A. INTRODUCTION

1. Purpose of Security

Ex p Mackay (aka ***Re Jeavons***) (1873) 8 Ch App 643

- A made loan to B: repayment took place at intervals
- B granted licence to A to use certain patents: royalties paid at intervals
- Loan was repaid out of royalties: B got 50% of royalties until loan repaid
  - ➔ In case of B's insolvency, A could fully deduct from B's royalties until A fully repaid [but arguments on charge-back not raised]
  - ➔ **Offend *pari passu* principle**

British Eagle v Cie Nationale Air France [1975] 2 All ER 390

- Interline traffic agreement by IATA: net debtor airlines pay $ into clearing house, which then distributed $ to net creditor airlines
- British Eagle in insolvency as net debtor of month in question

Majority

- "Clearing house" creditors will be treated as though they were creditors with valid charges on some of the book debts of BE: **BUT as unsecured creditors**
- Arrangement operates as a "mini-liquidation" to deal with BE's debts before other unsecured creditors
- Contrary to public policy to contract out of insolvency legislation regarding distribution of an insolvent's property (even though on facts, clearing agreement entered for good business reasons and not intended to evade legislation)

Minority

No diversion of money upon liquidation: money only payable and due to clearing house, not individual members (i.e. Air France)

Implication

But if not allow this kind of accounting system and netting, collapse of one party may lead to collapse of another (**BUT NB** legislative sanction of "clearing house")

3. Sham and Artificial Transactions

(i) Sham Transactions (External route)

(ii) Artificial Transactions (Internal route)

Re George Inglefield Ltd [1933] Ch 1

- Discounting agreement at 75% (facultative agreement) re hire-purchase agreement with customers

Held: Sale

- Look at substance of agreement, NOT form
- Differences between mortgage/charge and sale

	Sale	**Mortgage/Charge**
Right to redeem	Vendor would not get back subject-matter of sale	Can get back property by repaying loan (until foreclosed)
Surplus	Kept by buyer	Returned to debtor
Deficiency	Loss borne by buyer	Creditor could claim outstanding sum from debtor

Re Curtain Dream Plc [1990] BCLC 925

- Churchill Ltd (FC) provided (letter of) facility to CD, which referred to a trading agreement between them
- Sale to FC; automatic resale transaction with RoT in favour of FC, but CD with power to resale

Held: Charge

- Supplier credit line of up to 90 days for CD
- Interest charged at discount rate to yield LIBOR+1% (geared on value of property)
- Right to redeem: Mutuality re transfer of title
  - Obligation on CD to transfer property to FC upon start of agreement
  - Also for FC to transfer property back to CD, i.e. redemption by CD

Welsh Development Agency v Exfinco [1990] BCLC 393

- WDA had charge over Parrot's book debts
- Sale of discs from Parrot to Exfinco, then to overseas customers with Exfinco as undisclosed principal
- Payment into a/c in Parrot's name: but controlled by Exfinco
- Warrant point: authority of Parrot to conclude sale with overseas customers only for goods that conform to standard
- Only when unconditional appropriation made to overseas customers would authority of Parrot come into effect

Held: Sale (devised as a sale, and carried out as such)

4. Assignment

(1) Equitable assignment and procedure

- Equitable assignment, form and language

  Brandt Sons & Co v Dunlop Rubber Co [1905] AC 454
  - NO particular form of words is required for an effective assignment
  - Sufficient that clear intention to transfer an item of intangible assignment to assignee exists

- Parties and debtor: **NO need for debtor to be informed of assignment, if words of assignment used** (see ***Gorringe v Irwell India Rubber Works*** (1866) 43 Ch D 128)
  - B (assignor) assigned debt to C on 11 January
  - C notified A (debtor) of assignment on 5 February
    - **BUT** B bankrupt on 2 February

  Held: Assignment on 11 January; NOT vested in B's liquidator

- Consideration: Generally NOT necessary

  Re McArdle [1951] 1 Ch 669 (Executor used future words: "We will ensure that you will be paid")

  Held: Wife failed in both contract and equitable assignment
  - Language consistent with something to be done in future, and NOT with present transfer
  - Refused to enforce promise to make future assignment in absence of consideration

[**NB:** Purported present assignment of future debts regarded as promise to assign those debts when they come into existence and implemented then: ***Tailby v Official Receiver***]

(2) Statutory assignment: *Law Amendment and Reform (Consolidation) Ordinance, s.9*

- Apply to assignments of "any debt or other legal thing an action"

  NB: ***Torkington v Magee*** [1902] 2 KB 427 (also cover equitable things in action; but assignor ONLY has equitable interests in debts)

(3) Defences to assignee's claim:

- *LARCO, s.9*: "…subject to **equities** having priority over the right of the assignee…" [**NB:** Also apply to equitable assignment outside s.9]
  - Extended to cover defences and claims by debtors which amount to set off

Young v Kitchin (1878) 3 Ex D 127

- Builder assigned to P a sum owed by D under a building contract
- P sued for sum: BUT D pleaded breach of contract by Builder's unsatisfactory work for failure to complete on time (i.e. equitable set-off (defence) against P even w/o knowledge of the equitable defence)

Held:

- D entitled to deduct damages from debt claimed by P (followed in ***Govt of Newfoundland v Newfoundland Rly Ltd*** (1888) 13 App Cas 199)

(4) No-assignment clause

Re Turcan
- NOT invalidate transfer of fruits of debts (i.e. proceeds) when received

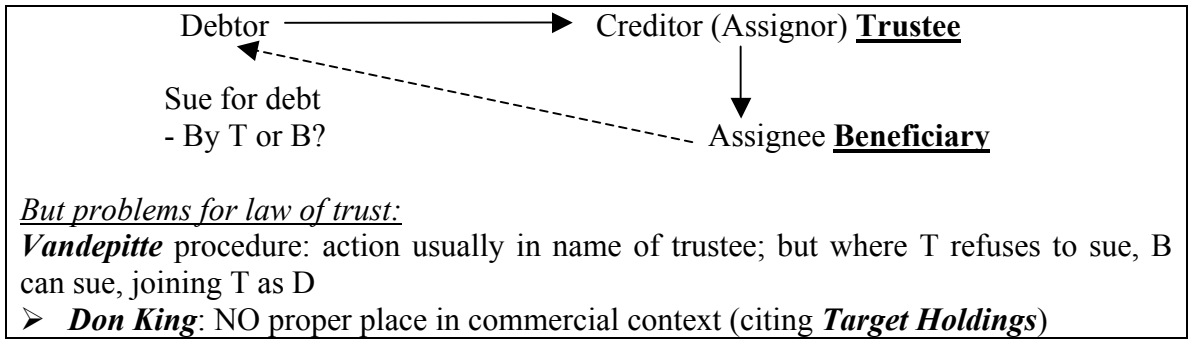
Helstan Securities v Hert CC (1978)
- Assignment rendered ineffective by clause prohibiting assignment of debts

Linden Garden Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1 AC 85
- Building contracts with clause that "The employer shall not with the written contract of the contractor assign this contract"

Held:
- Affirmed ***Helstan Securities***
- Clause effectively prohibited assignment by employer (w/o contractor's consent) of benefit of contract and assignment of chose of action
- Clause not contrary to public policy (genuine commercial interest in ensuring contractual party as originally selected)
- **Left open question of validity of contractual term preventing assignment of fruit of contract**

Don King Productions v Warren [1998] 2 All ER 608, aff'd [1999] 2 All ER 215
- Clause in original contract prohibited assignment: purported assignment by W to partnership of all his existing promotion and management agreement with boxers
  - ➔ **BUT clause did NOT prohibit trust: contracting party to contract involving skill and confidence from becoming trustee of benefit of being contracting party and benefit of rights conferred**

  Held: Purported assignor held benefit of debt on trust in favour of assignee
  - Slow to construe no-assignment clause as prohibiting declaration of trust



But problems for law of trust:
Vandepitte procedure: action usually in name of trustee; but where T refuses to sue, B can sue, joining T as D
- ***Don King***: NO proper place in commercial context (citing ***Target Holdings***)

Barbados Trust Co Ltd v Bank of Zanzibar [2007] EWCA Civ 148 (*per* Rix LJ, *obiter*)
- Affirm ***Don King*** that trust may still despite invalid assignment
- Function of ***Vandepitte*** procedure:
- Disagree with comment in ***Don King*** (above): should rather ensure that ***Vandepitte*** procedure NOT misused in commercial context where inappropriate

