



## **JUDGMENT**

**De Zwarte Band and another (Appellants) v Kanhai  
and another (Respondents) (Trinidad and Tobago)**

**From the Court of Appeal of the Republic of Trinidad  
and Tobago**

**before**

**Lord Wilson  
Lady Black  
Lord Briggs  
Lady Arden  
Sir Rupert Jackson**

**JUDGMENT GIVEN ON**

**23 December 2019**

**Heard on 25 November 2019**

*Appellants*  
Anand Beharrylal QC  
Cathryn Sutcliffe  
Joshua Hitchens

(Instructed by Richard H Sirjoo  
and Co)

*1st Respondent*  
Lynette Seebaran-Suite  
Shelly Perryman-Pollard

(Instructed by Signature Litigation  
LLP)

**Appellants:-**

- (1) De Zwarte Band
- (2) Gebr Kraan Bandenservice BV

**Respondents:-**

- (1) Glenda Kanhai
- [(2) Reuben Kanhai] instructed by Ronald Dowlath

**SIR RUPERT JACKSON:**

1. This judgment is in five parts, namely:

Part 1. Introduction

Part 2. The facts

Part 3. The appeal to the Judicial Committee of the Privy Council

Part 4. The relevant law

Part 5. Analysis and decision

***Part 1. Introduction***

2. This is an appeal by two judgment creditors against a stay imposed by the Trinidad and Tobago Court of Appeal upon an order for the sale of property over which they have charges. The property is the former matrimonial home of the two respondents. The appellants have charges on the husband's interest. The principal issue before the Board is whether the charges attach to the husband's interest as it was in 2012 or as it may become at the end of ancillary relief proceedings. A further issue is whether there are exceptional circumstances such as would justify postponing the sale for a significant period.

3. In this judgment the Board uses the following terms: "DZB" means De Zwarte Band, a company based in the Netherlands, the first appellant. "GKB" means Gebr Kraan Bandenservice BV, a company based in the Netherlands, the second appellant. "The wife" means Mrs Glenda Kanhai, the first respondent. "The husband" means Mr Reuben Kanhai, the second respondent. In summarising the relevant authorities we will refer to a husband as H and a wife as W.

4. Turning now to the relevant Trinidad and Tobago legislation, section 12(1) of the Married Persons Act, Chapter 45:50 provides:

“Subject to this section, in any question between husband and wife as to the title to or possession of property, either party may apply by summons to a judge, and the judge may make such order with respect to the property in dispute as he thinks fit ...”

5. This provision is similar to section 17 of the Married Women’s Property Act 1882 in England and Wales. It enables the court to declare what are the existing interests of each party in the disputed property.

6. Section 26 of the Matrimonial Proceedings and Property Act, Chapter 45:51 (“MPPA”) permits the court, on granting a decree of divorce, to make an order transferring property from one party to the other. This provision is similar to section 24 of the Matrimonial Causes Act 1973 in England and Wales. It enables the court to adjust the interests of each party in the disputed property as part of an overall financial settlement.

7. Sections 5, 7, 8 and 30 of the Remedies of Creditors Act, Chapter 8:09 (“ROCA”) provide:

“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.

...

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 50 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.

...

30. An order for sale shall be obtained by the party entitled thereto on a summons to be heard by a Judge in Chambers (in this Act referred to as a ‘summons for sale’) to be entitled in the action or other proceeding in course of which the order for execution has been made.”

8. In *Trinidad Home Developers Ltd v IMH Investments Ltd* [2003] UKPC 85, para 12 the Judicial Committee of the Privy Council characterised a charge on land arising under ROCA section 5 as a “judgment charge”. It is convenient to use the same term in this judgment.

9. After these introductory remarks, the Board must now turn to the facts.

## ***Part 2. The Facts***

10. For many years the husband and wife, together with their three daughters, lived at Lamp Post 13 Guaico Tamana Road, Sangre Grande, Trinidad and Tobago (“the property”), which they owned as joint tenants, each with a 50% interest. They ran a successful business, known as Kanhai’s Tyre Centre (“KTC”). DZB and GKB were two of their suppliers.

