[2017] JMCA App 37

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 65/2017

APPLICATION NO 119/2017

BETWEEN	**PALMYRA PROPERTIES LIMITED (IN RECEIVERSHIP)**	**1ST APPLICANT**
AND	**SANCTUARY SYSTEMS LIMITED (IN RECEIVERSHIP)**	**2ND APPLICANT**
AND	**KENNETH TOMLINSON**	**3RD APPLICANT**
AND	**JADE OVERSEAS HOLDINGS LIMITED**	**RESPONDENT**

Kwame Gordon instructed by Samuda and Johnson for the applicants

Kevin Williams and David Ellis instructed by Grant Stewart Phillips & Co for the respondent

13, 26 July and 3 October 2017

IN CHAMBERS

SINCLAIR-HAYNES JA

[1] Palmyra Properties Limited (PPL), Sanctuary Systems Limited (SSL) and Kenneth Tomlinson (the Receiver) have applied for a stay of execution of Sykes J's decision granting a number of declarations sought by Jade Overseas Holdings Limited (Jade) pending their appeal of the said judgment. The application is however forcefully resisted by Jade.

The background

[2] A loan was granted to PPL and SSL. That loan was secured by debenture dated 23 April 2007 (2007 Debenture) by means of which a consortium of debenture holders imposed fixed and floating charges over SSL and PPL's assets. Clause 5(a) of the 2007 Debenture created a charge as continuing security "over all the undertakings and assets of [PPL and SSL], both present and future". A Facility Agreement was entered into at the same time. A further loan was obtained and a Debenture (the 2009 Debenture) was created over the assets of SSL on 11 August 2009 in favour of one of the debenture holders. Both debentures were registered with the Companies Office of Jamaica.

[3] SSL and PPL subsequently failed to honour their obligations to the debenture holders and were placed in receivership on 23 July 2011. On 30 April 2013, the 3rd applicant was appointed receiver (the receiver) of SSL and PPL.

[4] Allegations of fraud were levelled against a former director of PPL, SSL and other persons. It was alleged that they (the former director and others) had defrauded SSL and PPL. Summary judgment was consequently obtained against the directors on 13 January 2011 in the sum of US$2,270,000.00 in favour of SSL and PPL.

[5] A settlement agreement was entered by the parties whereby the said judgment sum was to be divided among SSL, PPL and the receiver. By order of the court, the said sum is held in a joint account the names of the parties (PPL, SSL and the receiver).

[6] At the heart of this application is the ownership of that summary judgment which the learned judge declared to belong to Jade by virtue of an assignment to Jade by SSL and PPL.

Jade's claim

[7] On 2 September 2013, Jade instituted proceedings against PPL and SSL in which it sought a number of declarations including a declaration that a Management Agreement which PPL and SSL entered into on 25 May 2009 with Jade, effected a valid equitable assignment to Jade.

[8] According to Jade, the Management Agreement was in relation to the funding of litigation. The agreement was that Jade would provide the funds to enable PPL and SSL to pursue the claims against the former director and the others. Under that agreement, PPL and SSL assigned the proceeds of the judgment to Jade.

[9] Jade contended that the Management Agreement also provided that even if there were no recoveries or awards within a 10 year period, PPL and SSL guaranteed that Jade would recover its costs and fees with its full assets. Jade sought an accounting and inquiries and payment of monies due to it. It also claimed damages for breach of trust and conversion.

The defence

[10] For their part, PPL, SSL and the receiver averred that:

> (i) Funds received by the Receiver under the Settlement Agreement are for the Debenture Holders benefit.

(ii) The Management Agreement triggered an event of automatic crystallization because it created a charge over all of the assets which were already the subject of fixed and floating charges under the 2007 Debenture.

(iii) The debenture holders' consent was not sought before the Management Agreement was executed. In fact the Receiver was only made aware of the said agreement almost two years after the commencement of the receivership of PPL and SSL.

