a stand-alone remedy.
- b. Whether registration of the judgment as provided for under section 7 is a necessary requirement for the judgment creditor to realise an interest in the lands of a judgment debtor under **ROCA**.
- c. What is the effect of the section 5 **ROCA** charge upon third parties in relation to sections 7 and 8 of **ROCA**?

LAW

53. Sections 5 to 8 of **ROCA** provide as follows:

5) **Every judgment or decree to be entered up against any person in the Court shall operate as a charge upon all lands and rents of or to which that person shall at the time of entering up the judgment or decree, or at any time afterwards,** be seized, possessed or entitled for any estate or interest whatever, whether in possession, reversion, remainder or expectancy, or over which that person shall at the time of entering up the judgment or decree, or at any time afterwards, have any disposing power which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom the judgment or decree shall be entered up, and against all persons claiming under him after the judgment or decree, and shall be also binding as against his next of kin, and all other persons whom he might without the assent of any other person cut off and debar from any remainder, reversion or other interest in or out of any of the said lands and rents.

6) All decrees and orders of the Court made in any suit, and all rules of the Court made in any action, whereby any sum of money, or any costs, charges or expenses are payable to any person, shall have the effect of judgments in the Court, and the persons to whom any such moneys or costs, charges or expenses are payable shall be deemed judgment creditors within the meaning of this Act, and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such decrees, orders or rules respectively directed to be paid.

7) **No judgment or decree of the Court shall affect any lands as to purchasers, mortgagees or creditors**, or have any preference against heirs, executors or administrators, in the administration of their ancestors', testators' or intestates' estates, any notice to any such purchaser, mortgagee or creditor, or to any such heir, executor or administrator notwithstanding, **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, decree, order or rule has been obtained or made, and the date of the judgment, decree, order or rule, 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, together with the year and the day of the month when the memorandum or minute is so left with him**, in a book in alphabetical order by the name of the person whose estate is intended to be affected by the judgment, decree, order or rule, and the Registrar General shall be entitled for any such entry to the sum of two dollars and fifty cents, and all persons shall be at liberty to search the same book on payment of the sum of one dollar.

8) **Every judgment to be registered in the manner directed by this Act shall entitle the creditor, by virtue of the judgment, decree, order or rule, 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, decree, order or rule 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, or the amount made payable by the decree, order or rule, and interest thereon (*Emphasis supplied*).

SUBMISSIONS

54. The appellant made two main arguments regarding sections 5, 7 and 8 of the **ROCA**:

- i. Section 5 creates a statutory charge which becomes effective on the entry of a judgment.
- ii. Upon registration of the relevant judgment under section 7, however, and only then, the statutory charge created by section 5 is transformed by section 8 into a charge which confers upon the judgment creditor all the rights of an equitable chargee of any land owned by the judgment debtor at the time of the judgment.

55. Citing the case of **Deslauriers and Another v Guardian Asset Management Limited [2017] UKPC 34**, the appellant stressed the importance of registration. At paragraph 52, the court stated:

“52) Section 6 makes similar provision in relation to decrees and orders of the Court, as if they were judgments. Section 7 provides that no judgment or decree of the Court shall affect lands until it has been registered ...

In summary therefore, the effect of sections 5 to 8 of the Remedies of Creditors Act is, **upon registration of his judgment, to confer upon the judgment creditor all the rights of an equitable chargee of any land owned by the judgment debtor at the time of the judgment.**”

56. On the facts, the appellant submitted at the time of the sale of the first property, there was no registered judgment against the appellant. Regarding the second property, the respondent lodged a memorandum or minute with the Registrar General. However, this did not comply with the requirements of section 7 of **ROCA**. Further, section 8 requires that a judgment be registered in the manner required by **ROCA**. If the requirements are not met, the remedies conferred upon the judgment creditor towards the judgment debtor would not be available. The respondents' claim of a purported registration created no equitable charge.