11. Unfortunately, the marriage broke down. The husband moved out of the property. Relations between the husband and the wife became highly acrimonious and did not admit of any amicable resolution.

### **The family proceedings**

12. On 12 November 2010, the husband filed a petition for divorce. He refused to pay any significant maintenance for his wife and children. The husband maintained that after leaving the wife he had transferred KTC to his brothers (who were formerly employees), that he no longer had any stake in the business, and that he was unemployed. The business continued under the name Kanhai’s Tyre Traders (“KTT”). The wife maintained that this was a sham; in reality the husband continued to own and run the business.

13. On 11 March 2011 the wife applied for an Avoidance of Disposition order. On 8 April 2011 the wife applied for a property settlement order pursuant to MPPA section 26. On 25 July 2011 the Family Court granted a decree nisi. The decree absolute followed some time later.

14. The resolution of the financial and property issues between the parties took far longer than the divorce proceedings. It was not until 23 October 2015 that Ramkerrysingh J delivered her judgment in respect of those matters. In summary the judge held as follows:

- i) The husband and wife had equal beneficial interests in the property, which was to be held on trust for sale with power to postpone sale. The wife should continue to occupy the property until the youngest child attained the age of 18 or completed her full-time education. Thereafter the property should be sold and the proceeds divided equally between the husband and the wife.

ii) The husband was the true owner of KTT and the ostensible arrangement with his brothers was a sham. That business should be valued and the husband should pay one half of the value to the wife as a lump sum.

iii) The husband should pay maintenance for the children.

15. The wife regarded that judgment as unworkable on the basis that neither the husband nor his brothers would co-operate in the valuation exercise; furthermore, the husband would never pay a lump sum and there was no way of prising any substantial payment from him. By a notice of appeal dated 9 November 2015, the wife appealed to the Court of Appeal, contending that the proper order was one which transferred the property to her outright and left the husband as sole owner of the business. That appeal was heard on 24 June 2019, but judgment has not yet been delivered.

### **The debt actions and the enforcement proceedings**

16. The Board must now turn to the litigation between the appellants and the respondents (“the debt actions”). On 4 July 2012 DZB issued a claim form in the San Fernando Sub-Registry of the High Court against the husband and the wife claiming TT\$310,945 in respect of tyres delivered to KTC plus TT\$1,470 costs. On the same day GKB issued a claim form in the San Fernando Sub-Registry of the High Court against the husband and the wife claiming TT\$209,385 in respect of tyres delivered to KTC plus TT\$1,470 costs.

17. The husband entered an appearance in both actions, admitting liability. On 30 November 2012 DZB obtained judgment against the husband for TT\$320,074.71 plus interest at the statutory rate of 12% from the date of judgment to the date of payment. On the same day GKB obtained judgment against the husband for TT\$216,703.81 plus interest at the statutory rate of 12% from the date of judgment to the date of payment. Those two judgments have never been satisfied and are central to the present appeal.

18. The appellants (DZB and GKB) obtained judgments in default of appearance against the wife. On 5 December 2013 Seepersad J set aside those judgments because he was not satisfied that the claim forms had been properly served. The appellants made no further attempts to serve the wife. Their proceedings against her in the debt action have therefore lapsed.

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. At this point in the narrative we should explain that under the law of Trinidad and Tobago, where persons hold property as joint tenants,

each has an interest in the land. Trinidad and Tobago does not have the equivalent of England and Wales' 1925 property legislation. Therefore, the complication arising from *Irani Finance Ltd v Singh* [1971] Ch 59 (identified in *First National Securities Ltd v Hegerty* [1985] QB 850, 854D) does not arise.

20. The appellants set about enforcing their charges upon the property, in order to recover the two judgment debts. The husband, who had moved out in 2012, did not resist those steps. He was content that the property should be sold and that the appellants should recover the sums due to them out of his share of the sale proceeds. The wife, however, who was still in occupation and who hoped to acquire sole ownership, was minded to resist enforcement.