Sykes J's decision

[11] Sykes J acceded to Jade's request. In granting the declarations which Jade sought, the learned judge concluded *inter alia* that:

> "[116] **If [sic] 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**.
>
> [117] Anyone, including SSL, PPL, the receiver and any person who received proceeds of the settlement arrived by the terms of which included the distribution of proceeds of the summary judgment hold those monies on constructive trust for Jade.
>
> [118] 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." (Emphasis added)

[12] PPL, SSL and the receiver, being displeased with the learned judge's decision, on 26 June 2017 filed notice of appeal and an application for a stay of execution pending the determination of the appeal.

[13] The application for a stay of execution was heard by Sykes J who refused the stay and ordered the applicants to pay the costs of the application.

The grounds of appeal

[14] The following are the grounds of appeal:

> "a. The learned trial judge erred in law in finding that the management agreement was valid in the circumstances where the management agreement created a charge in conflict with the provisions of a prior Debenture;
>
> b. The learned trial judge erred in law and failed to properly construe the management agreement and in so doing found that it was no more than an agreement for litigation funding when in fact the management agreement created a charge over the assets of the 1st and 2nd Appellants;
>
> c. The learned trial judge erred in law in finding that the management agreement was within the ordinary course of business of the 1st and/ or 2nd Appellant in circumstances where the management agreement contained provisions which were incongruous with the ordinary course of business;
>
> d. The learned trial judge failed to apply the rules of equity which would have barred the Respondent from the equitable relief sought.
>
> e. The learned trial judge erred in law in finding that the failure to seek the written consent of the debenture holders to enter into the management agreement was not a breach of the Debenture of 2007 and the failure to disclose this management agreement to the debenture holders was not a breach of the Debenture of 2009."

Is Sykes J's judgment amenable to a stay?

The respondent's position

[15] Mr Kevin Williams, on Jade's behalf, opposes the applicants' application for a stay. Counsel posits that there was no order directing the applicants to make any

payment to Jade. He contends that Sykes J's judgment in the circumstances was declaratory and therefore cannot be stayed.

[16] Counsel referred the court to section 10 of the Judicature (Appellate Jurisdiction) Act and rule 2.14 of the Court of Appeal Rules 2002. He also directed the court's attention to the cases, **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams** [2010] JMCA App 27, **Dennis Atkinson v Development Bank of Jamaica Limited** [2015] JMCA App 40 and **Harold Miller v Ocean Breeze Hotel Limited and Carlene Miller** [2016] JMCA App 1 in support of his contention that the Sykes J order was declaratory hence this court has no power to grant a stay.

The applicant's position

[17] Mr Kwame Gordon, on the applicants' behalf, acknowledged that stays are not granted in respect of declaratory judgments; he too referred the court to the case of **Bowen v Robinson & Williams**. Counsel however argued that although the learned judge did not expressly order the defendant "to act in a certain way", implicit in his order that the receiver was to hold the proceeds of the summary judgment on constructive trust for Jade, is a requirement for the receiver to deliver up or pay over the said proceeds to Jade.

[18] Mr Gordon also points out that the learned judge not only granted the declarations which Jade sought, he ruled that:

> (a) the proceeds of the Summary Judgment could not be withheld from Jade; and

(b) the sums were held on constructive trust for the respondent.

[19] Counsel argued that if the receiver fails to comply, the order may be enforced against him. In those circumstances, he submits, the judgment is not purely declaratory and therefore is capable of being the subject of an order for a stay. Counsel also pointed the court's attention to the submissions filed on behalf of Jade which supports counsel's contention that there is an executory element to the judge's order.

[20] The submissions further state that the funds in issue are held in an escrow account at the First Global Bank Limited pursuant to Sykes J's order of 2014 which declared that Jade was legally entitled to the said funds and that the said funds are held in trust for Jade. FGB is therefore obliged to hold the said funds, and make the same available to Jade.

[21] Counsel also referred the court to the submissions advanced on behalf of Jade which stated that:

> "...been kept out of its funds for several years by the actions of [PPL, SSL and the Receiver] in breach of the management agreement...Therefore [Jade] should now be permitted to enjoy the fruit of judgment..."