B. MORTGAGES AND CHARGES

1. General

(a) Mortgages and charges

Re BCCI (No.8) [1998] AC 214

- BCCI granted loans to clients, with security over deposits (with BCCI, either pre-existing or given as pre-condition to loan) given by 3p
- "Letter of lien/charge"
  - 1st para: purports to grant BCCI proprietary interests over deposits in form of charge or deposit
  - 3rd para: contractual agreement that deposit will be repayable only if all liabilities of debtors have been repaid
- BCCI went into bankruptcy
- Issue: whether in seeking recovery of loans from debtors, they should set off (under Insolvency Rules 4.90) the amount standing to credit in deposit accounts

Held:

- Good security not only by contractual agreement under 3rd para (i.e. "flawed asset" approach)
  - ➔ **Also valid charge created over deposits (i.e. valid charge in favour of bank over debt which it owed): charge over depositor's right to claim repayment of his deposit**
  - ➔ **NO inconsistencies between this 'charge' and features of equitable charge**
- NO set-off: NO mutuality of debt required for set-off under Rule 4.90 between sums owed to BCCI by debtors and sums owed by BCCI to depositors

[NB: such charge possible anyway under s.15A, LARCO, Cap 23]

(c) Requirements of an equitable mortgage

Holroyd v Marshall

- Equity consider agreement to give mortgage as mortgage itself; floating charge cover future assets as present security fastened on assets when acquired by debtor

Tailby v Official Receiver (1883) 13 App Cas 523

- Izon granted mortgage to Tyrrell over "all the book debts due and owing, or which may during the continuance of this security become due and owing to the said mortgagor"
- Issue: whether O.R. can recover purchase price from purchasers (of book debts from Tyrrell)

Held:

- Good security: "the description of the property to be given as security should be such as to enable the court to find that the asset acquired by the debtor fell within the terms of the security" (Goode, p 627)
- NOT necessary for agreement to satisfy principles for specific performance
  - Agreement as "specifically enforceable", i.e. sufficient when creditor can show that consideration had passed as equity considers that as done which ought to be done

(d) The role of intention in the creation of charges

Swiss Bank Corporation v Lloyds Bank [1982] AC 584

- IFT as subsidiary of D4, Triumph Group
- IFT obtained permission from Bank of England to buy Swiss francs from P for investment in shares and loan stock of an Israeli Bank
  - Condition (v): maintenance of specified margin of cover for borrowing
  - Condition (vi): payment of interests and charges in respect of loan out of income arising from securities acquired
  - Condition (vii): repayment of borrowing is made from sale proceeds of foreign currency securities held in relative "loan portfolio"
  - Generally: securities acquired be kept on separate account
- Triumph Group asked for financial assistance from Lloyds
  - With guarantee by IFT and charges over all unencumbered securities held by group, including FIBI securities
- IFT bankrupt
- 1st issue: whether loan agreement created an equitable charge in favour of P (SB)?

Held: NO charge

- Equitable charge of two types:
  (1) Equitable mortgage: transfer of proprietary interest from creditor to debtor, who has right to redeem
  (2) Equitable charge not by way of mortgage: no legal transfer of property but merely a binding undertaking to confer proprietary interest in subject matter in equity
- Which type depends on intention of parties, express or implied, as ascertained from their conduct (i.e. rights and obligations as defined under contract)
  - Segregation of fund undertaken by debtor usually indicates that parties' intention that creditor is to have proprietary interests in segregated asset
  - ➔ **Fact that parties did NOT realise legal consequence of their arrangement as a charge did NOT mean that there is NO charge**

On facts: loan agreement contain clause that IFT have to observe conditions set by BoE, which existed from time to time [variable by BoE]

- Conditions in loan agreement merely to ensure that loan should not be tainted with illegality
- Segregation condition set by BOE could be varied at any time: so precarious a condition so as to suggest a charge
  - ➔ **Need very clear indication that parties still intended to enter into such arrangement as an equitable charge**
  - No indication that parties intended that property would be available as security for repayment

NB: Lord Wilberforce **(HL)**: Language of "charge" used for sterling deposits made by IFT with SB; NOT for this

Re Cossett [1998] Ch 495

- Building contract contained clause that in case of insolvency of contractor, site owner has to leave behind machines and site owner can take over machines for completing the work contracted
- Also contained clause allowing site owner to sell machine to cover claims against contractor

Held: No charge for 1st clause; BUT charge created under 2nd clause

2. Floating charges

(b) Nature of floating charge

Evans v Rival Granite Quarries [1910] 2 KB 979

- D co granted debenture (floating security over its undertaking and all assets)
- Pitman (3p) later became debenture-holder
- P sued D to recover rent of cottage leased to D (12 August)
  - P demanded payment from D (30 August): No further action to enforce security
  - P granted judgment (November); later obtained garnishee order against D's a/c)
  - 3p (DH) objected: right to that sum

Held: for P

- Floating security as present security, not specific security
- NOT affect any property until events of crystallisation
  - E.g. appointment of receiver by DH, bankruptcy of debtor, cessation of company's business
  - None on facts: asking debtor's bank to pay not lead to crystallisation

See also ***In re Yorkshire Woolcombers Association Ltd*** (per Romer LJ)

(1) if it is a charge on a class of assets of a company present and future,
(2) if that class is one which, in the ordinary course of business, would be changing from time to time,

[BUT (1) and (2) as dispensable: see *Agnew* and *Spectrum*]

(3) if the company may carry on its business in the ordinary way until action taken by charge-holder

3. Difference between floating and fixed charges

Floating charge: charger can use stock under subject-matter of charge w/o consent of chargor's consent

[C.f. consent necessary under fixed charge if c/or wish to dispose or encumber pty]

Agnew v CIR [2001] 2 AC 710

- Debenture: "fixed" (so stated) charge in favour of bank over its book debts arising in ordinary course of business and their proceeds [**exclude** those received by Company before required by bank to deposit it in a/c with bank]
  - "Floating charge" (so stated) over other assets of company
- Prohibits company from disposing its uncollected book debts
  - **BUT allowed to deal freely in ordinary course of business with assets which are merely subject to floating charge, including proceeds of collected book debts**

Held: floating charge [i.e. favour preferential creditors, e.g. CIR]

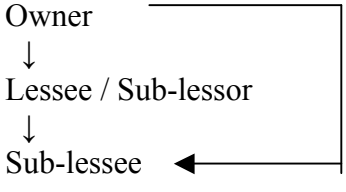
- Test: whether company is free to deal with charged assets and withdraw them from the security w/o consent of charge-holder [or whether charged assets were intended to be under the control of the company or of the charge-holder]
- Although restricted alienation of book debt, company still permitted to collect and use book debts freely
  - ➔ Thus, company (charger) allowed to withdraw assets from charge w/o chargee's consent

➔ ***Agnews*** confirmed by HL: ***National Westminster Bank plc v Spectrum Plus*** [2005] 2 AC 680

Summary

(1) Debtor free to collect debts and deal with proceeds: floating charge
(2) On basis of conditions in (1), further requirement that debtor has to pay proceeds into bank a/c:
  - NOT sufficient by itself: as fixed charge: require some control by bank
(3) Fixed charge on debts and floating charge for proceeds
  - Debts and proceeds as same thing: floating charge as a whole (***Spectrum***)

BUT what about this? (***Re Atlantic Computer Systems*** [1992] Ch 505)



Assignment by way of security on rental income:
Held: Fixed charge

Clearly contrary to ***Agnews*** and ***Spectrum***: **BUT NOT mentioned in those judgments** [See *Palmer's Company Law, Vol.3*, para 13115]

- Reason (?): Rental income as attached to proprietary interest

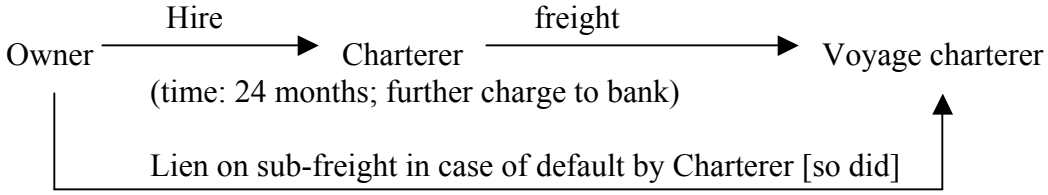
C. PERFECTION OF SECURITY INTERESTS

(a) Dual Register System [Companies Registry, and Registry kept by company]
Companies Ordinance, ss.80, 89-90
[NB: ONLY civil sanction follows from failure to register at CR]

(b) Duty to register and non-compliance **[Companies Ordinance, ss.80-1]**

(c) Registrable charges [See **Companies Ordinance, s.80(2)**]

Re Welsh-Irish Ferries [1985] 3 WLR 610



Held:
- "Lien" really as equitable charge on book debts; void for non-registration [though state of affairs maintained so for many years as trade practice]
  - **BUT** Lord Millet in ***Agnews*** thought: NOT charge [para 39]

London & Cheshire Insurance v Laplagrene [1972] 2 WLR 257

Held:
- Unpaid buyer's lien in S&P as creature of law and did not depend on contract; therefore NOT registrable
- Generally: securities arising by operation of law NOT registrable

Paul & Frank Ltd v Discount Bank (Overseas) Ltd [1967] Ch 348
- Insurance policy with Export Credit Guarantee Dept of Board of Trade to cover default by overseas customers: B went bankrupt
- Letter of authority charging benefit of policy to bank (receiving bank under bill of exchange)

Held:
- Test of "book debt": whether debts which in the ordinary course of business would be entered in well-kept books of a company
- On facts: NOT in practice be entered in books; NOT registrable
- Potential claim under insurance policy NOT as book debt: NOT registrable as customer may or may not default
  - ONLY has to register when customer actually defaults

NB: Effect on Future charges: Constant stream of book debts: security effected as future book debts come into existence

- Really require registration each time?