57. Therefore, the appellant submitted that the trial judge was plainly wrong in ruling that section 5 by itself had the effect of creating an equitable charge and that such a charge entitled the respondents to pursue the fruits of the judgment under **ROCA**.

58. The appellant submitted that even if **ROCA** contemplated an equitable remedy, it does not concern itself with enforcement. **ROCA** allows the execution of a judgment charge through well-defined situations only. These are provided under sections 30, 37 and 45.

59. Therefore, **ROCA** provides the means a judgment creditor creates an interest by way of a charge and the means to obtain that interest in a debtor's lands. In the amended summons this was not done by the respondents. The amended summons purported to lay a proprietary right in a traceable substitute for the lots but this could only apply after registration and the properties had been sold before there was valid registration.

60. The appellant also cited **paragraph 24 of Trinidad Home Developers Ltd v IMH Investments Ltd [2003] UKPC 85** in support of their contention (referred to in paragraph 77 below).

61. Further submissions were made by the appellant regarding the effect of the section 5 of **ROCA** charge upon third parties in relation to sections 7 and 8 of **ROCA**.

62. Section 5 allows the judgment creditor to use the remedies given to equitable chargees as against persons acquiring an interest in the judgment debtor's lands after judgment. The judgment creditor's right to do so is determined by registration under section 7.

63. The appellant submitted that the provisions of **ROCA** cannot be construed in a way that renders sections 7 and 8 otiose. Following statutory interpretation principles, words or phrases of an enactment are there for a purpose and cannot be disregarded.

64. In summary, the appellant submitted:

a) Under section 5 a judgment operates as a charge binding on all persons claiming title from the judgment debtor;

b) The section 5 charge operates in theory only and does not affect any lands until it is registered in accordance with section 7;

c) Once a judgment is registered under section 7, and only then, the judgment creditor acquires the rights of an equitable chargee of the judgment debtor's lands enforceable under **ROCA**.

65. The respondents contended that the appellant's submission that section 5 creates a charge after entry of the judgment, supports the respondents' position that the section 5 charge is equitable in nature.

Sections 30 and 35 deal with the process a judgment creditor undertakes to sell the land of the judgment debtor.

66. The respondents cited learning from the case of **Re Charge Card Services Ltd [1987] Ch 150 page 176** which stated:

“Thus the essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt. The availability of equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged.”

67. The remedies under section 30 and 35, support the nature of the charge created under section 5 as an equitable charge. Regarding section 7, the respondents submitted that this relates to the position of third parties such as purchasers, mortgagees and other creditors. It does not affect the position of the judgment debtor. The respondents submitted that the appellant misinterprets section 8. A proper reading of the section is that the judgment creditor is entitled to the remedies upon entry of the judgment and not on registration.

68. **Deslauriers**, according to the respondents, also does not assist the appellant which was also misinterpreted. They cited the last sentence of paragraph 52. This suggested that upon registration, the judgment creditor’s equitable rights is affected against third parties.

69. The respondents further submitted that the regime under **ROCA** can be enforced whereby the equitable charge created under section 5 gives

the judgment creditor a proprietary interest which is continuous and allows the judgment creditor to follow the proceeds of sale.

70. Finally, the respondents contended that the trial judge was correct in the exercise of the court's jurisdiction to grant the equitable remedy sought.

71. Further submissions were made by the respondents regarding the effect of section 5 upon third parties in relation to sections 7 and 8. They submitted that three categories of persons are captured by section 5.

72. The first category is the judgment debtor himself.

73. The second and third categories are persons whose interest derives from the judgment debtor's interest in land and that interest is therefore dependent on the judgment debtor. It does not apply to persons whose interest is paramount or superior to that of the judgment debtor.

74. Under the second category "all persons claiming under him after the judgment or decree" has two elements. The first element, "all persons claiming under him...", refers to lessees, heirs, devisees and licensees. The second element is a temporal limitation "...after the judgment or decree". So, the judgment charge is only binding against lessees, heirs, devisees and licensees, whose interest was created subsequent to the entry of the judgment.