21. On 7 February 2013 the appellants, in reliance upon their judgment charges, applied for an order that the property be sold. Seepersad J dealt with those applications on 5 December 2013, the same day that he set aside the default judgment against the wife.

22. Seepersad J refused to order a sale of the property, because the wife's application for financial relief and a property adjustment order under MPPA section 26 was currently before the Family Court. He observed:

“In that circumstance, the ultimate respective interest in the said land of the first and second defendants cannot be determined with any degree of certainty at this stage and only when the application for financial relief is determined can such an assessment be made.”

23. In other words, Seepersad J proceeded on the assumption that the judgment charges attached not to the husband's current half share of the property, but to whatever share of the property the husband might retain after the conclusion of the ancillary relief application in the family proceedings. Accordingly, he reasoned, it would be premature to order a sale of the property before the outcome of the family proceedings was known.

24. On 12 December 2013 the appellants filed notices of appeal against Seepersad J's refusal to order a sale of the property. Their principal ground of appeal was that the judge had erred in finding that their judgment charges could be affected by any subsequent property adjustment order which the Family Court might make.

25. On 27 January 2014 the Court of Appeal allowed the appellants' appeal. The court set aside Seepersad J's order refusing to direct a sale of the property. The court directed that the appellants' application dated 7 February 2013 for an order for sale be reheard together with the wife's ancillary relief proceedings.



26. On 17 March 2015 Ramkerrysingh J (the judge dealing with the ancillary relief proceedings) held a hearing at which the appellants, the husband and the wife were all represented. She enforced the two judgment charges by ordering that the property be sold by auction on the steps of the High Court in Port-of-Spain, after the sale had been advertised over a period of four weeks commencing on 5 June 2015. She ordered that the Registrar of the Supreme Court should have conduct of the sale and that the proceeds should be used to satisfy the two judgment debts.

27. There is no written judgment of 17 March 2015, stating the judge's reasons for ordering the sale. But the judge explained her thinking seven months later in the course of her judgment in the ancillary relief proceedings. At para 30 she said:

“Two of the Judgement Creditors De Zwarte Band and Bandenservice insisted on their Order for Sale. The summonses had already been through the wringer of the Judge at first instance and the Court of Appeal, and there was no reason to stall the hearing any further. Accordingly, donning my civil cap on the 17 March 2015 I ordered the sale of LP13 and directed inter alia, that notice of the sale be advertised for four (4) weeks but not before 5 June 2015.”

28. Neither the husband nor the wife appealed against the two orders for sale. The Registrar of the Supreme Court duly published advertisements of the forthcoming sale in accordance with Ramkerrysingh J's directions. The Registrar fixed Thursday 12 November 2015 as the date for the public auction.

29. As noted earlier, on 23 October 2015 Ramkerrysingh J gave judgment in the ancillary relief proceedings. Whilst maintaining the husband's 50% interest in the property and in the future proceeds of sale, she also directed that the wife should remain in occupation until the eldest child attained 18 or completed full-time education. This order would have worked if (as the judge hoped) the husband had satisfied the judgment debts which were charged upon the property, thus leading to the discharge of the orders for sale.

30. On 9 November 2015, in addition to serving a notice of appeal in the family proceedings (as summarised in para 15 above), the wife issued a “without notice” application seeking a stay of the order for sale of the property pending the determination of that appeal. On 11 November 2015, the day before the auction date, Justice of Appeal Soo Hon, sitting as a single judge of the Court of Appeal, granted that application. She directed that the sale be stayed pending the determination of the wife's appeal in the family proceedings.

31. On 14 July 2016 the two appellants issued applications to the full Court of Appeal to discharge the order made by Justice of Appeal Soo Hon. The full court (comprising Justices of Appeal Mendonca, Jones and Rajkumar) heard and dismissed that application on 19 September 2016.

32. Justice of Appeal Mendonca gave a concise judgment, explaining the court's reasons. The court accepted the wife's submission that the extent of the husband's interest in the property (to which the appellants' judgment charges attached) could not be known until the outcome of the ancillary relief proceedings. Therefore, a sale at that stage would be premature.