1. ***Independent Automatic Sales v Knowles & Foster***:
   - Time for purpose of registration runs from date when charges granted for present and future book debts
   - Distinction with insurance policy in ***Paul & Frank***: liability contingent on default of customers

2. ***Re Gregory Love & Co*** [1916] 1 Ch 203
   - Agreement with director L that Co would grant floating charge if (a) bank (security holder of Co) asking for repayment; or (b) bank calling on L to redeem property charged by him
   - One event happened after 3 months: then floating charge granted to L, and agreement registered

   Held: Charge ONLY arose upon occurrence of later events

(d) Particulars of charges for registration **[Companies Ordinance, s.83(1)]**

Sun Tai Cheung Credits v AG of HK [1987] 1 WLR 948 (PC)

- Oral agreement: sub-mortgage to bank (which agreed to extend time for repayment of loan made to company)
- Filled under heading "Date and description of the instrument creating or evidencing mortgage or charge" [in prescribed form to CR for filing]: ONLY "Bundle of letters" (stating dates and coipes)

Held:

- Should indicate to CR that charges created w/i statutory time limits; no instrument produced; date and method of creation of charge; explanation for absence of instrument creating or evidencing it
  - On facts: Should have stated that charges created by deposit of title deeds on particular dates

(e) Effect of registration

Wilson v Kelland [1920] 2 Ch 306
- (obiter) particulars registered under Companies Act amounted to constructive notice of charge affecting property, but NOT of any special provisions contained in that charge which are NOT registrable (e.g. restricting Co from dealing with their property in the usual manner when subsisting charge is a floating security)

(f) The Registrar's conclusive certificate and erros on the register
[Companies Ordinance, s.83(2)]

National Provincial Bank v Charnley [1924] 1 KB 431
- Company granted security to bank with its leasehold factory with all movable plant used in or about the premises
- Registration under CompAct: particulars only mentioned premise, NOT chattel
- Certificate of registration from CR only mentioned premises, NOT chattels

Held:
- CompAct provision provided that CR certificate as conclusive evidence that the requirements for registration complied with
- All charges created in instrument as valid: charge on chattel valid and NOT void, despite not being mentioned in CR's cert.

RE CL Nye Ltd [1971] 1 Ch 442

Held: Charge falsely-dated to satisfy 21-day filing rule; Still valid as CR's cert. conclusive

(g) Late registration

Companies Ordinance, s.86: Power on Court to order extension of time for registration

Re Ashpurton Estates [1983] Ch 110

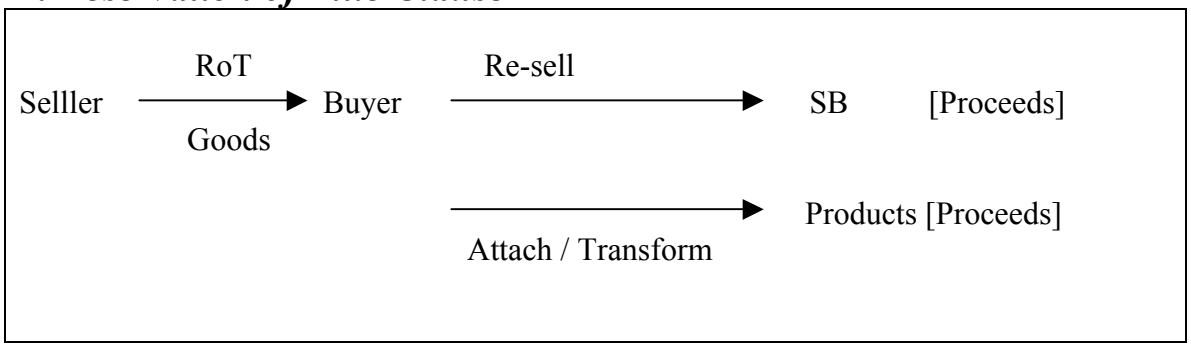
Held:
- Established practice of court in exercising its discretion that
  (1) Make order with proviso that it was made without prejudice to rights of parties acquired prior to time when charge became registered (***Charles*** order: ***In re L.H. Charles & Co Ltd*** [1935] WN 15)
  (2) Order would not be made once company went into liquidation
- On facts: Deliberate deferment of registration by chargee as factor against extension of time

Exeter Trust Ltd v Screenways Ltd [1991] BCLC 888

Re Fablehill Ltd [1991] BCLC 830
- Test: whether it would not be just and equitable to grant extension

D. QUASI-SECURITY

1. Reservation of Title Clause



Clough Mill Ltd v Martin [1984] 3 All ER 982

- Retention of title clause: remain S's property until all yarn supplied paid for
  - **Held:** NO charge created
- Also clause that property in products would pass to P until payment had been made or goods sold to sub-B in bona fide sale
  - **Held:** Charge
  - Though theoretically, if parties agree, property in products could vest in S
  - On facts: Clause did NOT mention about repayment of part of price for the material as has already been paid by B; allowance to b made by S to B for cost of manufacture of new goods, or other materials incorporated by B into new goods
  - **[BUT Buckley in *Borden* said this cannot be done] In any event, upset commercial expectation that products would be that of Buyer who had spent money and labour**
    - ➔ **Really IMPOSSIBLE!!!**

E Pfeiffer Weinkellerei Weinenkauf GmbH v Arbuthnot Factors Ltd [1988]

- Contract provided that property in wine remained P's property until paid; BUT imported permitted to sell goods
- Also: **Proceeds** arising from sub-sale would pass to P
  - Sub-sale by importer: debts owed by sub-purchasers to importer assigned to D absolutely
  - Entitled to recover arrears in rent within 14 days of payment becoming due

Held:

- When B permitted to sub-sell goods in normal course of business before paying S for them, normal implication would be that B would do so for its own account
  - **NOT fiduciary** (obliged to account to S all proceeds of sale)
  - Clause also inconsistent with existence of fiduciary relation
- Clause effected as equitable assignment to P of future debts owed by sub-B to importer [up to amount of outstanding indebtedness to to P]
  - Void for non-registration

Tatung (UK) Ltd v Galex Treasure Ltd (1989) 5 BCC 325

- "Varied" RoT: "proceeds of resale… preceding payment of full price… be held by [B] in a separate account as trustee thereof for [S]"

Held:

- BUT B could pay S by any money, NOT those in account
- As personal obligation to pay S performed, trust obligation released: S ONLY had an interest in the proceeds defeasible upon payment of the debt (at 332-3)
- Effected as security

Compaq Computers Ltd v Abercorn Group Ltd [1993] BCLC 602

- Contract: with RoT catching proceeds of sale of goods
- When B sold goods, NOT doing so as S's agent, bailee, fiduciary or trustee; sells lawfully on its own account w/o reference to S, when it liked, at what prices it liked and on what terms it liked, in the hope of making a profit for itself (at 615b)
- **Even though contract stated that B was bailee or agent of unsold goods, and B authorised to sub-sell goods**

Borden (UK) Ltd v Scottish Forest Timber Products Ltd [1979] 3 All ER 961

- Resin lost its identity as mixed and used

Armour v Thyssen [1991] 2 AC 339

- D: manufacturer and supplier of steel
- D sold and supplied to C Ltd. Steel strip for use in manufacturing process
  - Some steel cut into sheets; and others in state of being cut
  - Most in delivered state
- Contract included clause: all goods delivered remain D's property until all debts owed to D settled

Held:

- D reserved right of disposal of goods under contract of sales until condition [i.e. payment of all debts] fulfilled; property did NOT pass until that condition fulfilled under SGA ss.17, 19
- NO right of security created
  - Legitimate retention of title: NOT conferred by buyer

Hendy Lennox Ltd v Grahame Puttick Ltd [1983] 1 WLR 485

- When two chattels attached together, and it is impossible to separate them without significant damages, the lesser ingredient would lose its identity [What determines which is greater??]
- Owner of greater thing would own final products