75. Under the third category of persons against whom the judgment charge is binding "his next of kin, and all other persons whom he might without the assent of any other person cut off and debar from any

remainder, reversion or other interest in or out of any of the said lands and rents”, includes:

- a. Persons who may be entitled to inherit the judgment debtor’s land by virtue of being “next of kin”;
- b. All other persons who the judgment debtor might, without the permission of any other person, debar from any remainder, reversion or other interest in the lands.

76. The respondents went on to submit that section 7 by stating that purchasers, mortgagees and creditors are not affected unless the judgment is registered, provides notice of the judgment charge, and is consistent with equity. Section 8 does not deal with the effect of the judgment charge on third parties but emphasises and defines the equitable nature of the interest that is obtained by the judgment creditor on entry of the judgment, that is to say, the judgment creditor is entitled to the same remedies in equity as if the judgment debtor had agreed in writing to charge his lands with the amount of the judgment debt.

ANALYSIS

77. In **Trinidad Home Developers**, Lord Hoffman traced the origin of the **ROCA** legislation and identified the differences with the English position at paragraphs 20 to 24:

20. 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.

21. 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 ..."

22. 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.

23. 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."

24. 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 (*Emphasis supplied*).”

78. At **paragraphs 27, 31 and 39** of the judgment, Lord Hoffman stated the position to be that the judgment and registration creates the charge:

“27. At the time of the 1849 Act, a judgment creditor still had a **judgment charge merely by virtue of the judgment and registration...**

31. 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....**

39. 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 (*Emphasis supplied*).”

79. In the **Deslauriers** case, in addition to paragraph 52 cited above, the court further stated at paragraph 74:

“74. **The effect of sections 5 to 8** of the Remedies of Creditors Act is to give a judgment creditor the rights of an equitable chargee.”

80. In **De Zwarte Band and Others v Kanhai and Others [2019] UKPC 48** it was stated:

“44. The Board has concentrated so far on the English authorities. In England and Wales, of course, a judgment does not have any immediate impact on the debtor’s property. If the creditor wishes to obtain a charging order, they must apply for it. In Trinidad and Tobago the position is different. **As noted in Part 1 above, under ROCA sections 5 to 7, the judgment constitutes a charge upon the debtor’s property as soon as the judgment is registered.**”

81. At paragraphs 55 to 56, in **De Zwarte Band**, the Board noted:

“55. The Board comes, therefore, to the substance of the matter and the issue of law which lies at the heart of this appeal, namely whether:

i) As the appellants argue, **the two judgment charges attach** to the husband’s interest in the property as it was **when** DZB’s and GKB’s judgments dated 30 November 2012 **were registered; or**

ii) As the first respondent argues, those judgment **charges attach** to whatever the husband’s **interest** in the property **will be when the wife’s application** under MPPA section 26 **has been finally disposed of.**

56. ROCA section 5 **looks to the future as well as the present.** It provides that every judgment operates as a charge upon (a) property which the debtor owns **at the time when judgment is**

entered and (b) any property which the debtor subsequently acquires. The section does not, however, say that **any property to which the debtor subsequently ceases to be entitled drops out of the charge.** Section 5 does not say, either expressly or by implication, that the judgment merely constitutes a floating charge upon the debtor's assets for the time being. Indeed, such a security would be of little value, because the debtor could take rapid steps to release all valuable assets from the judgment charge (*Emphasis supplied*)."

82. The appellant referred the court to an old authority, **Ex Parte Joseph Boyle and Charles Boyle [1853] Eng R 366; (1853) 3 De G M & G 515; 43 E.R. 202** at page 208. In the **Trinidad Home Developer's case** reference was made to this judgment. At paragraph 35, Lord Hoffman noted this was a case decided at a time when the English law approximated as closely as it ever did the law of Trinidad and Tobago. Lord Hoffman found this case did not provide guidance on the issue before the court of whether it was necessary to register the execution. This is made clear by paragraph 34 where it was stated:

"34. 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.**"

The charge is automatic in Trinidad and Tobago on the judgment being entered and registered and is part of the process of execution: see also paragraph 37 of **Trinidad Home Developers**. Paragraph 34 recognises that the judgment charge is created by the combined effect of sections

5, 7 and 8. In other words, section 5 cannot be read without the requirements of sections 7 and 8.