[22] It was counsel's submission that by that statement the learned judge has made it plain that Jade is entitled to enjoy the fruits of the judgment. If the judgment was merely declaratory, there would not have been any discussion about the fruit of the judgment, counsel argued. Nor would there be an expectation to enjoy the fruits of the

judgment. It was counsel's submission that without a stay, the respondent would be at liberty to recover the said sums.

[23] In support of that submission, counsel directed the court's attention to paragraph 13 of the submissions filed on Jade's behalf at which counsel submitted that:

> "... the funds which are a part of the subject matter of this case are held in an escrow account at the First Global Bank Limited in accordance with the 2014 Order of the Court of Appeal. Sykes J's judgment declares that at all material times, Jade Overseas holdings Limited were legally entitled to the funds and any party holding the same, holds the same on trust for the respondent."

[24] Mr Gordon also referred the court to Jade's counsel's expressed opinion that the sums which are held in the joint accounts in the names of PPL and SSL are to be paid over to Jade. Counsel submitted that the effect of Sykes J's judgment must be considered. He postulated that if a stay is not granted, there is nothing to prevent Jade from attempting to recover the said sum.

Discussion

[25] The following statement of the learned authors of the text, The Declaratory Judgment, 2nd edition, Zamir and Woolf, explaining the difference between declaratory and executory judgments, has been endorsed by this court in a number of matters (see **Norman Washington Manley Bowen v Shahine Robinson and Neville Williams**; **Dennis Atkinson v Development Bank of Jamaica Limited**; and **Harold Miller v Ocean Breeze Hotel Limited and Carlene Miller**).

> "A declaratory judgement is a formal statement by a court pronouncing upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executory, in other words, coercive judgement which can be enforced by the courts. In the case of an executory judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights; if the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain any order which can be enforced against the defendant. Thus the court may, for example, declare that the plaintiff is the owner of a certain property, that he is a British subject, that a contract to which he is a party has or has not been determined, or that a notice served upon him by a public body is invalid and of no effect. In other words, the declaration simply pronounces on what is the legal position."

[26] It is true that the learned judge refrained from explicitly ordering the judgment sum to be paid to Jade. The learned judge's following conclusions at paragraphs [116], [117] and [118], as set out in paragraph [11] herein, can be interpreted as supportive of Mr Gordon's view:

[27] Strongly supportive of the argument advanced by Mr Gordon that implicit in Sykes J's orders at paragraphs 116, 117, and 118 of his judgment is an executory element; is the learned judge's statement that **"any person who received proceeds of the settlement arrived at by the terms of which included the distribution of proceeds of the summary judgment hold those monies on constructive trust for Jade**" (Emphasis added).

[28] A pertinent question arises. Would Jade be able to compel the receiver to pay over the proceeds of the summary judgment on the basis of the judge's findings? If, as counsel posits, that on the learned judge's order there is the likelihood of the applicants being compelled to pay the proceeds over to Jade, counsel's submission that the judge's orders are not purely declaratory is meritorious.

[29] Indeed there is a strong argument that should Jade demand payment, the receiver, being an officer of the court, would be duty bound to obey the spirit of the judge's decision.

[30] Mr Gordon's argument that the judge's conclusion that the proceeds are held on trust by the receiver for Jade, is a requirement for the receiver to deliver up or pay over the said proceeds is therefore not merely fanciful.

[31] Mr Gordon's submission that the judge's conclusion that the proceeds of the summary judgment cannot be withheld from Jade is to be interpreted that Jade is able to avail itself of the fruit of the judgment is not without merit. Counsel's submission that the learned judge's pronouncement that the settlement agreement "cannot override the management agreement made in May 2009" can be interpreted to mean that Jade has an immediate right of access to the fruit of the judgment. It is not improbable that such a conclusion can reasonably lead Jade to the conclusion that it has an immediate right to obtain the fruits of its judgment. The learned judge's further conclusion that the proceeds of the summary judgment cannot be withheld from Jade also tends to supports such a conclusion.

[32] In light of the forgoing, the learned judge's conclusions could reasonably lend themselves to the view that the orders are not purely declaratory. Indeed they seem to strengthen counsel's submission that the judgment contains an executory element.