33. The appellants were aggrieved by the decision of the Court of Appeal. Accordingly, they appealed to the Judicial Committee of the Privy Council.

### ***Part 3. The Appeal to the Judicial Committee of the Privy Council***

34. By a notice of appeal dated 13 January 2017 the appellants appealed against the Court of Appeal's decision dated 19 September 2016 on the ground that, for the purpose of enforcement under ROCA, the husband's interest must be determined as at the date of registration of the judgment; accordingly the judgment charge attached to the husband's half share of the property and no subsequent property adjustment order made in the family proceedings could diminish the extent of the appellants' charge.

35. The wife, as first respondent, lodged a notice of objection/acknowledgement, indicating that she would oppose the appeal. The husband, as second respondent, lodged a notice of objection/acknowledgement consenting to the grant of permission and consenting to the appeal being allowed. The Judicial Committee granted permission to appeal on 7 December 2017.

36. The appeal was heard on 25 November 2019. Mr Anand Beharrylal QC, leading Miss Cathryn Sutcliffe and Mr Joshua Hitchens, appeared for the appellants. Mrs Lynette Seebaran-Suite, leading Mrs Shelly Perryman-Pollard, appeared by video link for the first respondent, the wife. The second respondent, the husband, did not appear and was not represented. The husband's absence was entirely proper, since he did not oppose the appeal.

37. The appellants' arguments were, in summary, as follows:

- i) The wife could have appealed against the order for sale, but she did not do so.

ii) The Court of Appeal made its order for a stay in the family proceedings, not the debt action. It did not have power to do this.

iii) The wife delayed unduly in applying for a stay, even after Ramkerrysingh J had highlighted the need for her to proceed swiftly in the judgment of 23 October 2015 at para 49.

iv) The wife did not serve her application for a stay upon the appellants.

v) The Court of Appeal did not state the basis on which it was granting a stay.

vi) The judgment charge attached to the husband's interest as it was on the date when the judgment was registered. That cannot be affected by the outcome of the ancillary relief proceedings. Accordingly, the reasons stated by the Court of Appeal for continuing the stay in its judgment dated 19 September 2016 are unsound.

vii) A line of authorities, such as *First National Securities Ltd v Hegerty* [1985] QB 850, establishes that the rights of creditors generally should prevail over the interest of the spouse in occupation.

38. The first respondent's arguments were, in summary, as follows:

i) The Family Court has jurisdiction to vary or extinguish the husband's interest in the property. In her appeal against Ramkerrysingh J's judgment dated 23 October 2015 the wife is asking the Court of Appeal to transfer the property to her outright. Therefore, it would be premature to order a sale of the property before the outcome of that appeal is known.

ii) In the same appeal the wife contends that the business of KTT should be transferred to the husband outright and that he should be liable for all debts of the business, including the sums owed to DZB and GKB. The wife says that those arguments have good prospects of success in the Court of Appeal, although she accepts that there is no realistic chance of actually forcing the husband to pay anything.

iii) The *Hegerty* line of cases recognises that, in exceptional circumstances, the court will refrain from ordering a sale. In the present case, the plight of the wife and children in conjunction with Ramkerrysingh J's order that the wife should continue to occupy the house until the eldest child attains the age of 18 or completes her full-time education constitute exceptional circumstances.

iv) The order for a stay made by Soo Hon JA and continued by the full Court of Appeal was a proper exercise of discretion and the reasons given for that order were satisfactory. The Judicial Committee should not interfere with that exercise of discretion.

v) If the property is sold, the wife will not be able to purchase a comparable home for herself and the children out of her half share of the sale proceeds.

39. In the course of her oral submissions Mrs Seebaran-Suite raised a new point. This was that the husband's interest as joint tenant was not an interest in land and therefore could not be the subject of the two judgment charges. That is not correct, for the reasons summarised in para 19 above. Since this submission was not foreshadowed in writing and was only touched upon briefly at the hearing, the Board will not discuss it at greater length.