83. While **Ex Parte Boyle** did not assist the argument advanced in the **Trinidad Home Developers'** case, there was a discussion in the judgment in that case which I consider to be helpful on whether registration of the judgment is necessary to make the charge valid or operative:

“Now there can be no doubt upon the construction of the Judgments Act 1838 Chapter 110 (1 and 2 Vict), section 13. That statute makes the judgment a charge upon the land of the debtor, and gives the creditor the same remedy as if the debtor had signed a memorandum agreeing to give a charge. It therefore constituted the judgment creditor an equitable mortgagee, and, as I take it, upon the construction of the Act, makes him an equitable mortgagee, **from the time of registering the judgment**; for the 19th section of the same Act says, that no judgment of any of the superior Courts shall by virtue of the Act affect any lands, tenements, or hereditaments, as to purchasers, mortgagees, or creditors, **unless or until a memorandum or minute containing the particulars thereof shall be left** with the senior Master of the Court of Common Pleas. I take it to be clear from this that **the judgment must affect the lands from the time of registration**, because when the 19th section of the statute says that the judgment shall not affect the lands **unless and until a memorandum is entered**, the necessary implication is that it does affect them at the time when the memorandum is entered. The consequence is that **a charge is created at the time of entering the memorandum** with a suspension in point of remedy for a year after the time of entering up the judgment.”

84. The critical time for the operation of the remedy under the statute was the time of the “entering of the memorandum” which is the local equivalent of registering the judgment.

85. The long title to **ROCA** reads as follows:

“An Act for extending the remedies of creditors against the property of their debtors, and for the better protection of purchasers and mortgagees.”

86. The Act was therefore intended to extend the range of remedies available to creditors and at the same time provide for the better protection of purchasers and mortgagees. A statutory remedy was being added to whatever common law or other remedies may have then been available to judgment creditors. The Act became a comprehensive scheme for how a judgment creditor could seek to enforce a judgment against the land of the judgment debtor while allowing for the protection of bona fide purchasers and mortgagees from becoming embroiled in the legal proceedings of the judgment debtor and creditor. It provided for the process to be followed and the criteria to be met.

87. My understanding of sections 5 to 8 is that section 5 is to be read together with sections 6, 7 and 8. Section 5 is not a stand-alone remedy without reference to the registration requirement. To utilise the **ROCA** and pursue the sale of the judgment debtor’s land or tracing after a sale, the judgment must first be registered.

88. What the **De Zwarte Band** case at paragraph 44 explained was the difference between England and Trinidad and Tobago. In England, a party had to make an application for a charging order. The historical

difficulties posed by the different Registries in England were noted. That position differed from Trinidad and Tobago where there was one Registry. Registering a judgment here was therefore uncomplicated. In Trinidad and Tobago, the mere act of registering the judgment gave the additional remedy to the creditor.

89. The discussion at paragraph 56 of **De Zwarte Band** does not, in my respectful view, establish that section 5 is a stand-alone remedy. It must be read with the entirety of the judgment, including paragraph 44 and the issue to be decided in the appeal as stated at paragraph 55. The issue was between the appellant's contention that the judgment charges attached to the husband's property when they were **registered**, or as the respondent contended, "those judgment charges attach to **whatever the husband's interest in the property will be when the wife's application under MPPA section 26 has been finally disposed of**". Paragraph 56, in my view, was answering the issue identified at paragraph 55 and cannot be extended beyond that. It emphasises that once the provisions of the Act are complied with, this provides a remedy against the quick disposal of the property of the debtor. The statement made at paragraph 56 did not, in my view, remove the need for the judgment creditor to register the judgment to obtain a ROCA remedy. It treated the section 5 charge as being at one with the registration of the judgment. Read this way paragraph 56 is consistent with paragraph 44 of the same judgment as well as the dicta from the **Deslauriers** case at para 52 and the **Trinidad Home Developers** case at paragraphs 27, 31, 34 and 39 and with the discussion of Lord Hoffman cited above. It is also consistent with paragraph 19 of **De Zwarte Band** which stated:

"19. The appellants **registered their judgments against the husband pursuant to ROCA section 7. Accordingly, those two**

judgments automatically became charges upon the husband's interest in the property (*Emphasis supplied*)."

