[2017] JMCC Comm 16

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**COMMERCIAL DIVISION**

**CLAIM NO. 2013CD00142**

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|---|---|---|
| **BETWEEN** | **JADE OVERSEAS HOLDINGS LIMITED** | **CLAIMANT** |
| **AND** | **PALMYRA PROPERTIES LIIMITED (In Receivership)** | **FIRST DEFENDANT** |
| **AND** | **SANCTUARY SYSTEMS LMITED (In Receivership)** | **SECOND DEFENDANT** |
| **AND** | **KENNETH TOMLINSON** | **THIRD DEFENDANT** |

**IN OPEN COURT**

Caroline Haye and Trudy Ann Dixon Frith instructed by Grant Stewart Phillips and Co for the claimant

Kwame Gordon and Nadine Amos instructed by Samuda & Johnson for the defendants

December 1, 2 and 3, 2014 and June 23, 2017

**COMPANY LAW – WHETHER AGREEMENT TO FUND LITIGATION CHAMPERTOUS – FIXED CHARGE AND FLOATING CHARGE – WHETHER ASSIGNMENT OF PROCEEDS OF SUMMARY JUDGMENT INVALID – WHETHER ASSIGNMENT OF PROCEEDS OUTSIDE OF CHARGE – WHETHER AGREEMENT TO ASSIGN PROCEEDS OF SUMMARY JUDGMENT OUTSIDE OF ORDINARY SCOPE OF BUSINESS**

**SYKES J**

**The problem**

**[1]** Jade Overseas Holdings Limited ('Jade') is trying to extricate from the firm grasp of the receiver, Mr Kenneth Tomlinson, a sum in excess of US$5,000,000.00 which it claims it should receive because Palmyra Properties Limited ('PPL') and Sanctuary Systems Limited ('SSL') were cash strapped and could not fund the litigation in Jamaica, Canada and China which resulted in Jade funding the litigation in exchange for being paid back out of any sums recovered by PPL and SSL from the litigation. The money claimed by Jade was assigned to it under a management agreement executed by PPL and SSL on May 25, 2009.

**[2]** At the time the management agreement was signed, PPL had signed a facility agreement under which it and Palmyra Resort and Spa Limited ('PRSL') borrowed money from a group of lenders. PPL had also issued a debenture to the same group of lenders.

**[3]** At the time the management agreement was signed no receiver was appointed and none was appointed until July 2011.

**[4]** What has brought this matter to court is that there is a dispute over the proceeds of a summary judgment in favour of SSL and PPL. Jade says that money belongs to it by virtue of the assignment. The defendants say that the management agreement was champertous and therefore void. They also said it was issued in breach of the provisions of the loan agreements, that is, the 2007 debenture and the facility agreement. Now to the background to this contest.

**The alleged fraud, the assignment, the summary judgment, the settlement**

**[5]** The allegation is that around March/April 2009, PPL and SSL discovered what they have termed (a) breach of fiduciary duty; (b) breach of contract and (c) fraud perpetrated against PPL and SSL by the then president of PPL, a Mr Dennis Constanzo who was alleged to have conspired with a number of

persons, real (Mr Johnnie Wong) and corporate (Mango Manor Limited) ('MML') to perpetrate the alleged fraud. This led to litigation across the globe – from China to Canada to Jamaica. This judgment is about the litigation in Jamaica.

**[6]** On January 13, 2011, Mangatal J, of the Supreme Court of Jamaica, in **Sanctuary System Limited, Palmyra Properties Limited v Dennis Constanzo, Johnnie Wong, Katherine Constanzo, Mango Manor Limited, Pacific Crown International Company Limited and Huang Ciang-He** Claim No 2009HCV04344, granted summary judgment against Mr Constanzo and MML. Her Ladyship made an order against Mr Constanzo and MML to the effect that 'by way of debt or of monies had and received or breach of fiduciary duty, the sum of US$2,270,000.00 was received by [Mr Constanzo, whilst a fiduciary of [PPS and SSL] and was therefore recoverable by the claimants' (para 24 of particulars of claim).

**[7]** The undisputed evidence is that PPL and SSL could not fund this global litigation form their own resources. This led, it was said in the pleadings, to an agreement between PPL, SSL and Jade in which 'Jade would, among other things, act on their behalf in securing and paying for legal and other services which would be necessary to be pursued in several jurisdictions around the world' (para 22 of w/s of Robert Trotta).

**[8]** At all material times Mr Constanzo was a director of PPL, SSL and MML.

**[9]** Jade claims that the agreement struck with PPL and SSL, called a management agreement, 'constituted a valid equitable assignment of all of the fruits of the litigation ... in Jade's favour, such that Jade had a proprietary right to such fruits as soon as they accrued' (para 18 of particulars of claim).

**How did Mr Constanzo come to be in a position to perpetrate the alleged fraud?**

**[10]** Jade's case is that a luxury condominium and hotel were to be developed on land just outside of Montego Bay, Jamaica. PRSL, SSL and PPL

were the corporate vehicles to bring this vision to reality. Mr Constanzo had direct day to day responsibility for the project and in order to enable him to work effectively he was made a director of PPL and SSL. It is alleged that he and a construction company Shanghai Cosco perpetrated the fraud against SSL and PPL.

**The relationship between Jade and the other companies**

**[11]** According to Mr Kwang Sim who gave evidence for Jade, Jade as incorporated in the British Virgin Islands. He was the person who signed the management agreement on behalf of Jade. Jade has a corporate director, a company called Servco which authorises persons who can execute documents and conduct business for Servco. The shareholder of Jade is a company called Resort Properties Group ('RPG'). The shareholder of Jade is also the shareholder of many other companies in the group of which Jade is a part. Thus Jade has one sole director and one sole shareholder who are both corporate entities. Mr Sim told the court that RPG is owned by a private business trust. The trustee of the trust is a bank called Standard Bank in Jersey.

**[12]** From this the bank is trustee of the trust that owns RPG. RPG owns a number of companies which are part of the RPG group. Jade is part of the group. Mr Sim testified that Jade provides support functions for companies in the group such as fees for legal services.

**[13]** The court need not refer to the rest of the evidence of Mr Sim because from this court's perspective, the case was largely about the interpretation of documents. The evidence of the witnesses was used to give some context to the documents. The court will say that all the witnesses who testified had some degree of inconsistency in their evidence which is to be expected. From this court's perspective the case was not about credibility but about documents and their legal significance.

**[14]** The next witness for Jade was Mr Robert Trotta. He was authorised to act on behalf of PPL, SSL and Jade. One got the impression from Mr Trotta that he was authorised to act on behalf of the companies. He did not actually run any of the companies but received instructions regarding what was to be done and this included execution of documents.

**[15]** Mr Trotta indicated that Jade's core business was providing 'a basket of services for our group of companies.' In the present case he said it financed litigation and in respect of other companies it provides funding support. It also assists in preparing company documents, 'company searches, company formations.' Jade earns its revenue from the companies for which it is providing services.

**[16]** In respect of PPL he said that he received communication from a Ms Natalie Augustin who was at a firm known as FICO located in St Lucia. FICO was a director of PPL. He said that FICO registered companies for other companies. Mr Trotta confirmed that PPL and SSL are part of the RPG group. He said he was the chairman of the RPG. It appears that that was simply a title because he could not say who the other directors were. Mr Trotta said that he was authorised to sign the management agreement on behalf of SSL and PPL but he could not say whether there were board resolutions authorising him to do so.

**How did the receiver come to be in charge of PPL and SSL?**

**[17]** It is common ground that PPL and PRSL borrowed money from a number of banks. PPL and PRSL, on April 23, 2007, gave debentures in favour two the banks, National Commercial Bank of Jamaica ('NCB') and RBC Royal Bank (Jamaica) Limited ('RBC'). SSL and Caribbean Green Power Systems Limited ('CGPSL') took loans from RBC and on August 11, 2009 issued debentures to RBC.

**[18]** On July 23, 2011, the receiver was appointed by the Banks. The receiver took control over the assets of PPL and SSL. No issue has been joined in

this case on whether the receiver's appointment was triggered by any default event under the debentures and so the court will assume that the trigger event occurred and that the receiver was properly appointed.

**The essence of the arguments**

**[19]** Jade submits that the assignment of the proceeds of judgment is not barred by the terms of the 2007 debenture between PPL, PRSL and NCB, RBC. The defendants say that assignment is illegal and therefore unenforceable and in any event it was in breach of the 2007 debenture. Clearly the resolution of this depends on the terms of the relevant provisions of the debenture.

**[20]** Before getting to the discussion of fixed and floating charges the court has to deal with the submission that management agreement is invalid because it breaches the law relating to maintenance and champerty. The court will now address the issue of whether the management agreement is invalidated because of it was champertous.