40. Before addressing the competing arguments, the Board must first review the relevant law.

#### ***Part 4. The Relevant Law***

41. In *First National Securities Ltd v Hegerty* [1985] QB 850, H and W purchased a house in their joint names with a building society mortgage. H obtained a loan from FN secured by a charge on the house, forging W's signature on the necessary documents. FN subsequently sued to recover the debt, obtained judgment in default and, on an ex parte application, obtained a charging order nisi on the husband's interest in the house. A month later W commenced divorce proceedings and sought a transfer to herself of H's interest in the house. Bingham J, reversing the master's decision, made the charging order absolute. The Court of Appeal affirmed his decision. At pp 867-868 Stephenson LJ, with whom O'Connor LJ agreed, said:

“What the wife's counsel wants in this case, and Bingham J refused, is an order transferring the application to make the charging order absolute to the Family Division, so that a judge of that division can hear it together with her application for ancillary relief under Part II of the Matrimonial Causes Act 1973. The attractions of such a course are obvious. That court would have regard to all the matters specified in section 25, including the husband's financial obligation to pay this judgment debt, as well as the position of the wife and child of the marriage. It could consider making a property adjustment order under section 24 and an order for sale under section 24A of the Matrimonial Causes Act 1973, or under section 30 of the Law of Property Act 1925. And the plaintiffs would appear to have a right to be heard

under section 25(4), or possibly under rule 74(4) of the Matrimonial Causes Rules 1977. The court would have power to discharge or vary any charging order made by another judge under section 3(5) of the Charging Orders Act 1979, and also to postpone the time when it is to become enforceable under section 3(1) of the Act.

I have, however, come to the conclusion (1) that the court should not use its powers under Part II of the Matrimonial Causes Act 1973 to override the claims of a creditor seeking security for a debt by a charging order; (2) that it should not discharge or vary a charging order so as to prefer a wife's claim to such a creditor's; (3) that it can, and often should postpone the enforcement of a charging order until the hearing of any application under section 30 of the Law of Property Act 1925, when the court can decide between the competing claims of wife and creditor."

42. *In re Citro (Domenico) (A Bankrupt) and (Carmine) (A Bankrupt)* [1991] Ch 142 concerned two brothers who were adjudicated bankrupt and whose only assets were half shares of the beneficial interests in their respective matrimonial homes. Hoffmann J declared that in each case the bankrupt and his wife owned the beneficial interest in equal shares. He made orders for possession and sale, postponed in each case until the child of the family attained the age of 16. The Court of Appeal, by a majority, allowed an appeal by the trustee in bankruptcy and substituted a period of postponement not to exceed six months. The court held that the interests of the creditors would usually prevail over the interests of the other spouse. Only in exceptional circumstances, amounting to more than the ordinary consequences of debt and improvidence, could the interests of the other spouse prevail so as to enable an order for sale to be postponed for a substantial period. Nourse LJ, with whom Bingham LJ agreed, discussed at p 157 what constituted exceptional circumstances. The mere fact that the wife and children would be evicted and could not purchase a comparable home with the wife's half share of the beneficial interest did not qualify.

43. In *Lloyds Bank plc v Byrne and Byrne* [1993] 1 FLR 369, H held the matrimonial home as trustee for himself and W in equal shares. He became indebted to the bank, which obtained a default judgment and a charging order against H's interest in the house. The bank applied for and obtained an order for sale pursuant to section 30 of the Law of Property Act 1925. The Court of Appeal dismissed W's appeal against that order. Parker LJ, with whom Taylor LJ and Sir Roualeyn Cumming-Bruce agreed, reviewed a line of authorities culminating in *Citro*. Their broad effect was that the voice of the creditor would prevail over that of the other (non-indebted) spouse, save in exceptional circumstances.

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.