Held:

- NO destruction of property in engine (still identifiable, though take several hours to detach from other plants [which together form an engine block])

Associated Alloy Pty Ltd v CAN 001 452 106 Pty Ltd [2000] HCA 25

- Buyer, by declaring itself as trustee of proceeds for itself and Seller, entered into a genuine trust agreement: **NOT charge**

NOT practical to take charge from B:
- If one-off transaction: expensive to engage lawyer to register charges
- Bank already take charge from B
- Unfavourable rule of tacking

2. Hire Purchase and Finance Leases

Helby v Matthews [1895] AC 471
- Hire of piano that hirer would pay rent by monthly installment; could terminate by delivering up the piano to owner [though remain liable for arrears of hire]
- If hirer paid installment for 36 months, piano would become property of hirer

Held:
- Option on hirer to purchase piano: if he chose to pay for sufficiently long period of time
- Hire-purchase agreement: NO obligation to sell towards end of contract

McEntire v Crossley Bros [1895] AC 457
- Agreement between "owner and lessor" and "lessee": hire of engine by lessee, payment by installment
- Upon full payment: agreement would end and property in engine leased would pass to lessee
- Right on lessor to recover balance or to resume possession of engine if lessee defaulted

Held:
- Property remained with lessor; transaction NOT covered under Bill of Sales Act

Forthright Finance plc v Carlyle Finance Ltd [1997] 4 All ER 90
- Hirer would become owner of goods unless disclaimed

Held:
- Effectively as conditional sale: "Hirer" as owner all along

Belsize Motor Supply Co v Cox [1914] 1 KB 244
- When hirer unlawfully sells car [under hire-purchase contrary to h.p. agreement], owner could NOT recover the value of the car, BUT ONLY amount of hire purchase money remaining unpaid [i.e. the value of owner's interest in the car]
- Followed in ***Whiteley Ltd v Hilt*** [1918] 2 KB 808

3. Set-off

(i) Equitable set-off

Hanak v Green [1958] 2 QB 9

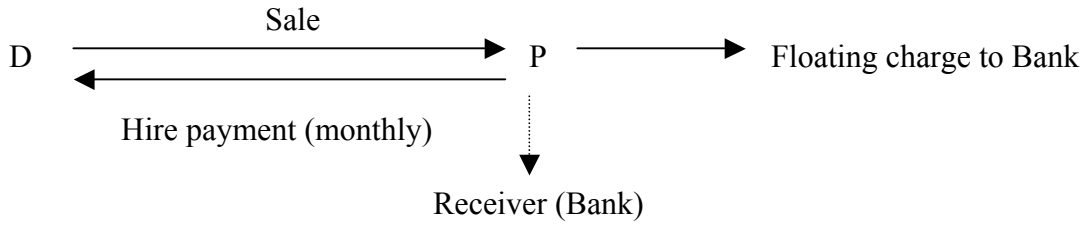
- Householder owed money to builder for contractual price
- BUT unsatisfactory work by builder: damages claimed by householder

Held:

- Equitable set-off: in single transaction; unjust NOT to allow set-off

(ii) Common law set-off

Business Computers v Anglo-African Leasing [1977] 2 All ER 741



- P [computer manufacturer]: granted floating charge in favour of Bank over all assets
- D owed P $10,587.5: purchase of computers from P
- Hire-purchase agreement between P and D [i.e. Purchase by D]
  - Monthly instalment payable on 18th for 36 months
  - Entitled to recover arrears in rent within 14 days of payment becoming due
- 18 May 1974: P defaulted payment
- 13 June: Bank appointed receiver as P insolvent
- 17 June: D notified of appointment of receiver; then entitled to terminate agreement [Effectively as notice of assignment to Bank]
- 31 July: Receiver repudiated hire-purchase agreement
- 8 August: D accepted repudiation by Receiver; entitled to sum of $30,000 under hire-purchase agreement [under acceleration clause: i.e. make future money immediately due and payable]

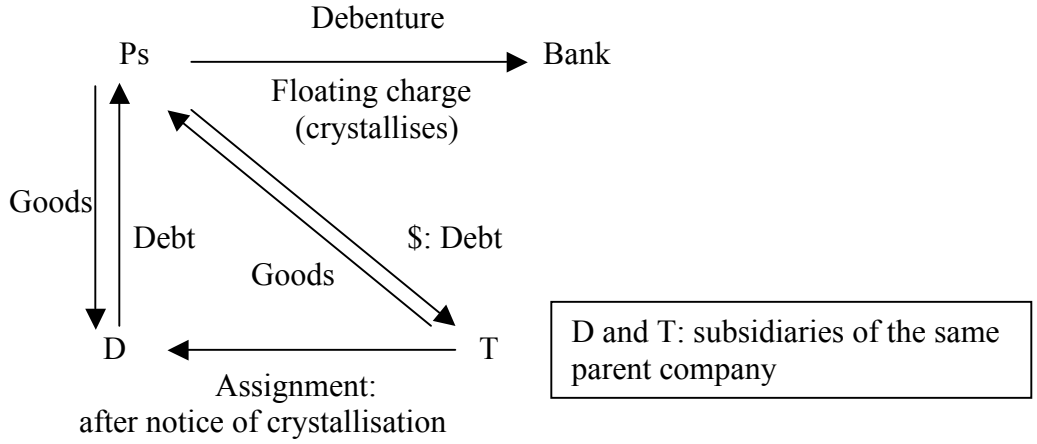
Held:

- Debtor CANNOT set off against assignee debt which had NOT accrued before the date of assignment NOR was connected with assigned debt
  - D NOT entitled to set-off $30,000 as NOT accrued before 17 June; liability arose under different contract
  - Sum NOT yet fallen due: P still had NOT enjoyed use of goods in future

  [Receivership: technically NOT insolvency; i.e. **common law set-off: ONLY applicable to sum fallen due (but may be NOT yet payable)**]

(iii) Equitable assignment

NW Robbie & Co v Witney Warehouse [1963] 3 All ER 613



- D could NOT claim set off for the amount of debt assigned from T:
  - Bank's floating charge subject to existing equities (i.e. D's original debts owed to P): Assignment from T was after crystallisation; NO mutuality

(iv) Bankruptcy set-off

Bankruptcy Ordinance, s.35

> Where there have been mutual credits, mutual debts or other mutual dealings between a bankrupt against whom a bankruptcy order is made under this Ordinance and any other person proving or claiming to prove a debt under the bankruptcy order, an account shall be taken of what is due from the one party to the other in respect of such mutual dealings and the sum due from the one party shall be set off against any sum due from the other party and the balance of the account, and no more, shall be claimed or paid on either side respectively; but a person shall not be entitled under this section to claim the benefit of any set-off against the property of a bankrupt in any case where he had, at the time of giving credit to the bankrupt, notice that the petition had been presented.

[For Companies: see **Companies Ordinance, s.264** (reference back to BO, s.35)]

M.S. Fashion v BCCI [1993] Ch 425 (per Hoffmann J; affirmed by CA)

- Company directors either
  - (i) signed as "principal debtor" an agreement with BCCI; or
  - (ii) guarantee for Company's debt [Bank does NOT have to resort to Company for payment]; or
  - (iii) guarantee liability expressed as secondary and stated as dependent on bank's claim [i.e. **contingent liability**; Bank did NOT make claim: **NO insolvency set-off [UK later has mechanism for assessing value of estimated claim: s.322(3), Insolvency Act 1986]**]
- Guarantee for repayment of loans by BCCI to Company: BCCI could withdraw money from deposit account with BCCI towards satisfaction of debts
- BCCI compulsorily wound up

M.S. Fashion v BCCI [1993] (cont'd)

Held:

- Directors could set off claim for return of deposit against his liability to pay Company's debt, so that debt totally extinguished
  - Letter of charge created liability on directors for Company's debt: as "principal debtor"
  - For primary (c.f. secondary) obligation: provision for writing NOT regarded as creating a contingency [for Case (ii) above]
  - Set off available even when BCCI did NOT sue directors for sum

- Also collected these principles about insolvency set-off:
  (1) Automatic principle: NO filing necessary to trigger insolvency set-off
    - Mandatory principle: Statutory set-off CANNOT be excluded by agreement between parties: ***National Westminster Bank Ltd v Halesowen Presswork and Assemblies Ltd*** [1972]
    - State interest in orderly distribution of insolvent company's assets
  (2) Retroactivity: Account is taken at date of winding order, although in fact it takes time for this to be worked out (see ***Stein v Blake***)
    - P sued for breach of contract
    - D counter-claimed for damages for misrepresentation
      - Before trial, P bankrupted: Trustee in bankruptcy purported to assign to P right of action against D
      - [Necessary for liquidator / trustee in bankrupt to get money to fund liquidation process]
    - 31 July: Receiver repudiated hire-purchase agreement
    - 8 August: D accepted repudiation by Receiver; entitled to sum of $30,000 under hire-purchase agreement