**Is the May 25, 2009 management agreement void on the ground that it is champertous?**

**[21]** There is the management agreement dated May 25, 2009 said to have been entered between Jade, PPL and SSL. The document in the bundle appears to have been signed by Mr Robert Trotta on behalf of PPL and SSL and by Mr Kwang Sim for Jade. The agreement is in the form of a letter addressed to Jade. It reads:

> *Dear Mr Kwang Sim*
>
> *As ultimate subsidiaries of Resort Properties Group we ask you to assist us by accepting assignment of multiple legal cases on our behalf. We neither have the staff nor capacity to handle this directly within our companies. From our initial discussion with Mischcon de Reya Solicitors believe that it will take multiple years and possibly*

*several million pounds sterling to pursue these cases without certainty of outcome. We believe that multiple other jurisdictions including Hong Kong, Jamaica, Canada and several others may become relevant.*

*The initial cases are being investigated against Mr Dennis Costanzo personally for defrauding our companies as well as Cosco International as well as their agents and numerous individuals associated with Mr Costanzo and Cosco in relation to the Palmyra Resort and Spa Construction. We are certain that there will be many follow on cases as we open discovery against these individuals and companies and related companies.*

*We herewith agree with you the following:*

*(a) That [Jade] hires solicitors on our behalf and in their judgment directs our companies, employees and agents to provide supporting evidence for the conduct of the aforementioned cases as well as any related or follow on cases as may arise from discovery.*

*(b) Jade makes payments to such solicitors on our behalf as well as hire consultants and/or managers as may be necessary to manage such cases.*

*(c) For such services we agree that:*

*(i) Jade apply any financial recovery (awards by courts, arbitrators or private settlements) from such cases won, to any costs it may have incurred on behalf of [SSL] and [PPL] prior to distribution of any excess to the claimants.*

*(ii) Such financial recovery of costs incurred is limited to the legal amounts of funds that Jade incurred and/or advanced for legal and professional fees and services in conducting these cases plus an administrative charge of 5% of all amounts paid by Jade. Such an administrative charge being by Jade from any awards directly.*

*(iii) …*

*(iv) For the avoidance of doubt [SSL] and [PPL] assign any awards from these and related cases to Jade and Jade will provide an accurate accounting of funds advanced, awards received, and fees charged on a quarterly basis to the claimants.*

*(v) Furthermore, should there not be any recoveries or awards within a 10 years period the claimants guarantee the recovery of costs and fees to Jade with its full assets.*

*This agreement is made on the 25th day of May 2009 under the law of the British Virgin Islands and shall remain in effect in effect [repeated twice in original] for an initial period of 10 years.*

**[22]** The letter was then signed by Mr Robert Trotta, twice, once on behalf of PPL and once on behalf of SSL, in his capacity as director of both companies. Mr Sim accepted and agreed on behalf of Jade.

**[23]** Mr Kwame Gordon submitted that the agreement was illegal because it was champertous meaning that it infringed the public policy that lies behind the law relating to maintenance and champerty.

**[24]** To assess this argument one has to be back to first principles. Let us begin with what an assignment is. 'Assignment means the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee' (**Norman v Federal Commissioner of Taxation** (1963) 109 CLR 9, 26, Windeyer J).

**[25]** PPL and SSL from the terms of the management agreement at clause c (iv) have assigned any award it receives from litigation conducted by it. What is assigned is not the right to litigate but the proceeds of the litigation. PPL and SSL have to do the heavy lifting by actually undertaking the litigation. Jade provides the lubricant of money that makes the litigation machine work much smoother and more efficiently. It is not the cause of action that is assigned. The agreement also states that from the sum assigned, Jade is to collect the money it used to fund the litigation along with administrative costs and interest.

**[26]** On the question of whether this agreement is illegal on the ground of it being champertous, the court rejects Mr Gordon's submissions. It has been said that maintenance is the genus and champerty the species. Lord Denning can assist with sufficiently good definitions of both for present purpose. His Lordship stated in **In re Trepca Mines Ltd** [1963] Ch 199, 219 – 220:

> ***Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse****. At one time, the limits of "just cause or excuse" were very narrowly defined. But the law has broadened them very much of late (see Martell v. Consett Iron Co. Ltd. and I hope they will never again be placed in a strait waistcoat. But there is one species of maintenance for which the common law rarely admits of any just cause or excuse, and that is champerty.* ***Champerty is derived from campi partitio (division of the field). It occurs when the person maintaining another stipulates for a share of the proceeds****: see the definitions collected by Scrutton L.J. in Haseldine v. Hosken. The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses. These fears may be exaggerated; but, be that so or not, the law for centuries has declared champerty to be unlawful, and we cannot do otherwise than enforce the law,…* (emphasis added)

**[27]** The House of Lords in **Trendtex Trading Corporation v Credit Suisse** [1982] AC 679 has had something to say on maintenance and champerty. In that case, Trendtex, the first claimant, which was owned by Temo, the second claimant, agreed to sell cement to an English company which was selling the cement to Nigeria. The purchase price and shipping costs were to be paid under a letter of credit issued by the Central Bank of Nigeria ('CBN'). CBN failed to honour the letter of credit. Trendtex sued CBN. CBN won at first instances, lost in the Court of Appeal and was given leave to appeal to the House of Lords. Trendtex did not have the money to continue litigating. Credit Suisse which was a creditor of Trendtex guaranteed the costs and fees incurred by Trendtex. Trendtex purported

to assign its cause of action against CBN by way of security. The written agreement stated that a third party had offered to buy Trendtex's right of action against CBN provided that Trendtex (a) released to Credit Suisse all its residual rights against CBN and declared that it had no further interest in the case against CBN; (b) gave a power of attorney to Credit Suisse's representative to enable the action to be settled and (c) deposited 90% of its share with the representative. Eventually, Credit Suisse's representative in fact assigned Trendtex's cause of action to a third party for over US$1m. The claim against CBN was settled. After this a claim was commenced against Trendtex and Temo alleging that the purported assignment fo Trendtex's cause of against to Credit Suisse and the subsequent assignment to the third party were void. Credit Suisse applied for and was granted a stay under the exclusive jurisdiction clause which had stated that agreement between Credit Suisse and Trendtex would be judged by the Court of Geneva alone and governed by Swiss law. The decision was upheld by the Court of Appeal and the House of Lords.

**[28]** The important point for this present litigation is Lord Wilberforce's observation at page 694. His Lordship stated that had the agreement been between Trendtex and Credit Suisse and even if there were an assignment of Trendtex's residual interest in the case against CBN it would be difficult to argue that the arrangement breached the law of maintenance and champerty. His Lordship also noted that Credit Suisse was in fact owed a large sum of money by Trendtex which Credit Suisse would be unlikely to recover unless Trendtex won the case against CBN. The reason was that Credit Suisse had a genuine and substantial interest in the success of the CBN case. Credit Suisse had taken a security interest in the litigation or its proceeds. His Lordship indicated that the fact that Trendtex might have been able to claim a return of any surplus did not invalidate the agreement. The problem arose because of the proposed sale of the cause action by Credit Suisse to a third party. For Lord Wilberforce, this was a step too far because it raised the possibility of 'trafficking' in litigation which was thought to be contrary to public policy. Lord Wilberforce concluded that the agreement was void under English law. His Lordship approved two cases of **In re Trepca Mines**

**Ltd (No 2)** [1963] Ch 199 and **Laurent v Sale & Co** [1963] 1 WLR 829 in which it was held that the agreements in those cases were champertous. It is therefore important to look at these two cases.

**[29]** In **Trepca Mines**, P's proof in a winding up was rejected by the liquidator. P lacked the funds to appeal. T agreed to fund the litigation on terms that T would bet 25% of the proceeds. The agreement was drafted in French but executed in London at S's office. S, a solicitor, was engaged to prosecute the appeal, and he engaged a barrister. T, as agreed, funded the litigation. P won in the Court of Appeal. P instructed another firm to negotiate with the liquidator. S sought to recover his costs which included many items relating to S's dealings with T the funder. P objected to these items on the ground that S was aware that what he was doing was champertous. The evidence showed that T the funder was to take control of the litigation and 'may from time to time direct in relation to the appeal and all matters connected therewith.' It was this clause that seemed to have been the problem.

**[30]** Lord Denning did not accept the proposition advanced that maintenance and champerty was confined to actions and suit and did not extend to insolvency proceedings. His Lordship held that it extended 'to any contentious proceedings where property is in dispute which becomes the subject of an agreement to share the proceeds.'

**[31]** In **Laurent**, the defendants wrote to K and M informing them that the defendants had instruction to pay them a certain sum of money. K and M purported to assign to the claimant the sums owed by the defendants. The claimant agreed to pay K and M a portion of the money paid by defendants. Things did not go according to plan. The defendants did not pay up. The claimant sued. The defendants took the point that assignments to K and M were champertous. The agreement was held to be champertous. Megaw J reasoned that the claimant was not the original person who would be entitled to sue and as such would need to

justify why he was suing when he in fact was not the person with the cause of action.

**[32]** As can be seen in **Trepca** and **Laurent**, the agreements were such that the litigation was being conducted or might be conducted by someone who has no real interest in the matter other than to 'make a profit' out of the proceedings. There was the risk that what might happen was trading in the right to bring a claim.

**[33]** **Trepca Mines** was decided in 1963. By 1980 Lord Denning was saying in **Trendtex Trading Corporation v Credit Suisse** [1980] QB 629, 653:

> *So far as maintenance itself is concerned (without champerty), the modern public policy is to be found in British Cash and Parcel Conveyors Ltd. v. Lamson Store Service Co. Ltd. [1908] 1 K.B. 1006; Martell v. Consett Iron Co. Ltd. [1955] Ch. 363 and Hill v. Archbold [1968] 1 Q.B. 686 (decided just before the passing of the Act of 1967).* ***It is perfectly legitimate today for one person to support another in bringing or resisting an action - as by paying the costs of it - provided that he has a legitimate and genuine interest in the result of it and the circumstances are such as reasonably to warrant his giving his support****. As I said in Hill v. Archbold, at pp. 694-695:*
>
> *"Much maintenance is considered justifiable today which would in 1914 have been considered obnoxious. Most of the actions in our courts are supported by some association or other, or by the state itself. Comparatively few litigants brings suits, or defend them, at their own expense. Most claims by workmen against their employers are paid for by a trade union. Most defences of motorists are paid for by insurance companies. This is perfectly justifiable and is accepted by everyone as lawful, provided always that the one who supports the litigation, if it fails, pays the costs of the other side."*

**[34]** And of champerty, the Master of the Rolls stated at page 654:

> *So far as champerty is concerned, there is need for some up-dating. Champerty is a species of maintenance: but it is a particularly obnoxious form of it. It exists when the maintainer seeks*

*to make a profit out of another man's action - by taking the proceeds of it, or part of them, for himself. Modern public policy condemns champerty in a lawyer whenever he seeks to recover - not only his proper costs - but also a portion of the damages for himself: or when he conducts a case on the basis that he is to be paid if he wins but not if he loses. As I said in In re Trepca Mines Ltd. (No. 2) [1963] Ch. 199, 219-220:*

*"The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses."*

*This reason is still valid after the Act of 1967. In Wallersteiner v. Moir (No. 2) [1975] Q.B 373, 394, I said:*

*"It was suggested to us that the only reason why 'contingency fees' were not allowed in England was because they offended against the criminal law as to champerty: and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England."*