45. The Judicial Committee of the Privy Council traced the origins and history of ROCA in *Trinidad Home Developers Ltd v IMH Investments Ltd* [2003] UKPC 85. In that case IMH obtained summary judgment against THD for "an equivalent in Trinidad and Tobago currency, to the sum of \$1,060,954.45 United States currency" under legislation which preceded ROCA and was in the same terms. IMH registered its judgment as being for US\$1,060,954. THD appealed to the Court of Appeal and IMH cross-appealed against the form of the order. THD went into liquidation before the hearing of the appeal. The Court of Appeal dismissed THD's appeal but allowed IMH's cross-appeal. The court corrected the judgment so that it was for US\$1,060,954. IMH then claimed that it had an equitable charge over THD's lands, thereby gaining priority over the unsecured creditors. The liquidator rejected the claim on a number of grounds, of which only two remained relevant: (i) the judgment was not properly registered because it was registered as being for a sum in US dollars, whereas the judgment at the relevant time was for a sum in the local currency; (ii) the judgment charge had become unenforceable by reason of section 254 of the Companies Ordinance. Section 254 provided that a creditor who had issued, but not completed, execution against the lands of a company which went into liquidation, could not retain the benefit of that security against the liquidator. The Judicial Committee of the Privy Council held that the liquidator of THD had rightly rejected IMH's claim on the second (but not the first) ground.

46. In relation to the second ground Lord Hoffmann, delivering the judgment of the Board, stated the core reasoning as follows at paras 37-39:

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

...

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.”

47. The appellants rely upon this pithy summary of the operation of ROCA in support of their appeal.

48. The Judicial Committee of the Privy Council returned to these matters in *Deslauriers v Guardian Asset Management Ltd* [2017] UKPC 34. A recitation of the facts of that case is unnecessary. The Board held at para 74 that ROCA gave a judgment creditor the rights of an equitable chargee. That gave a prima facie right to sell the property for the purpose of paying the judgment debt, unless the debtors could show that they were able to redeem by making reasonably prompt payment. Mr and Mrs Deslauriers were unable to show that.

49. After this review of the authorities, the Board must now address the issues in the present appeal.

## ***Part 5. Analysis and Decision***

50. It is correct, as Mr Beharrylal says, that the wife did not appeal against the orders for sale. Mrs Seebaran-Suite does not suggest that the wife had in 2015, or has now, any proper grounds for saying that the property should never be sold off to satisfy the judgment charges. She says that the wife will only have such grounds if the court in the family proceedings extinguishes the husband’s interest in the property. Hence her position at the moment is that the order for sale should be stayed, not abrogated.

51. Since that is how the wife puts her case, the Board can understand why she did not appeal against the orders for sale (although with the benefit of hindsight and in the light of the Board’s findings, that would have been a sensible course). The nub of this appeal is the order for a stay, not the orders for sale.

52. Looking at the pleadings and orders, one can see that Mr Beharrylal is right in his observation that as a matter of form the Court of Appeal made and continued the order for a stay in the context of the family proceedings, not the debt proceedings. But the Board is concerned with substance, not form. All the judges who dealt with this matter at first instance and on appeal exercised both civil and family jurisdiction.

Although there was some procedural confusion, it has not caused prejudice to any party. The judgment creditors were represented at the hearing before the full court, when the question of continuing the stay was debated. The Board is not prepared to allow the judgment creditors' appeal on the basis that the order for a stay was made in the wrong proceedings.

53. The Board takes a more serious view of the wife's delay in applying for a stay. She should have got on with that promptly after Ramkerrysingh J ordered the sale in March 2015. Failing that, Ramkerrysingh J's judgment of 23 October 2015 at para 49 should have alerted the wife and her advisers to the need for urgency. As it was, the wife waited until just three days before the date fixed for the auction sale and then made her application without notice to the appellants. This generated wastage of costs and, no doubt, inconvenience to many people. If the wife had made her application promptly and on notice to the appellants, the matter could have been argued fully before the single justice of appeal. If the single justice had granted a stay, she would have done so well before 15 November, thus avoiding most of the inconvenience and wastage of costs which occurred.