Is there a chance of the applicants succeeding on the appeal?

[33] It was well said by Moor-Bick J in **International Finance Corporation v Utexafrica S.P.R.L** [2001] EWHC 508 (Comm) that:

> "A person who held a regular judgment even a default judgment, has something of value and in order to avoid injustice he should not be deprived of it without good reason."

[34] Undoubtedly a successful litigant ought not to be deprived of the fruits of his judgment. But although that is an important consideration, it is not the only one. The proper approach in determining whether a stay ought to be granted was expressed by Clarke LJ in **Hammond Suddard Solicitors v Agrichem International Holdings Ltd** [2001] EWCA Civ 2065. At Paragraph 22 the learned judge said:

> "...Whether the court should exercise its discretion to grant a stay will depend upon all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand, if a stay is refused and the appeal succeeds, and the judgment is enforced in the meantime, what are the risks of the appellant being unable to recover any monies paid from the respondent?"

[35] That approach has been repeatedly adopted by this court in a number of matters including **Watersports Enterprises Ltd and Jamaica Grande Limited, Grand Resort Ltd and Urban Development Corporation** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 110/2008, Application No 159/2008, judgment delivered 4 February 2009; and **Crown Motors Limited and Key Motors Limited and Executive Motors Limited v First Trade International Bank & Trust Limited (In liquidation**) [2016] JMCA Civ 6. The applicants must therefore demonstrate that there is a realistic prospect of the matter being resolved in their favour and without a stay, ruin confronts them (see **Linotype-Hell Finance Ltd v Baker** [1992] 4 All ER 887).

The applicants' submissions

[36] Mr Gordon submits that the applicants have a good chance of succeeding on the appeal. He contends that of the several issues which have arisen, the following two main issues fall for determination:

> "a. Could the charge created pursuant to the Management Agreement be considered to be within the ordinary course of business?
>
> b. Did the charge created pursuant to the Management Agreement trigger an event of automatic crystallization?"

[37] Counsel submitted that the Management Agreement contains a charge which, he contends, is evidenced by section iv of the Agreement. The effect of this charge was to guarantee the payment of Jade's cost and fees by using all of the same assets which were already the subject of a charge pursuant to the 2007 Debenture. This, he argued,

conflicted with the provisions of the debenture which expressly forbade the creation of other charges without prior consent.

[38] Counsel posited that the creation of such a charge could never have been contemplated by the parties as being in the ordinary course of business as it directly undermines the efficacy of the security which the 2007 Debenture provided.

[39] Counsel further argued that Sykes J's declaration that the Management Agreement was valid and entitled Jade to enforce the said charge in accordance with said Agreement presents the following problems:

> "(a) The charge is in direct conflict with the provisions of the 2007 Debenture 2007 [sic].
>
> (b) [The] judgment suggests that it is legally permissible for a borrower to create a charge in conflict with an earlier charge and without the consent of the earlier chargee, despite the provisions of a debenture requiring consent so to do.
>
> (c) The effect of the said judgment is that the priority status of a debenture holder who registered his charge in accordance with the provisions and formalities of the law, could be overruled by a subsequent chargee.
>
> (d) Another effect of the said judgment is that a borrower can withhold from a chargee, information regarding the creation of a subsequent chargee, despite the provisions of the earlier chargee forbidding the act."

[40] Counsel also postulated that by virtue of clause 9 of the debenture, automatic crystallization was triggered by the creation of this subsequent charge pursuant to the Management Agreement. The effect of automatic crystallization is that the purported

transfers or assignments under the Management Agreement are ineffective. In support of this submission, counsel relied on the New Zealand Supreme Court case, **Re Manurewa Transport Limited** [1971] NZLR 909.

[41] Counsel submitted that the parties agreed that the borrower ought not to have created another charge over the assets without consent. Such an attempt has therefore triggered automatic crystallization. The court is therefore able to give effect to the expressed intention of the parties and hold that the floating charge has automatically crystallized. For that proposition he relied on the English case, **Re Brightlife** [1986] 3 All ER 673.