*They are contrary to modern public policy.*

**[35]** In relation to the impact of champerty on assignments, Lord Denning stated at pages 654 – 655:

*That old rule has not been able to survive into modern times. Just as the old law about maintenance (without champerty) was brought up to date by Martell v. Consett Iron Co. Ltd. [1955] Ch. 363, so the time has come when we should bring the law about assignments up to date.*

*Just as in maintenance, it is sufficient if the maintainer has a legitimate and genuine interest in the subject matter, and the circumstances are such as reasonably to warrant his support of the action or defence: so in an assignment of a chose in action, it is valid if the assignee has a legitimate and genuine interest in the subject matter and the circumstances are such as reasonably to*

*warrant the assignment of it to him. I realise that, like in maintenance and in champerty, this new policy will give rise to questions such as: What is a legitimate and genuine interest? What circumstances are such as reasonably to warrant the assignment? These questions are only to be solved in our English way - by case to case as the judges come to decide them. Thus there will be built up a body of case law to guide practitioners for the future. But meanwhile I will take from the books some instances when the assignment of a chose in action should be held to be valid:*

*…*

*(iv) Assignment of the proceeds*

*Take next a case where the plaintiff, Mrs. Glegg, brought an action against another lady for damages for slander. The plaintiff owed a large sum to her husband: and wanting to borrow more from him - so as to pay her solicitor's costs in the action - she assigned to him "all that the interest, sum of money, or premises to which she is or may become entitled" in the action or by settlement of it. That assignment was held to be good and not against public policy: see Glegg v. Bromley [1912] 3 K.B. 474. But, suppose she had used different words and assigned "all the right of action for damages," would that have made any difference? On principle, I should think not. There is no reason in public policy why the law should permit the assignment of the proceeds of a right of action and refuse to allow the assignment of the right of action itself. In either case the assignee is the one concerned to bring the action to trial or settlement. He promotes the litigation - and not the assignor.*

*But Glegg v. Bromley was an exceptional case. The cause of action was for slander - a personal tort. Such a cause of action is not in general assignable. Hence the need to say that it was only the proceeds which could be assigned.*

**[36]** As can be seen from these extracts the real concern of the law is the possibility of seeing the right to litigate as a commodity to be bought, sold and traded like a commodity. The reason for this concern is that risk of subornation of perjury, manufacturing of false evidence. The doctrine was designed to ‘protect the purity of justice and the interests of vulnerable litigants’ (Smith, Marcus, *The Law of*

*Assignment*, (2007) (OUP) p 321, para 12.69). Mr Smith suggests that when 'considering the matter, all aspect of the transaction in question should be considered.'

**[37]** The House of Lords placed a restraining hand on Lord Denning's modernisation zeal. In **Trendtex**, Lord Denning has said in the Court of Appeal at page 657:

> *The old saying that you cannot assign a "bare right to litigate" is gone. The correct proposition is that you cannot assign a personal right to litigate, that is, which is in its nature personal to you yourself. But you can assign an impersonal right to litigate, that is, which is in its nature, a proprietary right: provided that the circumstances are such as reasonably to warrant it.*

**[38]** Lord Roskill in the House of Lords held at page 703:

> *My Lords, I am afraid that, with respect, I cannot agree with the learned Master of the Rolls [1980] Q.B. 629, 657 when he said in the instant case that "The old saying that you cannot assign a 'bare right to litigate' is gone." I venture to think that that still remains a fundamental principle of our law. But it is today true to say that in English law an assignee who can show that he has a genuine commercial interest in the enforcement of the claim of another and to that extent takes an assignment of that claim to himself is entitled to enforce that assignment unless by the terms of that assignment he falls foul of our law of champerty, which, as has often been said, is a branch of our law of maintenance.*

**[39]** It would appear then that the bare right to litigant is still regarded as offensive. But why? Can it seriously be argued that those who traffic in litigation are inherently more likely to be 'be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses'? These distasteful behaviours have been manifested by those in whom the cause of action rests. The courts have seen claimants seeking to inflate claims (especially in personal injury cases where many of the assessments are uncontested), procure false witnesses and manufacture evidence. Defendants seeking to escape liability

are not beyond such temptations. The very offence of perjury speaks to the fact of witnesses coming to court and lying deliberately. Be that as it may, the law is as it is.

**[40]** In Jamaica contingency fee arrangements are permissible (section 21 of the Legal Profession Act). Jamaica came into the modern world in this area of the law from as far back as 1972 when the Legal Profession Act was passed. England abolished the criminal offence of maintenance and champerty by section 13 (1) (a) of the Criminal Law Act 1967. As torts, the causes of action were abolished by section 14 (1) of the same Act. The doctrines lived on, however. By 1990, England cast aside important reservations about funded litigation and enacted section 58 of the Courts and Legal Services Act that enabled conditional fee arrangements to be made and 'shall not be unenforceable by reason only of its being such' (Smith at page 336, para 12.111). There are still some restriction. The point is that as time has marched on the horror with which funding litigation was perceived has been in retreat and over time the common law has sought to keep pace with the view of the society.

**[41]** In **Trendtex** (Court of Appeal) at page 656 Lord Denning approved of a defamation case in which the proceeds of judgment were assigned. It was held that such an arrangement did not infringe the law of maintenance and champerty. That was the case of **Glegg v Bromley** [1912] 3 KB 474. In **Glegg** Fletcher Moulton said at page 488 – 489:

> *We are all agreed that you cannot assign a cause of action for a personal wrong, and I am not sure that some of the words here might not bear a meaning which would cover such an assignment. But if this be so the only effect would be that those particular words would be inoperative. Their presence would not invalidate the whole deed, because there is nothing in the way of maintenance or champerty in this assignment. It is clearly intended to assign the fruits of the action, so that whatever benefit comes from the action shall go to Mr. Glegg by way of further security, but there is nothing which gives him the right to intervene in the action or which is in any way against public policy. So that I do not trouble myself to*

*consider whether there are any words which may be such that they could not be supported. What I find is that there are words which do clearly assign whatever sum of money comes as the fruit of the action. They therefore purport to assign property defined by the source from which it comes as and when it becomes property, and that being so, I can see no valid legal reason why an assignment of property so defined should not be valid, provided the assignment is such that it is a good assignment in respect of property arising in the future. A sum of money coming into the possession of Mrs. Glegg, (or to which she establishes her right so that it is the same as if it came into her possession,) is property, and I decline to make any difference with regard to this money by reason of the source from which it comes. I am of opinion therefore that we must treat it as property becoming the property of Mrs. Glegg in the future, clearly assigned by the words of the deed, and that being so, seeing that I hold that this deed was for good consideration, I must hold that the proceeds of the action did pass to Mr. Glegg under the assignment, and that his title prevails over that of Mr. Hay.*

**[42]** Parker J in the same case said at page 489 – 490:

*In the first place, I think that according to the true construction of the mortgage in question the subject-matter assigned is money or other property which might thereafter be acquired by means of the pending action for slander. It is not an existing chose in action, but future property identified by reference to an existing chose in action. It is, I think, necessary to bear this distinction in mind, particularly in view of the course taken by the argument of counsel for the respondent. Ordinary choses in action were not assignable at law, but were, generally speaking, assignable in equity whether themselves legal or equitable choses. In the former case equity compelled the assignor to allow his name to be used for their recovery in legal proceedings, in the latter case the assignee could sue in equity in his own name. There was one exception to this rule. Equity on the ground of public policy did not give validity to the assignment of what is in the cases referred to as a bare right of action, and this was so whether the bare right were legal or equitable. I have looked at a good many authorities on that point, and I am satisfied that the real reason why equity did not allow the assignment of a bare right of action, whether legal or equitable, was on the ground that it savoured of or was likely to lead to*

*maintenance. There is no doubt in the cases about the rule, and there is no doubt in the cases with regard to the exception, but difficulties often arose in deciding whether a particular right was within the exception or was within the rule. It is to be observed that an equitable assignee of a chose in action, whether it is legal or equitable, could institute proceedings and maintain proceedings for its recovery. The question was whether the subject-matter of the assignment was, in the view of the Court, property with an incidental remedy for its recovery, or was a bare right to bring an action either at law or in equity. With regard to the assignments of future property, they stand, I think, on a totally different footing. Nothing passes, even in equity, until the property comes into present existence. Only when this happens can the assignment attach and an interest pass. It is clear, therefore, that no question of maintenance can ever arise. Thus, in the present case, as I construe the mortgage, the mortgagor remains at liberty to proceed or not with the slander action as she may think fit. The mortgagee has no right and is under no duty to interfere. The mortgage, therefore, is open to no objection on the ground of maintenance, nor is it open to any objection on the ground of champerty. Champerty, after all, is only a particular form of maintenance. This appears to be reasonably clear from such cases as Sprye v. Porter and Rees v. De Bernardy. Even a solicitor who is conducting an action or suit may take a mortgage on the fruits for the purpose of securing the payment of his proper costs. He may not be able to purchase an interest in such fruits because of the doctrine of champerty. This doctrine is well established by the case of Davis v. Freethy. I can find no trace in the authorities of any distinction having been drawn in this respect between actions based on personal tort and other actions; nor do I see why on principle there should be any such distinction. I am of opinion, therefore, that there is nothing to avoid the mortgage on the ground of public policy. For every equitable assignment, however, there must be consideration. If there be no consideration, there can be no equitable assignment. This appears from Tailby v. The Official Receiver and In re Ellenborough.*

**[43]** These passages were approved by Lord Roskill at page 702:

*My Lords, one of the reasons why equity would not permit the assignment of what became known as a bare cause of action,*

> *whether legal or equitable, was because it savoured of maintenance. If one reads the well known judgment of Parker J. in Glegg v. Bromley [1912] 3 K.B. 474, 490, one can see how the relevant law has developed. Though in general choses in action were assignable, yet causes of action which were essentially personal in their character, such as claims for defamation or personal injury, were incapable of assignment for the reason already given.* ***But even so, no objection was raised to assignments of the proceeds of an action for defamation as in Glegg v. Bromley, for such an assignment would in no way give the assignee the right to intervene in the action and so be contrary to public policy****: see Fletcher Moulton L.J., at pp. 488-489.* (emphasis added)

**[44]** Thus Lord Roskill has accepted the proposition that if the assignment is in respect of future property then the law of maintenance and champerty is not implicated at all. In this particular case, PPL and SSL agreed to assign the proceeds of the litigation and not the cause of action which means that the law of maintenance and champerty does not arise for consideration.