    Held:
    - As statutory set-off is mandatory and self-executing as of bankruptcy date, original chose in action [A's claim against B] ceases to exist
      - Replaced by a claim to net balance
      - Trustee in bankruptcy could NOT assign claim back to P [bankrupt]
  (3) Hindsight principle: see ***Sovereign Life Assurance v Dodd*** [1892] 2 QB 573
    - Dodd [policy holder] borrowed from SLA on security of his life insurance policies
    - Company wound up before insurance policies matured
    - Dodd continued to pay for premium after wound up until policies became due
      - BUT then arrangement which policy holder ONLY entitled to substantially reduced payments in respect for their policies
    - Company sued for whole sum of loan: Dodd pleaded set-off of full amount due on his policies

    Held:
    - Could set-off whole sum: account taken of the fact that policy actually matured after winding-up date

4. General Assignments of Book Debts

Lloyds and Scottish Finance Ltd v Cyril Lord Carpets Ltd (1979) [1992] BCLC 609

- **Block discounting case**
- Trading agreement: CLCS would sold debts arising from credit sales to LSF [payment due from CLCS's customers from 6-30 months] in consideration of 80% of amount of debt
  - Agreement that every agreement agreed upon would be absolute assignment and sale
- CLCS in bankruptcy

Held:

- Trading agreement provided for sale and purchase of debts; documents and oral evidence clearly negated intention of creating charge over book debts or merely making a series of loans
  - Trading agreement intended as real contract to govern individual transactions: trading agreement actually carried out as well

Chow Yoong Hong v Choong Hong Rubber Manufactory [1962] AC 209

- P received several out-stationed cheques from customer in course of business
  - Cheque could NOT be cleared w/o 7-10 days: P could NOT draw on them until cleared
  - D had special arrangement with their Bank: for a special charge, D allowed to draw on those cheque at once [as facilities available from Bank]
  - D gave P cheques in return
  - P endorsed those cheques in favour of D

Held:

- D's cheques NOT for "repayment of money lent", BUT rather for purchase or discounting of cheques
  - NOT covered by Moneylenders Ordinance: NO promise of repayment

E. PRIORITIES

Legal and Equitable Interests [*Bona fide* purchase principle]

Joseph v Lyons (1884) 15 QBD 280

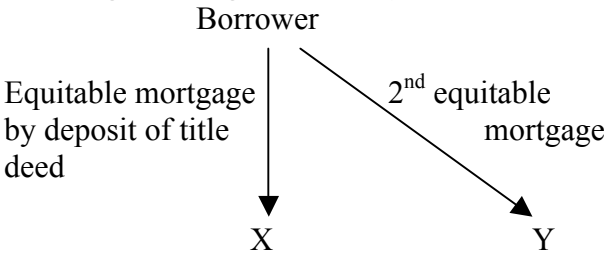
- Jeweler assigned to P, for valuable consideration, his after-acquired stock-in-trade under a security bill of sale [with equity of redemption]
- Before P took possession of the after-acquired stock-in-trade, Jeweller pledged a portion o f it with D, who had NO notice of P's BoS

Held:

- P entitled to retain stock-in-trade pledged with him as against P
- Cotton LJ (at 286) was of the opinion that a pawnbroker was NOT expected to search BoS Register [*Law of PPS*, 13.06, n21]

C.f. ***Wilson v Kelland*** [1910]: constructive notice regarding to particulars of charges registered at CR

Tacking the Legal Estate (the tabula in naufragio*)*



- If Y had NO notice of 1st equitable mortgage at time of acquisition of its interests, it could obtain priority over 1st mortgage by acquiring the legal estate [irrespective whether Y subsequently had notice of 1st mortgage]

➢ **BUT** see comment of Millett J in ***Macmillan v Bishopsgate Investment Trust*** [1995] 1 WLR 978, 999-1005

- Abolished in relation with mortgages (at 1002) [*Law of PPS*, 13.122: (i) uncertainty if s.94 LPA applies to personalty; and (ii) "tacking" Not defined in s.94; contextually limited to making of further advances]
- Also uncertain as Millett J suggested (at 1003-4) that a version of *tabula* continues to apply in the case of stocks and shares
- Securities made subject to equitable mortgage by deposit of share certificate, and mortgagee taking also a share transfer form duly signed by m/or, m/ee in the event of default is in a position to apply to Co to be registered as legal owner [NO need to resort to m/or]
  - When registered as legal owner, m/ee rank ahead of equitable interets

The Equities are Equal

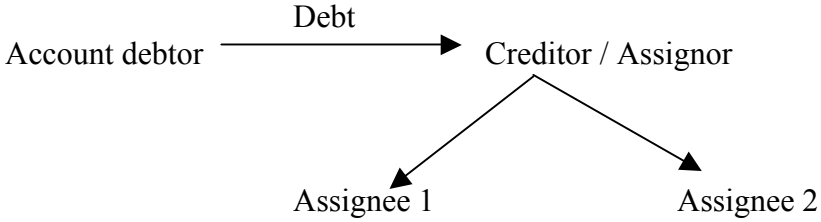
Rice v Rice (1853) 2 Drew 73, 61 ER 646 [*Law of Personal Property Security*, p429, n76]

- Lien arose followed by an equitable mortgage
- Mortgage won as the fact that the deeds were deposited with him was said to give him the better equity

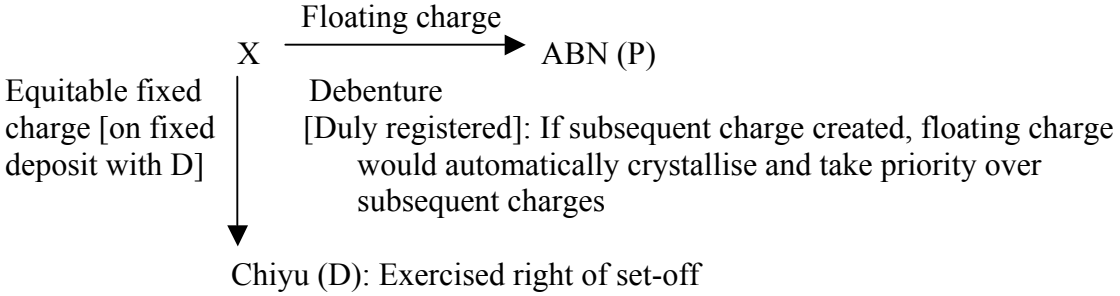
The Rule in Deale v Hall

[Explained in ***Ward v Duncombe*** [1893] AC 369; Bridge, *Personal Property Law*, p 162]

- The first of two or more assignees [of choses in action] for value to give notice has priority, provided that that person has NO notice (including constructive notice) of earlier assignment
- Apply to assignment absolute and assignment by way of charge: even though assignment is a partial one
- Apply to statutory and equitable assignment: NOT apply where one assignment as floating charge (Why?)



ABN Amro Bank NV v Chiyu Banking Corp [2001] 2 HKLRD 175

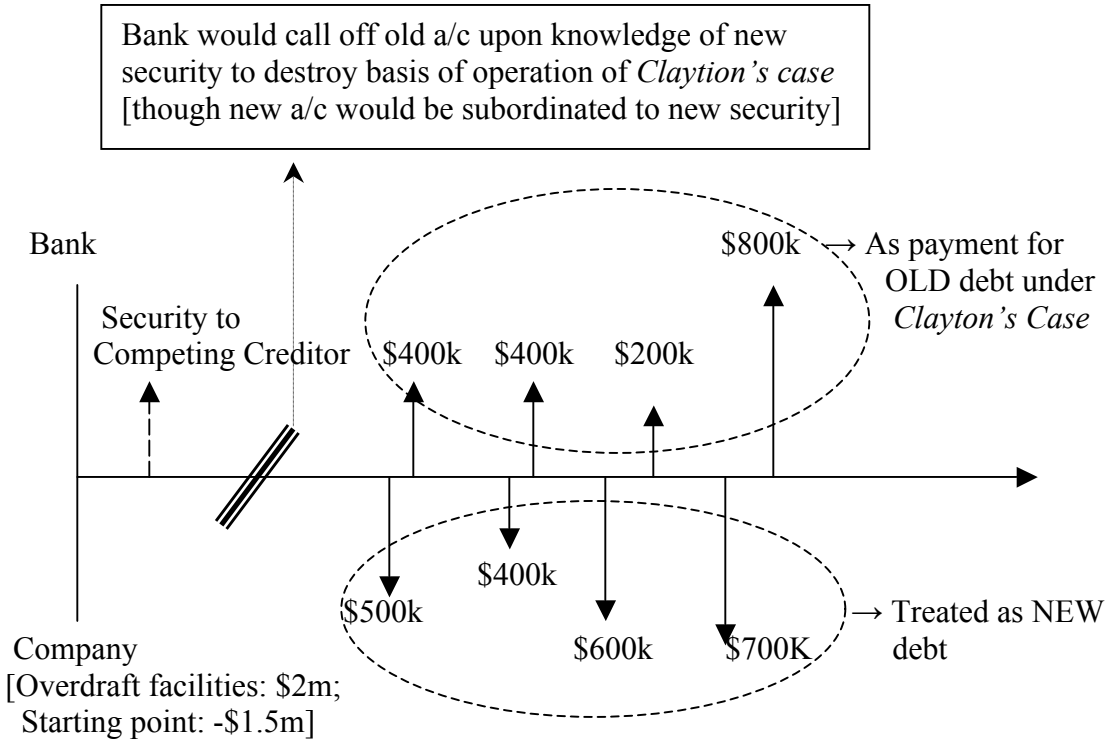


Held:

- D: NO constructive notice of prohibition clauses against X charging its assets w/o P's consent: ***Wilson v Kelland*** followed
- Under ***Dearle v Hall***, the first equitable assignee of a debt to give notice to account debtor is given priority, provided that assignee does NOT have notice of previous assignment when he advanced the money
    - Deposits maintained with Chiyu: NO need to give notice to itself regarding the charge-back in order to obtain priority over P's crystallised charge
    - [Why was NOT D bound by notice of floating charge??] ABN had NOT given notice to D at any time

[*Law of PPS*, p 491-4]
Restrictive CL and statutory rules against tacking: particular application to Banks

- Compounded with effect by the Rule in *Clayton's Case*: Applied at all material times whether a/c in credit, or in debit, or a mixture of two
- Payments into account are appropriated to oldest indebtedness in that account



Purchase Money Security Interest

Re Connolly Bros Ltd (No 2) [1912] 2 Ch 25

- Company issued floating charge in favour of Bank on all its assets
  - Company then purchased property: Borrowed money from O on terms that O would have charge upon assets to be purchased
  - Same solicitor acted for O and Company: retained title deed for O [also acted for parties in previous floating charge and thus notice]; BUT failed to investigate the title nor search register of debentures on O's behalf
  - Co later executed charge in favour of O

Held:

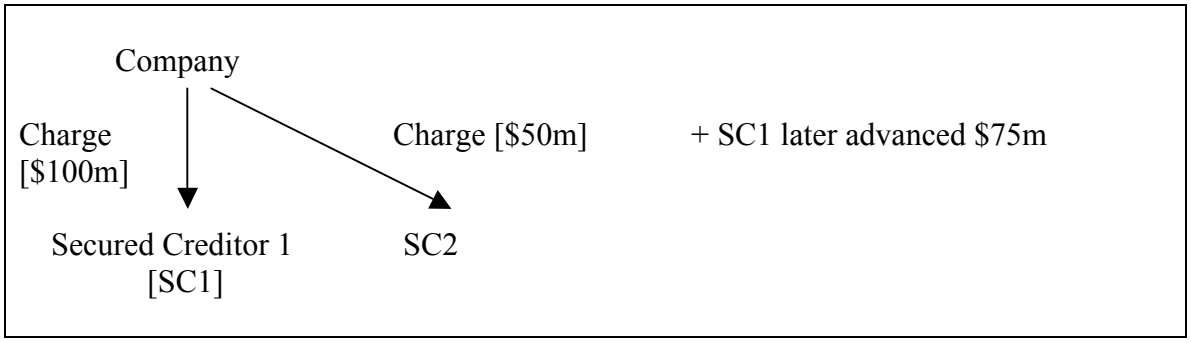
- O's charge over the property had priority over Bank's charge [though Co prohibited under agreement to charge property]
  - When Co acquired property, it ONLY got equity of redemption in property subject to equitable charge of O
  - I.e. NO *scintilla temporis* [glimpse of time]: Company can grant charge to O though NO interest in land yet
  - [HL in ***Abbey National Building Society v Cann (No.2)*** also rejected doctrine of *scintilla temporis*]

Tacking Future Advances

- Halsbury's Laws of Hong Kong, Vol. 16 "Land" (2007 reissue), para 230.0730, n1)
  - A mortgagee's right to tack, i.e. to add later advances to earlier advances so as to obtain priority over an intermediate incumbrancer, formerly existed:
    (1) where a legal mortgagee made a further advance without having notice at the time when the further advance was made of the existence of an intermediate incumbrance (see e.g. ***Tenison v Sweeney*** (1894));

    (2) where a third incumbrancer, having made his advance without notice of the second incumbrance, obtained a transfer of the first mortgage so as to obtain the benefit of the first mortgagee's legal estate (see e.g. ***McCarthy and Stone Ltd v Julian S Hodge*** (1971));

    (3) where a mortgage was made to secure further advances and such advances were made without notice of an intermediate incumbrance (see e.g. ***Hopkinson v Rolt*** (1861) 9 HLC 514) [**NB:** If has notice, consent of 2nd mortgagee necessary, even if contractually bound to make further advances (Goode, p 656)]



- SC2 could obtain priority over SC1 if there is priority agreement
  - **BUT CANNOT tack later advances on previous discretionary advances, e.g. overdraft facilities [as Bank could terminate supply of overdraft facilities at any time]**

NB: Conveyancing and Property Ordinance (Cap 219), Section 45 [commencing from 1 November 1984]

(1) A mortgagee under prior mortgage may make a further advance or re-advance to rank in the same priority over a subsequent mortgage as the original advance under that prior mortgage-
(a) if the subsequent mortgagee so consents; or
(b) where the further advance or re-advance does not exceed, with any other outstanding advance or re-advance, the specified maximum amount secured under that prior mortgage; or
(c) where that prior mortgage is in favour of an authorized institution (as defined in the Banking Ordinance (Cap 155)) and is expressed to secure all money which may, from time to time, be owing to the prior mortgagee, (Amended 27 of 1986 s. 137)

and paragraphs (b) and (c) shall have effect whether or not the prior mortgagee had notice of the subsequent mortgage at the time when the further advance or re-advance was made by the prior mortgagee.

(2) The priority to which a prior mortgagee is entitled under subsection (1) shall extend, in addition to the amount secured under the prior mortgage, to interest on that amount and to all costs, charges and expenses secured under the mortgage.

(3) Subject to subsection (1), the right to tack in relation to land is abrogated: (Amended 31 of 1988 s. 16)

Provided that nothing in this section shall affect any priority acquired before the commencement of this section.

Floating Charge

- Usually could be defeated by subsequent fixed charge [as usually in course of business]; and subsequent floating charges, provided that it is NOT over exactly the same assets as 1st floating charge

Re Benjamin Cope & Sons [1914] 1 Ch 800

- Co created series of debentures: 1st stated as 1st in series of 20 debentures, and that "all such debentures shall rank *pari passu* w/o regard to the date of issue thereof"
- 2nd series of debenture stated "all of such debentures, of this and the 1st series, shall rank *pari passu* w/o regard to the date thereof"
- NB: 2nd charge was over the whole assets comprised in 1st charge

Held:

- Second debenture did NOT rank *pari passu* with 1st debenture, but after them
- I.e. cannot gain priority merely by stating as "1st charge"
- *Law of PPS*, 13.44: "… a floating chargor does NOT have authority to create a subsequent floating charge ranking in priority to 1st charge if the 2nd charge is over the same property as 1st charge"

Re Automatic Bottle Makers [1926] Ch 412

- Restrictive clause in 1st charge: But company could create in priority to that charge such mortgages or charges "by the deposit of any dock warrants, B/L or similar commercial documents, …"

Held:

- Grant of 2nd floating charge as w/i implied authority under 1st floating charge
- Priority over 1st floating charge
    - Distinguish ***Re Benjamin Cope & Sons*** [2nd charge over same assets as 1st charge]: here, 2nd charge ONLY cover some assets under 1st charge

Griffiths v Yorkshire Bank [1994] 1 WLR 1427

- Priority depends on date of crystallization: **Clearly WRONG!!!**

Subordination Clauses and Priority Agreements

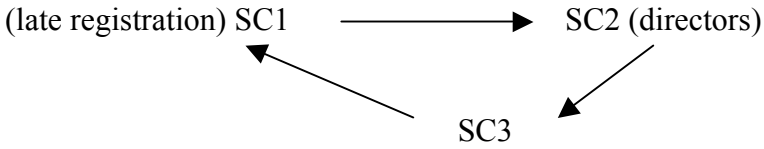
- NOT offend *pari passu* principle

Cheah v Equiticorp Finance Group [1991] 4 All ER 989

- Debtor has NO interest in the order of paying its creditors: Priority agreements bind debtor, whether or not he has asked for and gave his consent