[42] Counsel also relied on the preliminary view Mangatal J expressed on the issue, in respect of an application by Jade for an injunction ([2013] JMCC Comm 17). The learned judge opined at paragraph [60]:

> "...the law and construction of the relevant Instruments, that PPL and SSL could not without the prior written, or alternatively, other consent of the PPL Debenture Holders, create the charge or indebtedness which they purportedly created in favour of Jade - Clause 7 of the PPL Debenture and Clauses 12.2.1. and 12.2.2 of the Facility Agreement, In addition, it is my provisional view that entry into the Management Agreement may well have effectively triggered the automatic crystallization of the Floating Charge in the PPL Debenture into a fixed charge. However, because this is not the clearest point, I have relied more on my findings on the aspect of the case to do with whether the Management Agreement was an assignment in the ordinary course of business, and Jade's notice of the restrictive clauses in the Debentures."

Counsel further highlighted Mangatal J's copious reference to Andrew Burgess' work, Commonwealth Caribbean Company Law.

The respondent's submission

[43] It was Mr Williams' submission however that in any event the application has not demonstrated that the applicants have a realistic chance or prospect of succeeding on the appeal. According to counsel, the evidence on which the applicant relied, spoke only to the nature of the legal issues which were determined by the learned judge. It provided no cogent indication of a contention on which a conclusion could be made that the applicant has a realistic prospect of succeeding on appeal.

[44] The grounds of appeal, counsel argued, have no real prospect of succeeding. According to counsel, on the facts, the inter-relationship between the language of the 2007 debenture and the Facilities Agreement expressly permitted the companies to enter into the management agreement as it was in the normal course of business.

[45] The learned judge's conclusion on the facts and on the law, cannot, he argued, be successfully challenged.

Discussion

[46] In determining whether there is a chance of the applicants succeeding on their appeal is necessary to consider the arguments advanced by the parties in respect of the applicants' grounds of appeal.

[47] For convenience, grounds a and b will be considered together.

Ground a

> "The learned trial judge erred in law in finding that the management agreement was valid in the circumstances where the management agreement created a charge in conflict with the provisions of a prior Debenture."

Ground b

> "The learned trial judge erred in law and failed to properly construe the management agreement and in so doing found that it was no more than an agreement for litigation funding when in fact the management agreement created a charge over the assets of the 1st and 2nd Appellants."

[48] Noteworthily, no evidence has been advanced or argument proffered by or on behalf of Jade, that Jade was unaware of the existence of the 2007 Debenture. Clauses 5(a) and (b) of the 2007 Debenture created a charge "over all of the undertaking and assets" of SSL and PPL. Clauses 5(a) and (b) provide:

> "Charge
>
> a) As security for the due and proper performance of the Borrower's obligations under the Facility Agreement and this Debenture and the Securities, including but not limited to the repayment of the Principal Sum and the payment of all interest thereon and all fees, charges, costs, and expenses incurred by the Lender and NCBCML. in connection with or for preserving or enforcing this or any other security, and as security for the repayment of any other monies hereafter owing in respect of further advances under the Facility Agreement or otherwise owing to the Lender and NCBCML to or, for the account of the Borrower, and as security for any other liability or obligation (actual or contingent) now or hereafter owed by the Borrower to the Lender and NCBCML, the Borrower AS BENEFICIAL OWNER HEREBY CHARGES, and so that the charge hereby created shall be a continuing security, over all of the undertaking and assets of the

> Borrower, both present and future, of whatsoever kind and wheresoever situate.
>
> b)The charge hereby created shall be a first fixed charge on the freehold and leasehold land and buildings, plant, 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 the 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." (Emphasis added)

[49] PPL and SSL were further expressly forbidden from encumbering the property without the prior approval of the debenture holders. Clause 7 of the 2007 Debenture reads:

> "7) NO ENCUMBRANCE
> The Borrower shall not without the prior written consent of the Lender and NCBCML create any mortgage, charge, assignment, sale- and –lease- back or other security interest or encumbrance whatsoever over its undertaking or assets or any part thereof except as permitted under the Facility Agreement."