**[45]** First, SSL, PPL and Jade are part of the same group of companies and to that extent Jade has a legitimate interest in the successful conclusion of litigation by SSL and PPL. Second, all three companies have common directors and all three are owned by the same trust. Third, Jade provides various services to other companies within the group of companies. These services include the hiring of professional services as required by the group. Fourth, the allegation is that a serious fraud was uncovered which required litigation in various countries around the world. That type of litigation called for professional services that were beyond the resources of SSL and PPL. Fifth, there is no element of trafficking in litigation. Jade is restricted to recovering just the costs of funding the litigation and it was to provide an accurate accounting of funds advanced. Sixth, there is no evidence that risks of ‘to inflame the damages, to suppress evidence, or even to suborn witnesses’ and trafficking in law suits are present. The court holds that this agreement is valid.

**The 2007 debenture, the Facilities Agreement and the Management Agreement**

**[46]** The court is going to embark upon an examination of the law relating to what has been called fixed and floating charges because the submissions made by Mrs Haye is to the effect that the 2007 debenture did not prevent PPL executing the management agreement in on May 25, 2009. According to Mrs Haye, the 2007 debenture made provision for fixed and floating charges. The judgment and proceeds of judgment were never made the subject of a fixed charge. This means that the only other possible charge would be the floating charge. The floating charge in essence permits the company to have the use of its assets in the ordinary course of business and this management agreement was executed in the ordinary course of business having regard to all the circumstances of the case. The management agreement, it was further submitted, was not an assignment by way of security, that it to say, when the agreement was executed SSL and PPL did not retain any interest in the judgment or proceeds of judgment except in so far as if there was excess left after Jade took the money it advanced to cover the costs then that excess comes back to SSL and PPL.

**[47]** It is common ground that the relevant clauses from the 2007 debenture are clauses 5 (b) and 7. Clause 5 (b) reads:

> *The charge hereby created, shall be a firm fixed charge, on the freehold and leasehold land and buildings, plants, machinery, equipment, furniture, furnishings, fixtures, (including all accessories, spare parts, additions, renewals and replacements to the foregoing from time to time) shares and other securities held legally or beneficially by the borrower issued by other legal entities, and unpaid and uncalled capital of the borrower, both present and future, and a first floating charge on its stock-in-trade, book debts, other accounts receivable and any other property of the borrower, both present and future of whatsoever kind and wheresoever situate.*

**[48]** Clause 7 states:

*The borrower shall be not, without the prior written consent of the lender and NCB, create any mortgage, charge, assignment, sale and lease back or other security interest or encumbrance whatsoever over its undertaking or asset or any parts thereof, except as provided in the Facilities Agreement.*

**[49]** The relevant clause of the Facilities Agreement was clause 12.2 which reads:

*That form the date hereof until all its liabilities under this agreement have been discharged:*

*12.2.1 neither the borrower nor the co-obligor will without the consent of the lender undertake any of the following, as long as any obligations are outstanding under the Syndicated Facilities and this will include*

- *acquisitions and mergers;*
- *sale or disposal of assets except in the ordinary course of business but for the condominiums to be constructed on the hotel lands and which PRSL has communicated to the lender will be sold; and*
- *additional indebtedness except as defined under the following clause.*

*12.2.2 no debt additional to the Syndicated Facilities will be permitted except for*

*12.2.2.1 current liabilities arising in the normal course of trading;*

*12.2.2.2 incremental facilities arranged by the lender; and*

*12.2.2.3 incremental debt on a fully subordinated basis to the Syndicated Facilities with the explicit written consent of the lender obtained at least thirty (30) days prior to the anticipated funding date.*

**[50]** For the 2009 debenture between SSL, CGPSL on the one hand and RBTT bank on the other the relevant clauses are said by Mr Gordon to be clauses 4 and 36. There is a clause 4 which creates the charge but there is no need to

dwell on it since the property in question is no longer the property of Jade and clearly cannot be future property. The submission was that the failure to tell the 2009 debenture holder of the assignment undermines Jade's position in that the debenture holder did not have notice of the management agreement and therefore it cannot defeat or take priority over the legal interest or equitable interest created without notice of the management agreement. From here Mr Gordon went into arguments about delay in enforcing right, laches and the like.

**[51]** The issue to be resolved under the 2007 debenture is whether this management agreement of 2009 has the legal consequence proposed by Jade. Jade says that the 2007 debenture did not cover, by its terms, the summary judgment of Mangatal J, and therefore it was property that PPL could properly make the subject of an equitable assignment and therefore the management agreement is valid and effective. The ultimate conclusion being that the summary judgment amount is not part of the assets of PPL or SSL and therefore the receiver does not have control over it.

**[52]** The court now turns to the question of whether the agreement runs afoul of the 2007 debenture. Jade's primary submission was that clause 5 of the 2007 debenture was the only clause that created the charge. It was also submitted that the two charges created were (a) a fixed charge and (b) a floating charge. Mrs Hay stressed that these two types of charges are quite different. The former attached immediately to the assets named and the latter only attached when there was a crystallising event.

**[53]** In developing her submissions Mrs Haye relied on the cases of **Agnew and another v The Commissioner of Inland Revenue** [2001] 2 AC 710 and **In re Spectrum Plus Ltd (In liquidation)** [2005] 2 AC 680. These two cases this court accepts had laid down definitively the characteristics that distinguish between a fixed charge and a floating charge. The first case is a Privy Council decision delivered by Lord Millett, a leading commercial lawyer and commercial judge of his

generation. The second was a decision of the House of Lords and it approved **Agnew**.

**[54]** It may be useful to say what is meant by a charge. In **In re Cosslet (Contractors Ltd) Ltd** [1998] Ch 495, Millett LJ stated at page 508:

> *It is of the essence of a charge that a particular asset or class of assets is appropriated to the satisfaction of a debt or other obligation of the chargor or a third party, so that the chargee is entitled to look to the asset and its proceeds for the discharge of the liability. This right creates a transmissible interest in the asset. A mere right to retain possession of an asset and to make use of it for a particular purpose does not create such an interest and does not constitute a charge.*

**[55]** Lord Hoffman in **In Re Bank of Credit and Commerce International (No 8)** [1998] AC 214, 226:

> *An equitable charge is a species of charge, which is a proprietary interest granted by way of security. Proprietary interests confer rights in rem which, subject to questions of registration and the equitable doctrine of purchaser for value without notice, will be binding upon third parties and unaffected by the insolvency of the owner of the property charged. A proprietary interest provided by way of security entitles the holder to resort to the property only for the purpose of satisfying some liability due to him (whether from the person providing the security or a third party) and, whatever the form of the transaction, the owner of the property retains an equity of redemption to have the property restored to him when the liability has been discharged. The method by which the holder of the security will resort to the property will ordinarily involve its sale or, more rarely, the extinction of the equity of redemption by foreclosure. A charge is a security interest created without any transfer of title or possession to the beneficiary. An equitable charge can be created by an informal transaction for value (legal charges may require a deed or registration or both) and over any kind of property (equitable as well as legal) but is subject to the doctrine of purchaser for value without notice applicable to all equitable interests.*

**[56]** Thus a charge confers a proprietary right by way of security only on the chargee/lender and he, she or it is entitled to look to that particular asset to satisfy the debt or obligation.

**[57]** Even though we speak of fixed and floating charges, it is important to remember these are not terms of art. They are convenient labels, short hand so to speak, that encapsulates the conclusion that the user of the word has come to about the terms of any security instrument that purports to place a charge on property of the borrower. The words reflect the degree of control the borrower has over the property that is the subject matter of the charge. The problem in this area has arisen not from the labels in and of themselves but a desire on the part of lenders to impose on the labels of fixed and floating charge some kind of immutable and unchangeable interpretation once the lender calls the charge fixed or floating. What they have been seeking to do is to say to the courts, 'You don't need to decide whether the charge is fixed or floating. We have already done the categorisation and what you, judges, need to do is accept your classification.' The courts have consistently rejected this approach. In the end, that is all the case of **Agnew** and **Spectrum** were about.

**[58]** Insolvency focuses the mind. It usually precipitates a struggle for the assets of the failed business. Understandably, lenders want everything to be a fixed charge since by so doing they are less vulnerable to statutory preferred creditors. Floating charges are bad for them. Hence strenuous efforts made to turn floating charges into fixed charges simply by calling the floating fixed. As Lord Walker in **Spectrum** put it, bankers and lenders wanted to 'upgrade their security' by imposing fixed charges on the borrower's circulating capital. The fixed charge usually says that any property subject to the fixed charge cannot be disposed of without the written permission of the lender. The consequence of this was to draw the lender into the day to day running of the business. Increase transaction costs. Increase monitoring costs. Slows down business operations since every time a borrowers wishes to withdraw some money from an account he would need to get the consent of lender. In many instance this had proven cumbersome for the

lenders and practicality resumes its seat and the trader is allowed to resume full management of his business without the micro-managing hand of the lender. When there is an insolvency, as is the case here, the debentures come up for scrutiny and the courts will have to determine the power of the respective parties over the property in dispute and that resolution of that will decide whether the property was subject to fixed or floating charge regardless of the label attached to it. It would seem to this court that lenders are better served by simply setting out the powers that lender or borrower has over the property in question rather than be caught up in the labels. In other words lenders and their advisors need not be trapped by the New Bullas fallacy (named after the famous case of **In re New Bullas Trading Ltd** [1994] 1 BCLC 485 where the debenture labelled the charge a fixed charge in relation to book debts, and so held by the courts in that case even though 'the company was free to collect the book debts and deal with the proceeds in the ordinary course of its business, though it was unable to assign or factor them' **Agnew**, para 4 (Lord Millett)). The **New Bullas** case was rejected and mortally wounded by the Privy Council in **Agnew** (where the reasoning of Nourse LJ was described as 'fundamentally mistaken') and the last rites were administered by the House of Lords in **Spectrum** when it was overruled.