90. When the distinction was being made between the English position and the position in Trinidad and Tobago in both **De Zwarte Band** and **Trinidad Home Developers** it was essentially that the charge in England was not automatic as opposed to the charge being automatic in Trinidad and Tobago upon entry of the judgment **and** registration.

91. To hold that section 5 provides the remedies as against the judgment debtor without need for registration ignores section 8 which provides that "**every judgment to be registered** in the manner directed by this Act **shall entitle the creditor... to the same remedies in equity against the lands charged by virtue of this Act...**"

92. A question that also arises is whether the term creditor used in section 7 includes judgment creditor. There is no need to construe "creditor" in section 7 to represent persons other than the judgment creditor as advanced by the respondents. The term creditor includes the judgment creditor, but it is of wider application to other creditors. Section 8 also refers to "creditor" but it is plain that the reference in section 8 is to "judgment creditor". Further, **ROCA** uses the terms "creditor", "judgment creditor" and "execution creditor". This was a recognition that **ROCA** could affect different types of creditors which included one particular type, judgment creditors. Thus creditor must necessarily include judgment creditor. In my respectful view, the use of the term "creditor" in section 7 was not meant to cover persons other than judgment creditors and to exclude judgment creditors. There are later sections where the term creditor is used and it can be gleaned that the implication is a reference to judgment creditor. There is also a later reference to execution creditor for example at section 24.

93. The judgments referred to us from the Privy Council refer to the requirement of registration before the remedies under **ROCA** are triggered. That the facts of those cases showed that registration of the judgment had already taken place in those cases is not sufficient to displace the statement of the law and the text of sections 5 to 8 of **ROCA** that registration is required. The Act imposes a requirement for judgment creditors to register their judgments if they wish to avail themselves of the remedies provided by **ROCA** in respect of lands held at the time of entry of the judgment and after. They must do so promptly if they wish to forestall a judgment debtor disposing of his property. The pronouncement of a judgment imposes a legal obligation on a judgment debtor to satisfy the judgment. It does not necessarily mean the judgment debtor must be otherwise prohibited from engaging in business transactions over property he owns. For example, he may legitimately sell property to pay a judgment debt. It is to be recalled that **ROCA** provides only one method by which a judgment debt can be enforced. There are other avenues to enforce a judgment open to a judgment creditor outside of **ROCA**. However, once the judgment is registered, **ROCA** allows the judgment creditor to proceed in respect of enforcement of the judgment debt by going after the property of the debtor directly. It also gives notice to prospective buyers that the property is encumbered. This is also why re-registration of judgments is important on expiration. The encumbrance is not permanent. It expires after three years. Thus, if judgment creditors desire to avail themselves of the **ROCA** remedies, re-registration becomes necessary. Failure to re-register allows a gap for disposal of the property. Prompt registration of judgments is a necessity if the judgment creditor wants to benefit from the operation of **ROCA**.

94. The respondents were seeking to ground their amended summons for a remedy specifically under **ROCA** in tracing the proceeds of the sale of

the land which had occurred before registration of the judgment. This attempt at enforcement came several years after the judgment was entered. This remedy, in my respectful view, did not arise under **ROCA** concerning the properties already sold before registration. In light of this, I differ from my learned colleagues and I am of the view that the judge ought not to have granted the remedies as framed in the amended summons. Accordingly, I would have set aside the orders of the judge.

.....

R. Boodoosingh
Justice of Appeal