[50] Clauses 4, 5, 9, 12, 18 and 36 of the Facility Agreement categorically disallowed the sale or disposal of the assets, without the consent of the debenture holders except in the ordinary course of business. Clauses 12.2. to 12.2.3 read:

> "12.2 The Borrower undertakes with the Lender that from 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:-
>
> 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 ordinary 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."

[51] Can an agreement which entitles Jade to the proceeds of the judgment, in the circumstances of this case, be regarded as being in "ordinary course of business"? The issue of as to what constitutes "ordinary course of business" was addressed by the Privy Council in the case, **Countrywide Banking Corporation Ltd. v. Brian Norman Dean as Liquidator of CB Sizzlers Limited (New Zealand)** [1997] UKPC 57. In that case the issue was considered in relation to section 266 of the New Zealand Companies Act.

[52] Deduced from that decision, is the necessity to consider the peculiar facts of each case objectively. In so doing regard must be had to **"**the ordinary operational activities" of the business. Gauld J, in delivering the judgment, stated at paragraph 34:

> "Plainly the transaction must be examined in the actual setting in which it took place. That defines the circumstances in which it is to be determined whether it was in the ordinary course of business. **The determination then is to be made objectively by reference to the standard of what amounts to the ordinary course of business.** As was said by Fisher J in the *Modern Terrazzo Ltd*. case, the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business. While there is to be reference to business practices in the commercial world in general, **the focus must still be the ordinary operational activities of businesses as going concerns**, not responses to abnormal financial difficulties ..." (Emphasis added)

[53] The language of the drafters of sections 12.1 to 12.3 of the Facilities Agreement is unambiguous. The contracting away of the proceeds of a judgement to Jade falls outside of what the parties intended as "in the ordinary course of business".

[54] Save for "current liabilities arising in the ordinary course of trading", PPL and SSL were expressly forbidden from incurring additional debt without consent. The business PPL and SSL were engaged in was the construction of a luxury condominiums and hotel. The contracting away of sums purloined by the former directors and recovered is strongly arguable as not being "current liabilities in the ordinary course of trading". By that agreement, PPL and SSL, incurred further debt, that is, the cost of the litigation. It is by no means a specious argument that such a contract required the prior knowledge of the debenture holders.

[55] Indeed the business of PPL and SSL at that juncture had devolved to the receiver. His responsibilities included construction, maintenance and repairs, and marketing. The receiver was therefore responsible for the general oversight of the

operations and business of SSL and PPL. Quite apart from those responsibilities, there were also several law suits against SSL and PPL with which the receiver had to contend. It seems that the instituting of legal proceedings against the directors fell within the purview of the receiver. In any event, such an agreement required the consent of the debenture holders.

[56] It is also certainly more than a fanciful argument that the sum recovered by the said litigation was the property of the debenture holders, they having provided the capital which was purloined. In the light of the terms of the Facilities Agreement such a contract required the written consent of the debenture holders. As was averred by Mr Tomlinson in his affidavit of 8 October 2013 in opposition to Jade's application for an injunction, such funds were to be to be utilised "to cover operating expenses to reduce [PPL and SSL's] indebtedness to the Debenture Holders" (see paragraph [36] of the judgment of Mangatal J).

[57] It is therefore not an argument without a chance of success that the Management Agreement infringed the terms of the Facilities Agreement.

Did the creation of the Management Agreement trigger an event of automatic crystallization?

The Management Agreement

[58] The Management Agreement was executed on 25 May 2009. Evidently from the correspondence between the parties as set out below the receiver was neither made aware of the parties' intention to so contract nor was subsequently informed of the said agreement. It is apparent that the receiver was only belatedly made aware of the

terms of the Management Agreement by way of letter dated 23 September 2011 from Mishcon de Reya to him. The letter, as set out in paragraph [24] of the judgment of Mangatal J, reads:

> "We set out below a summary of the proceedings that have commenced and are on foot in various jurisdictions. The combined costs and disbursement of the litigation to date are in excess of US$3.5 Million. We anticipate a further US$1.5 Million will be incurred going forwards. Whilst we are hopeful of recovering through enforcement actions, there is of course no guarantee that the amounts claimed or the costs will be recovered. There is also the risks of adverse costs orders should any of the litigation be unsuccessful.
>
> ...
>
> We also enclosed a copy of the management agreement between Jade Overseas Holdings Limited, Sanctuary Systems Limited and Palmyra Properties Limited dated 25th May 2009. By this agreement Sanctuary and Palmyra outsource management of the said litigation to Jade on terms that Jade funds the litigation in consideration of a lien over proceeds of the claims (through whatever means) to the extent of monies expended by it plus and administrative charge of 5% (of the monies advanced) and interests of LIBOR – 4%.
>
> Our view is that these terms are favourable from a receiver's perspective having Jade fund the proceedings for the benefit of the companies in receivership subjected to reasonable modest interest and administrative charges. However if you wish to take charge of funding and administration of the litigation in the receivership, this is a discussion which should be taken up with Jade Overseas directly. For the avoidance of doubt we can confirm that all costs and disbursements in these proceedings to date have been paid to us by Jade and likewise we believe to the other solicitors acting in those matters as referred to above. We are happy to obtain verification if your wish."

[59] The receiver's attorneys at law responded to Jade's letter and disputed Jade's claim. The response, as set out in paragraph [28] of the judgment of Mangatal J, stated the following as being some of reasons for so doing:

> "...
>
> (ii) The purported agreement was first brought to our clients' attention by Mischon de Reya (Mischon). However, although the letter stated that the agreement was enclosed it was in fact not enclosed hence the receiver remained unaware of the contents of the purported agreement;
>
> ...
>
> (v) Until your letter dated June 10, 2013 the receiver had no information to support any claim or interest which Jade may have in any asset belonging to the Companies;
>
> (vi) The purported assignment of the benefit of any recovery by the Companies in respect of the claims against Dennis Constanzo et al was in breach of the provisions of the Loan Agreement and the security interest created by the Companies in favour of National Commercial Bank and Royal Bank of Canada (the Banks) as the Companies failed to obtain the permission of the Banks to grant this purported assignment. As a result the purported assignment is invalid;
>
> **(i) The Banks interest in the asset of the Companies were recorded at the appropriate registries required by law and hence notice to the world was given therefore any claim Jade may have would be subject to the interest of the Banks and by extension the Receiver whom they appointed to realize their interests**." (Emphasis added)

[60] Quite apart from clauses 5, 7, 12 which were referred to above, clause 16 of the 2007 Debenture likewise, in very plain language, proscribed the charging or encumbering of PPL and SSL's business, goodwill or capital assets without the prior consent of the receiver. Clause 16 reads:

> "The Borrower's Covenants
>
> The Borrower hereby covenants with the Lender and NCBCML that at all times during the continuance of this security it will:
>
> i) ...
>
> ii) ...
>
> iii) comply with and perform all of the covenants and other provisions in the Facility Agreement, all of which are hereby incorporated herein by reference;
>
> iv) use its best endeavours to obtain all licenses necessary or desirable in relation to the carrying on of its business and promote, to the best of its power, the success and development of the said business and will not, without the written consent of the Lender and NCBCML, do or suffer to be done any act or thing whereby the said business or the goodwill thereof or the capital assets or effects thereof or any part thereof may be charged or encumbered or otherwise prejudicially affected in any way save as is herein otherwise specially provided;..."

Mr Gordon directed the court's attention to section v of the Management Agreement which states:

> "Furthermore, should there not be any recoveries or awards within a 10 year period [PPL and SSL] guarantee the recovery of costs and fees to Jade with its full assets"

[61] If, as asserted by counsel that the Management Agreement was not executed in the "ordinary course of business", and also contains a forbidden charge, it seems that the following effects enumerated by Mr Gordon are meritorious, that is, the charge conflicts with the provisions of the 2007 Debenture; the priority status of a debenture holder whose charge "was registered in accordance with the provisions and formalities

of the law, could be overturned by a subsequent charge; and "that a borrower is able to withhold information from a chargee regarding the creation of a subsequent charge notwithstanding the provisions of the earlier charge forbidding same.