Circular Priority Problems [*Law of PPS*, p 544-6]

Re Fablehill [1991] BCLC 830, 843-4

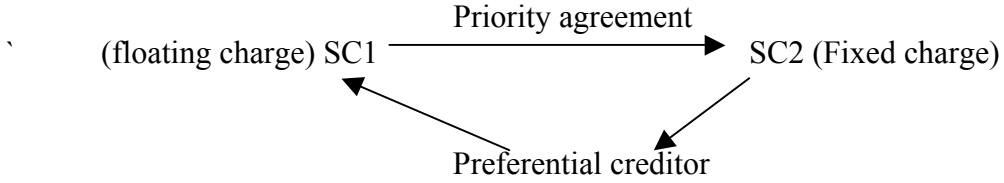


[Another: lost priority to SC2 as created at later date]

Held:

- Directors should know of the need for registration of 1st security [for SC1]: could NOT take advantage of *Charles* order under order for late registration **[i.e. SC1 had priority over SC2]**
- Sol^{n} of subrogation: SC1 would stand in position of SC2 and entitled to sum to the extent SC2 is entitled [SC1 was subrogated to SC2's right to priority as against preferential creditor]
- Priority order: SC1 [in place of SC1]; SC3; SC1 [for the balance owed to it]; SC2; SC1 for remaining amounts
  - [NB: Anomaly: promote SC3 ahead of SC2]
- Adopt agreed outcome in ***Re Woodroffe's (Musical Instruments) Ltd*** [1986] Ch 366

Re Portbase Clothing Ltd [1993] 3 WLR 14



Held:

- Preferential creditor won in this "circularity of priority" problem: s.175(2)(b), Insolvency Act 1986 provides that:

  "*Preferential debts… have priority over the claims of holders of debentures secured by, or holders of, any floating charge created by company, and shall be paid accordingly out of any property in or subject to that charge*"
- Order of priority: PC; SC1; SC2
  - **BUT this means that preferential creditors would receive a windfall from the priority agreement to which it is NOT a party and has NO rights**

Preferential Creditors [For list of PCs, see **Companies Ordinance, s.265**]

Companies Ordinance, s.79 (Payment of certain debts out of assets subject to floating charge in priority to claims under the charge)

(1) Where a receiver is appointed on behalf of the holders of any debentures of a company secured by a charge which, as created, was a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts, which in every winding-up are under the provisions of Part V relating to preferential payments to be paid in priority to all other debts, shall, according to their respective priorities under section 265, be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures. (Amended 10 of 1987 s. 3)

(1A) In the application of the provisions of Part V, section 265 shall be construed as if the provision for payment of accrued holiday remuneration becoming payable on the termination of employment before or by the effect of the winding-up order or resolution were a provision for payment of such remuneration becoming payable on the termination of employment before or by the effect of the appointment of the receiver or possession being taken as aforesaid. (Added 6 of 1984 s. 45)

(2) The periods of time mentioned in the said provisions of Part V shall be reckoned from the date of the appointment of the receiver or of possession being taken as aforesaid, as the case may be.

(2A) Where the date referred to in subsection (2) occurred before the commencement* of the Companies (Amendment) Ordinance 1984 (6 of 1984), subsections (1) and (2) shall have effect with the substitution, for references to the provisions of Part V, of references to the provisions which, by virtue of section 265(7) are deemed to remain in force in the case therein mentioned, and subsection (1A) shall not apply. (Added 6 of 1984 s. 45)

(3) Any payments made under this section shall be recouped as far as may be out of the assets of the company available for payment of general creditors.

(Amended 6 of 1984 s. 45) [cf. 1925 c. 23 s. 78 U.K.]

[Note: * Commencement date: 31 August 1984.]

Re Lewis Merthyr Consolidated Colleries Ltd [1929] 1 Ch 498

- Where a creditor has both fixed and floating charges, he was entitled to be paid ahead of preferential creditors so far as assets fell within the fixed charge

Execution Creditors and Garnishee Proceedings

- Priority lost if floating charge crystallites before money paid: both for execution creditors (see ***Evans v Rival Granite Co*** [1910] 2 KB 979) and garnishee proceedings (see ***Relwood Pty Ltd v Manning Homes Pty Ltd (No.2)*** [1992] 2 Qd R 197)

Expenses of Liquidation, Receivership, Administration, etc.

- Preferential creditors rank ahead of floating chargees
- Expenses of liquidation rank ahead of preferential creditors: s.175(2), IA 1986

Re Barleycon [1970] Ch 465

- Priority order: Liq. expenses; PC: floating chargee

Buchler v Talbot [2004] 2 AC 298

- ***Re Barleycon*** overruled
  - Two separate funds:
    1. Non-charged assets: Liq. expenses ranks ahead of PCs
    2. Charged assets: PCs rank ahead of floating chargees
  - NO legislative provision that permitted liq. expenses to be paid out of assets subject to floating charge
  - PCs had to exhaust unencumbered fund before claiming for encumbered fund
- **BUT Companies Act 2006, s.1282 inserted a new section s.176ZA of the Insolvency Act 1986 to overrule *Buchler v Talbot*** [2004] 2 AC 298

1282 Payment of expenses of winding up

(1) In Chapter 8 of Part 4 of the Insolvency Act 1986 (c. 45) (winding up of companies: provisions of general application), before section 176A (under the heading "*Property subject to floating charge*") insert–

"176ZA Payment of expenses of winding up (England and Wales)

(1) The expenses of winding up in England and Wales, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over any claims to property comprised in or subject to any floating charge created by the company and shall be paid out of any such property accordingly.

(2) In subsection (1)–

(a) the reference to assets of the company available for payment of general creditors does not include any amount made available under section 176A(2)(a);

(b) the reference to claims to property comprised in or subject to a floating charge is to the claims of–

(i) the holders of debentures secured by, or holders of, the floating charge, and

(ii) any preferential creditors entitled to be paid out of that property in priority to them.

(3) Provision may be made by rules restricting the application of subsection (1), in such circumstances as may be prescribed, to expenses authorised or approved–

(a) by the holders of debentures secured by, or holders of, the floating charge and by any preferential creditors entitled to be paid in priority to them, or

(b) by the court.

(4) References in this section to the expenses of the winding up are to all expenses properly incurred in the winding up, including the remuneration of the liquidator.".

F. ENFORCEMENT AND INSLOVENCY

When can Creditor Exercise his Power?

Cripps v Wickenden [1973] 1 WLR 944

- Sufficient time for creditor if given time to get money from some convenient place, NOT to negotiate a deal which he hopes would produce money
- On facts: 1 hour sufficient ; debtor did NOT have money ready anyway

Bank of Baroda v Panessar [1987] Ch 335

- NO need to state the precise amount of debt in making demand for payment
- Time: Debtor who was required to pay money on demand was allowed ONLY such time as was necessary to implement the mechanics of payment needed to discharge debt
    - In view of modern methods of communication and transfer of money: time needed was exceptionally short
    - On facts: 1 hours [after which Bank would appoint receiver] as sufficient time

Dao Heng Bank Ltd v Lam Ying Bor Investment Co Ltd [1987] 1 HKC 217

- NOT necessary to specific any sum in notice for demand of payment
- If Bank chose to specify the sum and misstated it, the error would NOT vitiate an otherwise valid notice.
    - Sufficient if notice shows that Bank is making demand for payment for principal and interests and other moneys owing to it

Sale

Re Morritt, ex parte Official Receiver (1886) 18 QBD 222

- Inherent power of sale w/o having to go to court
- BUT has to go into possession, which could be a disadvantage [as would be liable for wilful default in management of assets]

Law of Property Act 1925, ss.101 and 103

- Statutory power to sale given to m/ee and c/ee

Receivership: Practically Most Important Remedy [*LPA 1925*, ss.101 and 103]

Re Newdigate Colliery [1912] 1 Ch 468

- Court-appointed receiver case
- On facts: Receiver sought to discontinue contract for supply of coal, as coal price had risen sharply

Held:

- Court dismissed summons directing that receiver could discontinue contract]
- NOT entitled to look exclusively to interests of security holder, BUT also interests of debtor (at 472, bottom)
- If receiver decided to manage business, duty to ensure that nothing would damage goodwill of business: Receiver would have effectively ended the business by what they propose

Airlines Airspares v Handley Page [1970] 1 Ch 193

- Out-of-court receiver case
- Receiver could NOT be prevented from breaking contracts of company: In any event, repudiation of contract would NOT adversely affect realisation of company assets and any future trading prospects of company