**[59]** The message is clear: once the borrower is free to with draw the property from the security without the permission fo the lender and he is free to use it in the ordinary course of business, it matters not what the charge is called and what degree of restriction there is, the charge is not fixed charge but a floating charge. One of the curious things about the idea that what the parties called the security is conclusive is that such a proposition was considered and rejected by Farwell J in **In re YOrshire Woolcombers Association Limited, Houldsworth v Yorkshire Woolcombers Association Limited** [1903] 2 Ch 284, 289:

> *In my opinion this is, although the parties have chosen to call it a specific security, nothing more nor less than a floating security. But when one comes to consider what "specific security" means, in my opinion it is quite clear that anything which may take effect as a floating security is wholly inconsistent with, and is the antithesis of,*

> *a specific security. A specific security is that which is given on specific property. A charge on all book debts which may now be, or at any time hereafter become charged or assigned, leaving the mortgagor or assignor free to deal with them as he pleases until the mortgagee or assignee intervenes, is not a specific charge, and cannot be. The very essence of a specific charge is that the assignee takes possession, and is the person entitled to receive the book debts at once. So long as he licenses the mortgagor to go on receiving the book debts and carry on the business, it is within the exact definition of a floating security.*

**[60]** So there is it. Remarkably, a century later the same issue resurfaced.

**[61]** In **Agnew**, the company was in receivership and its only assets were proceeds of book debts which were outstanding when the receivers were appointed and which the receivers eventually collected. The company had granted a charge over the uncollected book debts. The issue was whether the charge as framed left the company free to collect the debts and use the proceeds in the ordinary course of business was a fixed or floating charge. The question was not academic because a finding that the charge was a fixed charge meant that the proceeds went the company's bankers as the holder of the charge. If it were a floating charge then the proceeds were payable to employees and the Commissioner of Inland Revenue. The trial judge held that it was fixed charge. The Court of Appeal reversed the trial judge holding that it was a floating charge. The Board affirmed the Court of Appeal's decision.

**[62]** Lord Millett traced the history of fixed and floating charges from the last thirty years of the nineteenth century, when they were recognised, through to the twenty first century. In so doing his Lordship identified the essential characteristics of a floating charge. The fixed charge gives the charge holder an immediate proprietary interest in the property covered by the charge and binds all those into whose hand the property comes who have notice of the charge. The problem however was that the company could not deal with its assets without the charge holder's permission, could not pass good title or even make use of money paid for the goods. In fact, it could not even use the money advanced by the charge holder.

This explains, in part, why the charge in the present case is a charge over 'freehold and leasehold land and buildings, plant, machinery, equipment, furniture, furnishings fixtures … shares and other securities.' These kinds of things are not usually that part of the property that the borrower would trade in the ordinary course of its business, hence the fixed charge on these kinds of assets.

**[63]** Since the borrower was a company and it would obviously be contemplated by the lender and the borrower that the company should be able to conduct its business in the ordinary way and that meant that the company should be able to deal with its stock-in-trade, pay creditors, collect receivables and the like a form of security that enabled the company to do these things while giving the lender additional security was desirable. The solution was the floating charge.

**[64]** The floating charge had at least two characteristics which were usually present but their presence did not mean necessarily that the instrument was floating charge. The two characteristics are (a) a charge over assets present and future and (b) the class of assets would be changing from time to time. There was a third characteristic that was taken as the distinctive feature of the floating charge: until some step was taken by the charge holder to bar dealing with the assets the company was free to carry on its business in the ordinary way in respect of that class of assets that was the subject of the floating charge.

**[65]** What did this look like in practice? In respect of book debts, the issue was whether it was floating or fixed charge because if the former, under Companies Acts, the floating charge was required to be registered failing which it was not effective against third parties who would not have had notice of the floating charge which was an equitable charge. The crucial factor for book debts was whether the company could receive the proceeds on its own account and deal with them without any reference to the charge holder.

**[66]** The language of the parties is not conclusive. The fact that the parties call the charge a fixed charge or a floating charge does not make it one or the other. It is what the lender and borrower are able to do with the asset is

determinative. Lord Millett had to demolish this stronghold because it was thought that under the umbrella of freedom of contract the parties were free to attach any label they wished and the courts were bound to accept that label. His Lordship laid waste to that idea by saying that freedom of contract enables the party to decide who could do what with the asset in. The focus of attention must always be on what the company is or is not able to do with the assets in question.

**[67]** Lord Millett had to destroy another fallacy. It was thought that since floating charges were usually taken over a fluctuating class of assets, the charge granted over such assets must always and can only be a floating charge. His Lordship held that such a view was erroneous. Why? It lost sight of the fact that what made a floating charge what it was, was not the class of assets over which it was granted but rather whether the company was free to use the assets on its own without the consent of the lender. Book debts are usually fluctuating assets and thus are not ideal subjects for a fixed charge but there is nothing conceptually that prevents that (see **In re Keenan Bros Ltd** [1986] BCLC 242 where the instrument was held to be a fixed charge over present and future book debts). It may be inconvenient but it can be done if the appropriate words are used and the parties' conduct is consistent with a fixed charge. As Lord Millett said at paragraph 23:

> *If the chargor is free to deal with the charged assets and so withdraw them from the ambit of the charge without the consent of the chargee, then the charge is a floating charge. But the test can equally well be expressed from the chargee's point of view. If the charged assets are not under its control so that it can prevent their dissipation without its consent, then the charge cannot be a fixed charge.*

**[68]** In **In re Brightlife Ltd** [1987] Ch 200, the parties called the instrument a fixed charge but Hoffman J held it to be a floating charge because the company 'was free to collect its debts and pay the proceeds into its bank account. Once in the account, they would be outside the charge over debts and at the free disposal of the company. In my judgment a right to deal in this way with the charged assets

for its own account is a badge of a floating charge and is inconsistent with a fixed charge' (page 209).

**[69]** Even a restriction on charging or assigning debt was not sufficient by itself to create a fixed charge. Hoffman J held at page 209 (approved by Lord Millett in **Agnew**):

> *It is true that clause 5 (ii) does not allow Brightlife to sell, factor or discount debts without the written consent of Norandex. But a floating charge is consistent with some restriction upon the company's freedom to deal with its assets. For example, floating charges commonly contain a prohibition upon the creation of other charges ranking prior to or pari passu with the floating charge. Such dealings would otherwise be open to a company in the ordinary course of its business. In this debenture, the significant feature is that Brightlife was free to collect its debts and pay the proceeds into its bank account. Once in the account, they would be outside the charge over debts and at the free disposal of the company. In my judgment a right to deal in this way with the charged assets for its own account is a badge of a floating charge and is inconsistent with a fixed charge.*

**[70]** In dealing with the restriction on use even if the money was paid by the borrower into a bank account at the lending bank Hoffman J cited two cases in order to explain why even that is not sufficient to create a fixed charge. His Lordship said at page 210:

> *I was referred to Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd. [1979] 2 Lloyd's Rep. 142 and a recent decision of the Irish Supreme Court in In re Keenan Bros. Ltd. [1986] B.C.L.C. 242, in both of which charges over book debts were held to be fixed and not floating. In the former case, the debenture was in favour of a bank and not only prohibited the company from selling or charging its book debts but required that they be paid into the company's account with that bank. Slade J. decided that as a matter of construction the bank would not have been obliged to allow the company to draw upon the account at a time when it still owed the bank money under the debenture. The company was not free to deal with the debts or their proceeds in the ordinary course of its*

*business. Each debt as it accrued to the company could therefore properly be said to become subject to an equitable fixed charge. On the other hand, Slade J. said, at p. 158:*

*"if I had accepted the premise that [the company] would have had the unrestricted right to deal with the proceeds of any of the relevant book debts paid into its account, so long as that account remained in credit, I would have been inclined to accept the conclusion that the charge on such book debts could be no more than a floating charge."*

*In re Keenan Bros. Ltd. [1986] B.C.L.C. 242 was an even stronger case than Siebe Gorman & Co. Ltd. v. Barclays Bank Ltd. [1979] 2 Lloyd's Rep. 142. Again the debenture was in favour of a bank and this time the company was obliged to pay the proceeds of all debts into a designated account with the bank and "not without the prior consent of the bank in writing make any withdrawals or direct any payment from the said account": see p. 245. Neither case is therefore of assistance to Norandex.*

**[71]** Millett LJ in **Cosslett** held at page 510:

*But with respect the converse does not follow. The chargor's unfettered freedom to deal with the assets in the ordinary course of his business free from the charge is obviously inconsistent with the nature of a fixed charge; but it does not follow that his unfettered freedom to deal with the charged assets is essential to the existence of a floating charge. It plainly is not, for any well drawn floating charge prohibits the chargor from creating further charges having priority to the floating charge; and a prohibition against factoring debts is not sufficient to convert what would otherwise be a floating charge on book debts into a fixed charge: see in In Re Brightlife Ltd. [1987] Ch. 200, 209, per Hoffmann J.*

*The essence of a floating charge is that it is a charge, not on any particular asset, but on a fluctuating body of assets which remain under the management and control of the chargor, and which the chargor has the right to withdraw from the security despite the existence of the charge. The essence of a fixed charge is that the charge is on a particular asset or class of assets which the chargor cannot deal with free from the charge without the consent of the*

*chargee. The question is not whether the chargor has complete freedom to carry on his business as he chooses, but whether the chargee is in control of the charged assets.*

**[72]** In the present case, the distinction is important from Mrs Haye's point of view because she, submits, if the charge is fixed then the proceeds of the summary judgment are not caught and if the charge is floating then the proceeds are still not caught because until crystallisation SSL would have been free to deal with the assets as it saw fit in the ordinary course of business. According to her the prohibition against mortgaging, charging, assigning, sale and lease back applied only to the creation of security interests but not to an out-and-out assignment.