54. The grant and continuance of the stay involved an exercise of discretion. The wife's delay was undoubtedly relevant to the Court of Appeal's exercise of discretion. If the court had decided to set aside the stay on the grounds of the wife's delay, that decision would have been unimpeachable. But the Court of Appeal did not take that view. The Board is not prepared to say that the wife's delay was such a grievous matter that the only proper course open to the court was to discharge the stay for that reason. Although the original application was rushed and made without notice, when the matter came back before the court the judgment creditors were represented. The court heard full argument from all parties. Although disapproving of the wife's delay in 2015, the Board cannot interfere with the Court of Appeal's decision on that ground.

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.

57. Turning to the family legislation, the structure is similar to that in England and Wales. Section 12 of the Married Persons Act (like section 17 of the Married Women's Property Act 1882 in England and Wales) enables the court to declare what the existing property interests of H and W are and (if relevant) what those property interests were in the past. Section 26 of the MPPA (like section 24 of the Matrimonial Causes Act 1973 of England and Wales) enables the court to adjust those property interests. Any transfer of property under MPPA section 26 takes effect following the court's order. Section 26 looks to the future; it is not retrospective.

58. The Board therefore concludes, as a matter of statutory construction, that any property adjustment order which the courts may make under MPPA section 26 in proceedings between H and W cannot affect judgment charges created by ROCA section 5 before the conclusion of those proceedings. The reasoning of the Board in *Trinidad Homes Developers Ltd*, quoted in Part 4 above, provides further support for this conclusion.

59. Accordingly, the reasons which the Court of Appeal gave on 19 September 2016 for continuing the stay were based on a misreading of the statutory provisions. The court's decision cannot stand on the basis of those reasons.

60. That, however, is not the end of the matter. The Board must next consider the wife's alternative basis for resisting the appeal.

61. Mrs Seebaran-Suite submits that the plight of the wife and children, coupled with the order made by Ramkerrysingh J on 23 October 2015, constitute exceptional circumstances for continuing the stay. She points out that Ramkerrysingh J ordered that the wife and children should be allowed to remain in occupation until the eldest child attains the age of 18 or completes her full-time education. Any earlier implementation of the orders for sale would frustrate that order made by the judge. The wife's half share of the sale proceeds will not enable her to purchase a comparable home for herself and the children.

62. Although Mrs Seebaran-Suite put her arguments cogently and attractively, the Board cannot accept them. The authorities reviewed in Part 4 above make it clear that the wife's loss of a home for herself and the children cannot constitute exceptional

circumstances. The fact that the wife will only be able to purchase a more modest property with her share of the sale proceeds cannot constitute exceptional circumstances, either: see *In re Citro*. The voice of the judgment creditors must prevail.

63. The order made by Ramkerrysingh J on 23 October 2015 (seven months after the orders for sale) that the wife should be able to remain in occupation until the youngest child attained the age of 18 or completed her full-time education is relied upon by the wife as an additional feature making her circumstances exceptional. The Board accepts that this is an unusual feature. The order of 23 October 2015 was based on the optimistic assumption that the husband would pay off the judgment debts. The judge made one order between husband and wife, and the other orders between husband's judgment creditors and husband/wife. In her October judgment at para 31 the judge candidly acknowledged that she had no previous experience of balancing the interests of civil and matrimonial parties. She went on to say that it would be unfair to put the interests of the creditors above the wife's financial relief. She may at that stage have been referring to the situation which would arise if the husband did not pay off the judgment debts. If at para 31 the judge meant that the wife's interest should prevail over that of the appellants, such an approach would have been incorrect: see the authorities reviewed in Part 4 above. If, on the other hand, the judge was accepting that her previous orders for sale took priority in the event that the husband did not redeem the judgment charges, then her subsequent order permitting the wife to remain in occupation until the youngest child attained 18 or completed full-time education would be unexceptionable. Either way, that order could not constitute exceptional circumstances justifying a stay on the orders for sale.

64. In the result, therefore, this appeal will be allowed. The stay ordered by the Court of Appeal will be set aside. The judge's orders of 17 March 2015 for the sale of the property remains in force, but the precise dates fixed by her for the commencement of the sale process have, of course, long since passed, and will need to be rescheduled by means of further directions, unless the parties are able to agree them. The wife, as first respondent, must pay the costs of this appeal.