The effect of the Management Agreement

[62] The question is, whether the creation of that subsequent charge, pursuant to the Management Agreement, without the debenture holder's permission triggered automatic crystallization has a chance of succeeding on appeal? Crystallization of Floating Charge is dealt with at clause 9 of the 2007 Debenture. It reads:

> "**Notwithstanding anything hereinbefore contained, the floating charge hereby created pursuant to clause 5 above, shall become crystallized and automatically converted into a fixed charge** and the principal monies hereby secured shall become immediately repayable and all unpaid interest which has accrued hereunder and any other monies hereby secured shall become immediately payable and this security enforceable on the occurrence of any of the following, each an event of default:-
>
> i) ...
>
> ii) if the Borrower makes default in the observance and performance of any covenant set forth in the Facility Agreement, or is otherwise in breach of the Facility Agreement and fails to cure the same as according to the terms provided under the facility Agreement;
>
> ii) ...
>
> iv) ...
>
> v) if the Borrower makes default in the observance and performance of any covenant set forth in this Debenture or in any of the of the other part of the Security Package, or is otherwise in breach of this Debenture or of any of the other documents

comprising the Security Package and such default is [sic] continues beyond the time allowed in the Facility Agreement;

vi) if any encumbrancer takes possession of any property of the Borrower or any part thereof;

vii) ...

viii) if all or any of the charges and in particular the charge referred to in Clause 5 hereof shall for any reason cease or fail to rank as a first priority charge against the assets thereby purported to be charged in favour of the Lender;

...

xiv) if the Borrower shall dispose of or enter into any contract to dispose of all or substantially all of the assets of the Borrower..." (Emphasis added)

[63] Andrew Burgess, in his text, Commonwealth Caribbean Company Law states the modern position thus:

> "An area in the law relating to crystallisation which remains very unsettled is that of the legal effectiveness of what are referred to as 'automatic crystallization clauses.' Automatic crystallisation clauses are clauses found in debentures which provide for the floating charge to crystalise on the occurrence of specified events of default and this is whether or not the debenture-holder knows that the event has occurred and whether or not the debenture-holder wants to enforce the charge as a result of the happening of the event.
>
> An evaluation of the case law indicates that the older authorities without deciding the issue, point to the theory that automatic crystallisation clauses are legally ineffective...
>
> The more recent cases are somewhat equivocal but on balance appear to incline in favour of the effectiveness of automatic crystallisation...
>
> It is submitted that the crux of the doctrinal problem associated with automatic crystallisation lies in whether

> parties are free to contract in respect of crystallization events. If they are, automatic crystallisation clauses are ipso jure legally valid; if they are not, but their contractual freedom is restricted, then such clauses are invalid. **The better view appears to be that courts have no legal basis on which to ignore the contractual agreements of parties**." (Emphasis added)

[64] The parties have expressly agreed that "the floating charge...shall become crystallized and automatically converted into a fixed charge".

[65] In light of the forgoing it cannot in my view be reasonably asserted that applicants are without a chance of the appeal succeeding.

[66] A further important consideration in determining whether to accede to the applicants' request to grant a stay is that Jade is an overseas company. The unchallenged evidence of De Andra Butler is that if a stay is refused and the applicants' appeal succeeds, Jade has no assets in this jurisdiction against which proceedings to enforce a judgment could be instituted.

[67] It was also Ms Butlers' evidence that the SSL and PPL are indebted to the debenture holders in the sum of US$60,000,000.00. It is Ms Butlers' evidence that if a stay is refused and the sums paid to Jade, the applicants will be seriously disadvantaged should the appeal succeed. Indeed, it is her evidence that the appeal would be rendered nugatory.

[68] Jade has however not asserted that it will suffer financial loss and hardship if the said sum is not paid pending the appeal. The evidence is that the said sum is being

held in an interest bearing account and will continue to bear interest. Should the appeal fail, Jade will be able to recover the said sum with interest.

[69] In the circumstances I make the following orders:

1. A stay of execution of the judgment of Sykes J which was delivered on 23 June 2017 is granted until the hearing of the appeal.

2. Costs to be the costs in the appeal.