**[73]** Lord Millett was critical of the distinction sought to be made between trying to treat the uncollected book debt as being subject of a fixed charge and the collected debt as being the subject of a floating charge. His Lordship said the correct approach is as stated at paragraph 32:

*In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it. … So here: in construing a debenture to see whether it creates a fixed or a floating charge, the only intention which is relevant is the intention that the company should be free to deal with the charged assets and withdraw them from the security without the consent of the holder of the charge; or, to put the*

*question another way, whether the charged assets were intended to be under the control of the company or of the charge holder.*

**[74]** Lord Millett did not accept the idea that a mere restriction on the part of the company to dispose of the assets to third parties created a fixed charge. To say that it was unnecessary to go further and prohibit the company from collecting and disposing of the proceeds was incorrect. The heart of the matter is stated by Lord Millett at paragraph 36:

> *The judge considered that the critical distinction between a floating charge and a fixed charge lay in the presence or absence of a power on the part of the company to dispose of the charged assets to third parties. It was sufficient to create a fixed charge on book debts that the company should be prohibited from alienating them, whether by assigning, factoring or charging them. It was not necessary to go further and also prohibit the company from collecting them and disposing of the proceeds. Their Lordships cannot accept this. It is contrary to both principle and authority and their Lordships think to commercial sense. It is inconsistent with the actual decisions in the Brightlife case [1987] Ch 200 and the Supercool case [1994] 3 NZLR 300 and contrary to the statements of principle in virtually every case from In re Yorkshire Woolcombers Association Ltd [1903] 2 Ch 284 to In re Cosslett (Contractors) Ltd [1998] Ch 495. It makes no commercial sense because alienation and collection are merely different methods of realising a debt by turning it into money, collection being the natural and ordinary method of doing so. A restriction on disposition which nevertheless allows collection and free use of the proceeds is inconsistent with the fixed nature of the charge; it allows the debt and its proceeds to be withdrawn from the security by the act of the company in collecting it.*

**[75]** This part of Lord Millett's analysis puts paid to the idea advanced by Mr Gordon that any assigning of the proceeds was necessarily a breach of the debenture. The reason is that assets that are not the subject of a fixed charge can obviously be dealt with the company. Even assets that are the subject of floating charge can be dealt with the by company in the ordinary course of business since

the floating charge by definition contemplates that the assets will be ‘circulating’ or ‘fluctuating.’

**[76]** Mrs Haye relies heavily on Lord Millett’s reasoning in paragraphs 43 – 50. Lord Millett held that a debt is a receivable and it is a right to receive payment from the debtor. This right cannot be enjoyed in specie but can only be exploited by either (a) exercising the right or (b) assigning it for value to third parties. His Lordship insisted that any assignment or charge of a receivable without the corresponding right to receipt has not value and is worthless.

**[77]** In order to create a fixed charge over book debts it would be necessary to prevent the company from realising the debt itself either by assignment or collection. It is not necessary for the lender to require the borrower to seek permission to dispose of debts if it appoints ‘the company its agent to collect debt for its account and on its behalf’ (para 48). The reason is that the commercial consequence is the same. The seeking of permission is only a practical manifestation of the fact that the company is not free to deal with debt or its proceeds as it sees fit. So too, the paying into a specific account held by the chargee. However, even if the money is paid into the specific account – called a block account – that is not helpful to the creditor if the account is in fact accessible to the borrower and the borrower is free to use the money as he sees fit.

**[78]** The next case to be examined is **In re Spectrum Plus Ltd (In liquidation)**. In this case seven judges sat to hear the case. It also dealt with the issue of whether the House of Lords only had jurisdiction to overrule prospectively but that need not concern us. The relevant facts are that a company opened an account with bank with which it had an overdraft facility. The company issued a debenture to the bank to secure the indebtedness. Under the terms of the debenture, the company was to pay any proceeds of any book debt into a specified account at the bank. The debenture had these clauses:

> *"A specific charge [of] all book debts and other debts ... now and from time to time due or owing to [Spectrum]" (para 2(v)) and "A*

*floating security [of] its undertaking and all its property assets and rights whatsoever and wheresoever present and/or future including those for the time being charged by way of specific charge pursuant to the foregoing paragraphs if and to the extend that such charges as aforesaid shall fail as specific charges but without prejudice to any such specific charges as shall continue to be effective" (para 2(vii)).*

*With reference to the book debts and other debts hereby specifically charged [Spectrum] shall pay into [Spectrum's] account with the bank all moneys which it may receive in respect of such debts and shall not without the prior consent in writing of the bank sell factor discount or otherwise charge or assign the same in favour of any other person or purport to do so and [Spectrum] shall if called upon to do so by the bank from time to time execute legal assignments of such book debts and other debts to the bank.*

**[79]** The evidence in the case was that the company collected the book debts, paid them in the current account but was free to draw on it as it wished for business purposes. The company went into voluntary liquidation. One of the important issues to decide was whether the charge was fixed or floating.

**[80]** Lord Scott observed that a company can create a fixed charge over all present and future book debts. His Lordship noted that the label the parties have chosen for themselves may be an indication of the rights they intended the parties to have in relation to property but the label is not conclusive (para 80).

**[81]** Lord Scott traced the development of the floating charge and indicated that the key feature that made it attractive was that it granted enabled a charge to be placed over present and future property while permitting the borrower to conduct business with the same assets that were the subject of the floating charge. Those assets were usually things that would change over time such as stock-in-trade, book debts and other receivables. The reason for being able to use these assets (called circulating assets by some) was that they were not ‘fixed’ to the charge in specie, that is to say, the book debt that existed on Monday from X was

so identified that it was that book debt specifically and no other book debt that could be used to satisfy the debt. When X paid the money due, that debt no longer was a debt because it was not paid but since the company was on going other debts from A, B, C and D would arise and would now be the debt that may be part of the floating charge. Similarly, when the company made soap, the soap made would be its stock in trade. It made soap seven days per week. Potentially the soap made on Monday could be used to meet the floating charge but since the specific soap made on Monday was not specifically identified as the only soap and no other soap to meet the debt (or to use the language of this area of law, Monday's batch soap was not fixed to or attached to the loan in such a manner that the only soap that could meet the debt was Monday's soap and no other) such a soap could not be part of the fixed charge but could only be the subject of a floating charge. Hence the assets were described as circulating. Hence the language of Lord Macnaghten in **Illingworth v Houldsworth** [1904] AC 355, 358:

> *I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.*

**[82]** The Lord Chancellor added at page 357:

> *In the first place you have that which in a sense I suppose must be an element in the definition of a floating security, that it is something which is to float, not to be put into immediate operation, but such that the company is to be allowed to carry on its business. It contemplates not only that it should carry with it the book debts which were then existing, but it contemplates also the possibility of those book debts being extinguished by payment to the company, and that other book debts should come in and take the place of those that had disappeared. That, my Lords, seems to me to be an essential characteristic of what is properly called a floating security.*

**[83]** And Buckley LJ in **Evans v Rival Granite Quarries Ltd** [1910] 2 KB 979, 999:

> *A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security.*

**[84]** Lord Scott explained why a charge over book debt was possible. The expression 'book debt' means '*debts in some way connected with the trade of the bankrupt [or company]*' (**Shipley v** Marshall 143 ER 567, 569 (Erle CJ). Williams J in the same case said book debts '*all debts due to the bankrupt [or company] in respect of which entries could be made in the ordinary course of his business*' (page 569). Lord Esher in **The Official Receiver v Tailby** (1886) 18 QBD 25 (CA), 29 – 30, stated that '*I apprehend that the meaning of the term "book debts" is confined to debts arising in a business in which it is the proper and usual course to keep books, and which ought to be entered in such books, though I do not think that the term is confined todebts which are actually entered in the books*.' From these judicial expressions, it is clear that book debts are those that usually arise from the provision of goods and services by the trader or company and not from judgments secured by the trader.

**[85]** Lord Scott in **Spectrum** observed at paragraph 103:

> *As soon as a book debt is incurred and becomes owing to the chargor it constitutes an item of "ascertained and definite" property and would qualify as a possible object of a fixed charge. So a debenture expressed to grant a fixed charge over present and future book debts would be capable of creating a fixed charge over*

*all such debts as and when they accrued due to the chargor company. Slade J so held in Siebe Gorman & Co Ltd v Barclays Bank Ltd [1979] 2 Lloyd's Rep 142 and no one has suggested that in that respect he was wrong.*

**[86]** Then comes the vital paragraph in Lord Scott's exposition. At paragraph 104 his Lordship said:

*Moreover, the debenture could fortify the apparently fixed character of the charge by including a provision entitling the chargee to call for a formal written assignment by the chargor of the debts as they accrued. Such an assignment unaccompanied by written notice to the debtor would constitute the chargee equitable proprietor, and not simply equitable chargee, of the debt. The appearance of a fixed security would be fortified. It is not surprising, therefore, to find debentures containing provisions of this sort. The Siebe Gorman debenture did so. So did the bank's debenture in the present case. But the intention of the parties that the charge over book debts created and fortified in this way would be a fixed charge has to take account also of Romer LJ's third characteristic of a floating charge, namely, that until some further step by way of intervention is taken by the chargee the chargor company can use the assets in question for its normal business purposes and, in using them, remove them from the security. The fact that a valid fixed charge over present and future book debts is capable of being created does not answer the essential question whether a fixed charge over assets that remain at the disposal of the chargor can be created.*

**[87]** This is Lord Scott's second vital paragraph. At paragraph 111 his Lordship stated:

*In my opinion, the essential characteristic of a floating charge, the characteristic that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime the chargor is left free to use the charged asset and to remove it from the security. On this point I am in respectful agreement with Lord Millett. Moreover, recognition that this is the essential characteristic of a floating charge reflects the mischief that the statutory intervention to which I have referred was*

*intended to meet and should ensure that preferential creditors continue to enjoy the priority that section 175 of the 1986 Act and its statutory predecessors intended them to have.*

**[88]** In the present case, it is clear that PPL was not restricted by any language in the 2007 debenture regarding how judgment debts and proceeds of judgments should be treated. This long discourse on fixed and floating charges became necessary in order to show that the 2007 debenture did not even include book debts as part of the fixed charge even though legally it is possible. As to whether it would be workable would be another matter but the fact is book debts were excluded from clause 5 (b) as being part of the fixed charge. The floating charge applied to 'stock-in-trade, book debts, other accounts receivable and any other property of the borrower.' This would be the only part of clause 5 (b) that could conceivably cover the judgment and proceeds of judgment.

**[89]** A judgment debt is not a book debt in the commonly understood sense of the expression book debt. It is true that unpaid for goods and services can lead to a claim but a successful claim is not usually classified as a book debt. Once the good or service is supplied and not paid the debtor and amount of the debt can be clearly and specifically identified and thus that amount of debt can be specifically earmarked and made the subject of a fixed charge.

**[90]** The judgment debt was not specifically identified and appropriated to meet any debt under the 2007 debenture and thus like all other property subject to a floating charge and not a fixed charge, Jade was free to deal with the judgment debt and its proceeds of judgment in its ordinary course of business.

**[91]** Mr Gordon points to clause 7 of the 2007 debenture. It says that Jade is not to create 'any mortgage, charge, assignment, sale and lease back or any other security interest or encumbrance whatsoever' without the written consent of the lender except as permitted by the Facility Agreement. It is clear to this court that clause 7 was covering the creation of security interests and not an out and out disposition of the property that could only be covered by the floating charge. The word 'assignment' as used in clause 7 in this court's view means 'assignment by

way of security' having regard to the other words used. PPL was being prevented from charging the property as security for payment of debt. If there was any doubt the phrase 'or any other security interest or encumbrance whatsoever' puts the matter beyond doubt that assignment was referring to an equitable charge which necessarily a security interest.

**[92]** The management agreement was an equitable assignment of future property in respect of the judgment and proceeds of judgment. An equitable assignment transfers rights of ownership. Consideration is necessary because the common law could not accommodate the idea of a transfer of future property. The common law said you cannot transfer what you do not have. Equity took a different view and hence the ability to transfer future property. An agreement to assign future property if made for valuable consideration was treated as an agreement to assign. Equity does not assist a volunteer and hence the need for consideration. This meant that once the property came into the hand of the assignor equity would force him to perform.

**[93]** The problem in this case for the lenders is that fixed charged and floating charges are necessarily equitable because neither security requires a transfer of title, legal or equitable, to the lender. The borrower remains in possession of the property and legal/equitable title are also in him. The lender as a proprietary interest **by way of security**. It is not an ownership interest in the charged property. The fixed security is better for the lender because specific property has been identified as the property to be used to satisfy the debt in the event of default. No so with the floating security and because no specific property is identified, an inevitable and necessary corollary is that the borrower can dispose of the property to the detriment of the lender. The borrower can pass good title in equity regarding future property. For better or worse, this is where we are in this case. The court makes no value judgment one way or the other. The court is simply declaring what is.

**[94]** Neither clause 5 (b) nor clause 7 of the 2007 debenture contemplated the **Tailby v Official Receiver** (1888) 13 App Cas 523 type of case. Lord MacNaghten's judgment is, respectfully, the most illuminating and the summary of facts are taken from his Lordship's judgment. Izon was a packing-case manufacturer. He became indebted. He came to some arrangement to pay his creditors. At Izon's request Tyrell signed promissory noted for the last instalment to be paid under the arrangement. To ensure that he could recover his money, Tyrell was astute enough to take a bill of sale as counter-security since he was making himself liable on the promissory note for Izon's debt. The bill of sale assigned to Tyrell by way of mortgage the stock in trade and 'all the book debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor.' The bill of sale enabled the mortgagee to take possession of the property but it also said that until default the mortgagor had the use and enjoyment of the mortgaged property. Little wonder then that Lord Macnaghten described this bill of sale as belonging to the class of floating security found commonly in debentures of trading companies. Tyell paid money to Izon's creditors. Izon continued trading. Regrettably, Tyrell died and his executors called in the moneys due to his estate. The executors took possession of the mortgaged property and sold the book debts including one due from Wilson Bros. Another disaster struck, Izon became bankrupt. After Izon's bankruptcy, Wilson Bros paid the purchaser of the book debt. The official receiver sought to recover the money from the purchaser and the Court of Appeal found for the receiver. Lord Macnaghten stated the principle at page 543 with pristine clarity:

> *It has long been settled that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding the subject-matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified.*

**[95]** In other words the official receiver could not recover the payment for the purchase of the book debt. The purchaser had bought the debt but had not yet collected until Wilson Bros paid. It is therefore easy to see by Lord Millett was so strident that it is unwise to separate the debt (which is a right to receive payment from the debtor) from the proceeds of the debt is not sensible commercially. The end result in **Tailby** was that the purchaser of the debt, that is the right to collect the debt, was able to collect because it was an out and out disposition of the debt and not a security interest in the hands of the purchaser. This result was possible because the bill of sale in the terms in which it was drafted, had it been a company, would have been a debenture with a floating charge. The same reasoning applies here. The judgment debt could at best be covered by floating charge part of the debenture. This meant that PPL was free to do what it would do in the ordinary course of business.

**[96]** Lord Walker in **Spectrum** made a very invaluable contribution to the discussion. His Lordship noted the history of the floating charge, the battle between the lender and the borrower with the former wanting a fixed or specific charge and the latter seeking to have as much freedom as possible. Lord Walker identified the fundamental characteristic of the fixed/specific charge and the floating charge. At paragraph 138 his Lordship stated:

> *Under a fixed charge the assets charged as security are permanently appropriated to the payment of the sum charged, in such a way as to give the chargee a proprietary interest in the assets. So long as the charge remains unredeemed, the assets can be released from the charge only with the active concurrence of the chargee….*
>
> And at paragraph 139:
>
> *Under a floating charge, by contrast, the chargee does not have the same power to control the security for its own benefit. The chargee has a proprietary interest, but its interest is in a* fund *of circulating capital, and unless and until the chargee intervenes (on crystallisation of the charge) it is for the trader, and not the bank, to decide how to run its business….*

**[97]** The drafter of clause 5 (b) of the 2007 debenture was undoubtedly aware of this learning and that is why an attempt was made to cast a very wide net in the use of the expression 'a first floating charge on its stock-in-trade, book debts, other accounts receivable and any other property of the borrower, both present and future of whatsoever kind and wheresoever situate.' As wide as this phraseology is the bank can at best have a proprietary interest in a circulating fund and unless and until the bank intervenes the PPL is free, in the ordinary course of business, to decide how to run its business and this includes how to fund litigation.

**[98]** If litigation and its funding are not part of the ordinary course of business of a company then one of the benefits of incorporation would be severely compromised. The company could not effectively sue or fend of claims against it. Surely a company, unless restricted, must have the capacity to decide how it is going to litigate, when it is going to litigate. Had the company not pursued what has been described as the fraudulent Mr Constanzo a strong argument could have been made that the company's directors were derelict in their duty and could be accused of not advancing the best interests of the company. PPL did not sit idly by and allow the alleged fraudster to disappear. It did not have the resources. It secured the resources and in fact brought the litigation to a successful conclusion when the summary judgment was entered. To this court's mind, it is a serious misuse of words to suggest that what happened here was not a company acting in the ordinary course of business.

**[99]** From this court's perspective, pursuing officers of a company alleged to have committed a fraud, unusual though it may be, does not take such action out of the ordinary course of business since in this court's view such actions are to be expected if there are fraudulent company officers. The fact that PPL had not done this before is no bar to the conclusion.

**The 2009 debenture**

**[100]** Mr Gordon submitted that May 25, 2009 agreement was in breach of the 2009 debenture which was executed August 11, 2009. This debenture was

between SSL, CGPSL on the one hand and RBTT Bank Jamaica Ltd. Mr Gordon referred to clause 36 which speak to the borrowers representing that they the 2009 debenture is not contravening or inconsistent with any security instrument affecting the borrowers. The submission that the last clause of management agreement seeming to suggest that if not judgment is recovered in ten years then the costs can be recovered from the assets of SSL and PPL is inconsistent with the 2009 debenture.

**[101]** Mr Gordon referred to the following clauses from the 2009 debenture. They are as follows:

> *4.2 Each of the chargors, as beneficial owner hereby assigns absolutely to the collateral agent as a continuing security for the payment and discharge of the secured indebtness:*
>
> *(a) …*
>
> *(b) the benefit to the charger of all guarantees, letters of support, warranties and representations given or made, by and any rights or remedies to which, the chargor is now or may, in the future be entitled against , all or any suppliers, professional advisers and contractors in relation to any of the charged properties and the manufacturers, suppliers or installers of all plant machinery, fixture, fittings or other items now or from time to time under contract with or under a duty to the chargor including (without limitation) the right to prosecute in the name of the chargor any proceedings against any such person in respect of any act, omission, neglect, default, breach of contract, or breach of duty, whether relating to the design, construction, inspection or supervision of the construction of nay of the charged properties, or to the quality or fitness for use of such plant, machinery, fixtures, fittings and other items or otherwise, and the benefit of all sums recovered in any proceedings against all or any of such persons.*
>
> *4.4 The undertaking all properties, assets and rights of the (sic) each of the chargors charged by or pursuant to this clause 4 referred to herein as the charged properties. All charges created or agreed to be created by this clause are, or in the case of future property shall be, first charges.*

*5.2 The floating charge created by this debenture shall automatically and without notice be converted into fixed charges as respects each chargor:*

*(a) which shall become subject to any charge or to a disposition contrary to the provisions of clause 6 or 9.*

*9 It is a term of this debenture that, and each of the chargors hereby covenants that it will not without the prior consent in writing of the collateral agent, at anytime during the continuance of this security:*

*(a) create or attempt to create or permit to arise or subsist any charge of whatsoever kind (other than charges created by the securities) upon over or affecting any of the charged properties or any part thereof whether ranking in priority to, or pari passu with or (save and except a second charge in favour of National Commercial Bank Jamaica Limited beneficially for itself, NCB Capital Markets Limited and the lenders securing indebtedness arising in connection with the Facility Agreement) subsequent to the charges created by this debenture or any security issued collateral to or in substitution of this debenture; or ..*

*…*

*(h) incur, create, assume or permit to exist any long term indebtedness (whether direct or indirect and whether as principal obligor or surety) except the credit facilities and other indebtedness to the collateral agent arising under or in connection with the loan agreement.*

*18 Not, except with the prior written consent of the collateral agent –*

*(i) sell or otherwise dispose of any part of its assets other than in the ordinary course of business for full consideration or sell or otherwise dispose of any part of its assets if same will or may at its options or at the option of any associate company or any other security party, be re-acquired by or leased to either chargor or any associate company or nay other security party or if possession or use of such asset is*

*retained by either chargor or any associate company or security party;*

**[102]** The court need not spend a great deal of time examining the clauses because by the time this 2009 debenture was issued, the management agreement had already assigned all proprietary rights it had in any future judgment or proceeds of judgment to Jade. That document is valid and effective. The management agreement is not affected by the 2009 debenture even though the summary judgment was not granted until 2011. Such is the power of the ability to enter into an agreement now to assign future property.

**[103]** Mr Gordon submitted on the failure to register the agreement and laches. The submission do not affect any of the conclusions made already.

**The ordinary course of business**

**[104]** The 2007 debenture makes does not use the expression 'ordinary course of business' whereas the 2009 debenture does make such a reference. The facilities agreement uses the expression 'ordinary course of business.' The 2009 debenture and the facilities agreement permit the borrower to deal with its assets in the ordinary course of business. The fact that the 2007 debenture does not use this expression does not point to the conclusion that PPL could not use its property in the ordinary course of business. This must necessarily be so when dealing with property that is subject to the floating charge. The floating charge permits the borrower to dispose of subject property in the ordinary course of business. If it could not, how would the business generate the revenue necessary to repay the lender? Thus the absence of the expression 'ordinary course of business' from the 2007 debenture is no bar to PPL disposing of property subject to the floating charge in the ordinary course of business

**[105]** The court relied on the approach of Etherton J in **Ashborder BV v Green Gas Power Ltd** [2005] BCC 634, case very similar to this one where one of the issues, in the context of a debenture and facilities agreement, was whether the property in question was dealt with in the ordinary course of business. His Lordship

was anxious not to make any comprehensive pronouncement on the meaning of the phrase ‘in the ordinary course of business’ but nonetheless summarised what he thought were important considerations to be bourne in mind when deciding that question. This court takes the same approach. Paragraph 227 is helpful. It states:

> *227 With the same caution, and for the same reasons, as were mentioned by the Privy Council in Countrywide Banking , I do not propose to attempt any particular formulation of the test for determining whether a transaction falls within the ordinary course of a company's business for the purpose of a floating charge, or to make any comprehensive statement of the criteria for determining when a transaction is to be held to have taken place in the ordinary course of business for that purpose. On the other hand, it may be helpful to summarise briefly the following conclusions that I have reached from the decided cases that I have reviewed: (1) The question whether a particular transaction is within the ordinary course of a company's business in the context of a floating charge is a mixed question of fact and law; (2) it is convenient to approach the matter in a two-stage process; (3) first, to ascertain, as a matter of fact, whether an objective observer, with knowledge of the company, its memorandum of association and its business, would view the transaction as having taken place in the ordinary course of its business; and, if so (4) secondly, to consider whether, on the proper interpretation of the document creating the floating charge, applying standard techniques of interpretation, the parties nonetheless did not intend that the transaction should be regarded as being in the ordinary course of the company's business for the purpose of the charge; (5) subject to any such special considerations resulting from the proper interpretation of the charge document, there is no reason why an unprecedented or exceptional transaction cannot, in appropriate circumstances, be regarded as in the ordinary course of the company's business; (6) subject to any such special considerations, the mere fact that a transaction would, in a liquidation, be liable to be avoided as a fraudulent or otherwise wrongful preference of one creditor over others, does not, of itself, necessarily preclude the transaction from being in the ordinary course of the company's business; (7) nor does the mere fact that a transaction was made in breach of fiduciary duty by one or more directors of the company; (8) such matters in (6) and (7) may,*

> *however, where appropriate and in all the circumstances, be among the factors leading to the conclusion that the transaction was not in the ordinary course of the company's business;(9) transactions which are intended to bring to an end, or have the effect of bringing to an end, the company's business are not transactions in the ordinary course of its business.*

**[106]** Before this summary was stated Etherton J was confronted with what he described as two extreme positions. The contentions were as follows: (a) the transaction in question could only be in the ordinary course of business 'if it was part of the common flow of business done by the company, forming part of the ordinary course of business which it carried on, calling for no remark and arising out of no special or particular situation' and (b) once the transaction was permitted by the memorandum of association, was not fraudulent, not calculated to bring the business to an end then the transaction was in the ordinary course of business. Etherton J reviewed the authorities cited to him.

**[107]** In respect of proposition (a) Etherton J held that such an approach was too narrow because it would not embrace a transaction for the preservation and continuation of the company's business merely because it was not a transaction that had ever been carried out before (see para 203). Regarding proposition (b) his Lordship said that it gave too little weight to the adjective 'ordinary.' This was the foundation for principle 5 in the passage cited from Etherton J. This court emphasises principle 5 because an allegedly fraudulent company officer surely cannot be considered as run of the mill as selling goods and services but neither should be thought to be so unusual or so odd pursuing such a person is to be regarded as outside the ordinary course of business. This court agrees with Etherton J when his Lordship said at paragraph 202:

> *The proper starting point is that the words in the expression "ordinary course of its … business" are ordinary words of the English language which must be given the meaning which ordinary business people in the position of the parties to the facility agreement and the debentures would be expected to give them*

*against the factual and commercial background in which those documents were made.*

**[108]** Would an ordinary business person think that suing an allegedly dishonest and fraudulent officer of the company, even if unusual, would be within the ordinary course of business of the company? The answer is obviously yes. The arguments advanced by Mr Gordon to the contrary cannot be countenanced. Would anyone contend that suing a person who had not paid the company for goods and services provided was outside the ordinary course of business? Would any reasonable person rationally contend suing a negligent person for damaging the company's property was outside the ordinary course of business? What is the difference between suing a non-paying customer, a negligent person on the one hand which would make such actions within the ordinary course of business and suing an allegedly fraudulent company officer that would make the latter outside of the ordinary course of business? The court is not able to identify any.

**[109]** The type of litigation in this case was unusual in the sense that there is no evidence that PPL was in the business of suing its officers for fraud. Happily, there is no evidence that fraudsters were running amok in PPL and so the litigation it undertook was not extraordinarily unusual but in this court's view was well within the ordinary course of business of a company. It would be quite a remarkable thing if a company cannot sue its allegedly fraudulent officers for fear that such a claim would not be considered as part of the ordinary course of business where it has issued a debenture. It would be equally remarkable of the company could not arrange to fund the litigation if it found that it did not have the financial resources to do so. The suggestion from Mr Gordon that the company ought perhaps to seek funding from some other sources is not accepted.

**[110]** Mr Gordon sought to say that the assignment of the proceeds was not part of the ordinary course of business of SSL because the business in this case was the building of condominiums and what happened here was not sale of condominiums and therefore outside of the ordinary course of business. Respectfully, that misses the point. SSL is involved in the building of

condominiums and related activities. The ordinary course of its business includes seeing to it that its officers act honestly and where they don't the ordinary course of business requires them to see that that is corrected. If litigation is required then that litigation is in the ordinary course of business.

**[111]** Mr Gordon also said that no consideration came from Jade. That is not correct. Jade lent money to PPL to pursue the alleged malefactors in exchange for the repayment on a future date if and when moneys were recovered. The assignment was the means by which that agreement was effected.

**[112]** Mr Gordon said that PPL assigned the right to sue. That is not correct. They assigned the proceeds of any awards. The management agreement went out of its way to assign the judgment itself or its proceeds. The drafter of the letter was obviously aware of **Trendtex** and the observation that the assignment of the bare right to sue would be champertous. PPL was in charge of the litigation process. Jade simply lent the money.

**[113]** Mrs Haye is submitting that by parity of reasoning, the summary judgment proceeds were at the free disposal of PPL and were not the subject of any fixed charge and in any event since it was an assignment of future property, the assignee had already acquired the equitable proprietary interest in the proceeds from the time the summary judgment was given. The basis for this is that as Lord Millett said it is unrealistic to separate the debt from the proceeds; it is unrealistic to separate the right to collect on the summary judgment from the proceeds of the summary judgment. It is the proceeds of the judgment that gives the right to collect any value. The court agrees with these submissions.

**[114]** Mr Gordon said that to the extent that PPL under the management agreement agreed to charge the same assets that were the subject of the 2007 by guaranteeing the recovery of costs and fees to Jade with the same assets it would be contrary to the terms of the 2007 debenture. The court need not decide that question because the main issue before the court is the fate of the summary judgment. The court now turns to the 2009 debenture.

**The settlement agreement**

**[115]** The receiver, in 2013, settled Claim No 2009HCV04344. Having regard to the reasons already given, any disposition of any part of the proceeds of judgment of the settle claim to anyone is subject to a trust in favour of Jade because Jade acquired a proprietary interest in the proceeds by virtue of the management agreement executed May 25, 2009.

**Delay**

**[116]** Although this matter was completed in 2014 the final portion of the transcript containing the evidence was not available until February 2014. When it became available the court was on leave. Other judgments were prepared and delivered during the period of leave. The delay is regretted.

**Conclusion**

**[117]** If follows from what the court has said that the proceeds of the summary judgment cannot be withheld from Jade. The assignment was good and effective to transfer any judgment and its proceeds to Jade from the time it was executed and took effect once the summary judgment was granted.

**[118]** Anyone, including SSL, PPL, the receiver and any person who received proceeds of the settlement arrived the terms of which included the distribution of proceeds of the summary judgment hold those monies on constructive trust for Jade.

**[119]** The settlement agreement entered into between the receiver and the defendants in the summary judgment case cannot override the management agreement made in May 2009.

**[120]** The declarations sought by Jade are granted. Costs to the claimant to be agreed or taxed. Certificate for two counsel granted.