NB: As agent of company: Receiver NOT liable for inducing breach pf contract [In effect, can breach contract with impunity]

Gaskell v Gosling [1896] 1 QB 669

- Practical effect that m/ee did NOT like to enter into possession: made to account for what he might receiver without wilful default (i.e. NOT taken proper care of assets) (at 691: "almost penal liabilities")

Sowman v David Samuel Trust [1978] 1 WLR 22

- Receiver appointed under mortgage; insolvency supervened

Held:

- Receiver ceased to be an agent of the company after insolvency supervened: thus deprived power to bind company personally
- NOT affect power to hold and dispose of property under debenture
  - Thus binding on company
- Conveyance executed in name of Co effectively completed contract: power of attorney under debenture, which was also irrevocable because it was an authority coupled with an interest [under Powers of Attorney Act 1971, s 4(1)]

Insolvency Act 1986, ss.72A-H [Chapter III entitled "Prohibition of Appointment of Administrative Receiver" with exceptions for certain financial activities]

Insolvency Act 1986, Schedule 1 [Power on administrative receiver under s.42]

Duty of Mortgagee on Sale

Kennedy v de Trafford [1896] 1 Ch 763, [1897] AC 180

- ONLY duty on mortgagee selling under power of sale in mortgage is to act in good faith
- I.e. Mortgagee could favour its own interests

Cuckmere Brick Company v Mutual Finance [1971] Ch 949

- M/ee entitled to choose time for sale; BUT if decided to sell, m/ee obliged to take reasonable care to obtain a proper price
- **BUT two halves of statement seems contradictory: esp. conflict of interests between m/or and m/ee in falling market, though with some expectation that market could rise**

Tse Kwong Lam v Wong Chit Sen [1983] 1 WLR 1349

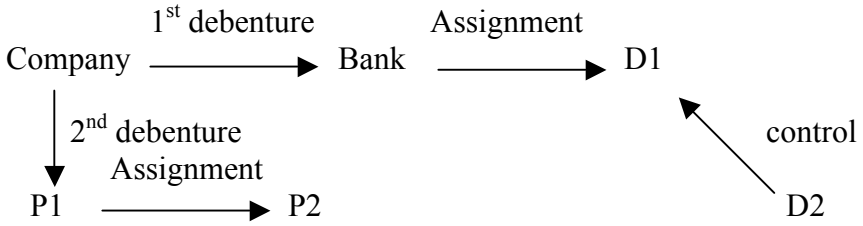
- M/ee sold property to company in which he had interests

Held:

- Duty to make the sale in good faith and take reasonable precautions to obtain best price reasonably obtainable at the time
- On facts: failed to show that reasonable precaution taken [esp. under conflict of duty and interests: could have been consulted estate agents about level of reserve price, etc.]; BUT delay by m/or defeated his claim

Duty of Receiver

Downsview Nominees v First City Corporation [1993] AC 295 (PC)



- P1 appointed receiver; D2 appointed receiver under 2nd debenture to disrupt receivership under 1st debenture and prevent enforcement of 2nd debenture by P1
  - P1's receiver relinquished control to D2
  - P1 also offered to purchase 1st debenture for the sum outstanding
  - Company continued trading and incurred substantial loss

Held: for P (on facts)

- NO duty in tort as inconsistent with his right and duty to act in interests of his debenture holder: NO duty of care in management of company
- **BUT certain duty imposed in equity:**
  (a) to act in good faith and for the purpose of obtaining repayment for his debenture holder and;
  (b) to take proper care to obtain the best price reasonably obtainable when selling the charged assets

BUT see: ***Medforth v Blake*** [2000] Ch 86

- D appointed as receiver to P
- P alleged D's negligence in conduct of business in failing to request and obtain discounts for purchase of pig-feed [which would be given as a matter of trade]

Held: D owed P a duty of care in conducting business

- Duty NOT confined to good faith: extent and scope of additional duty of care in negligence depends on facts and circumstances of case
- Duty measured against primary duty of receiver: try to ensure that debt and interests could be repaid
  - NOT necessary for receiver to conduct business: BUT if receiver did carry on business, should take reasonable steps to obtain profit
  - Power to inquire: whether discount would be given
  - Distinction with duty of directors

Claw-Back
(i) Transactions at an Undervalue

Insolvency Act 1986, ss.238, 240, 339 and 341
***Bankruptcy Ordinance*, ss.49, 51-51B** (NO corporate equivalence)

Re M C Bacon [1990] BCLC 324

- Overdraft facility with Bank w/o security in favour of Bank
- Business in difficulty as main customer of B Ltd terminated business
  - Bank knew of this and original directors ceasing to play active role in management of company's affairs
  - Demand security as condition for further support: May 1987 report stating company as insolvent, but possible to trade out of difficulty
  - September 1987: administrative receiver appointed
- Applicant (company liquidator) applied to set aside bank's debenture: voidable preference under s.239, IA 1986; transaction at undervalue under s.238, IA 1986

Held:

(1) Voidable preference [i.e. unlawful preference]

- Has to show that company desired was influenced by a desire to produce the effect under s.239(4)(b): Subjective desire [Old law: "dominant intention"]
- Has to prove that Company has desire to improve creditor's position in event of insolvency
- **BUT difficult to prove seemingly: BUT for associate, presumed that company has desire to favour associates**

(2) Transaction at an undervalue

- Granting of debenture as NO gift: ss.(a) NOT applicable [though NO new value given]
- NOT deplete company's assets: ONLY lose liberty to deal with proceeds
- **C.f. *Hill v Spread Trustee Co*** (per Arden LJ)

(ii) Unlawful Preferences

***Bankruptcy Ordinance*, ss.50-51B**
Companies Ordinance, s.266B
Re M C Bacon [1990] BCLC 324 (see above)

(iii) Floating Charges

***Companies Ordinance*, s.267**

> Where a company is being wound up, a charge which, when created, was a floating charge on the undertaking or property of the company and which was also created within 12 months of the commencement of the winding up shall, **unless it is proved that the company immediately after the creation of the charge was solvent**, be invalid, except to the amount of any cash paid to the company at the time of or subsequently to the creation of, and in consideration for, the charge, together with interest on that amount at the rate specified in the charge or at the rate 12 per cent per annum whichever is the less.
> (Amended 81 of 1976 s. 5; 84 of 1995 s. 7) [cf. 1929 c. 23 s. 266 U.K.]

Re Teovil Glove Company [1965] 1 Ch 148

- "in consideration for" means "by reason of" or "having regard to existence of" the charge

Power v Sharp Investments [1994] 1 BCLC 111 (CA)

- Shoe Lace Ltd in financial difficulties; sought assistance from parent company Sharp Ltd
- Money advanced to Shoe Ltd in April to July
- All money charge was executed by Shoe Ltd in favour of Sharp

Held:

- Where the making of an advance preceded the formal execution of a debenture by any time whatsoever, then unless the interval is so short that it can be regarded as minimal, no money paid to the company before the execution of the debenture would fall under s.245(2)(a) of IA 1986
- On facts: charge invalid; NOT "made at same time of creation of charge"

Re Fairway Magazine [1992] BCC 924

- Overdraft facility with Bank w/o security in favour of Bank **[emergency financing]**
- Money advanced in August; debenture executed in September

Held:

- Not invalidated if merely a 15-min coffee break
- Accept as "same time" under following approach:
    - Look at substance of transactions: Court NOT engage in mechanical timekeeping when applying these provisions
    - If payment made on account of consideration for creation of charge in anticipation of its execution and in reliance on its promise to execute the charge, the court may regard such payment as made at the time of creation of charge
    - **NB: decision before CA hearing of *Power v Sharp Investments*** (contrary result was reached)

(iv) Transactions Defrauding Creditors

***Companies Ordinance*, ss.266-266A**

Agricultural Mortgage Corporation v Woodward [1995] 1 BCLC 1

- Farmer D mortgaged farm to P as security for loan from P
- Payment fallen into arrears: before deadline for payment, D granted tenancy of mortgaged property to wife [as secured tenancy under agricultural legislation]

Held:

- Considering transaction as a while: though market rent, value of additional benefits conferred on wife were greater in value in money or its worth than the value of the consideration provided by her
- Wife at "ransom" position as m/ee would have to pay her off from the farm
- Transaction void

(iv.1) Fraudulent Preferences (HK)

Section 60: Voidability of dispositions to defraud creditors

(1) Subject to subsections (2) and (3), every disposition of property made, whether before or after the commencement of this section, **with intent to defraud creditors**, shall be voidable, at the instance of any person thereby prejudiced. **[NO time line mentioned]**

(2) This section does not affect the law of bankruptcy for the time being in force.

(3) This section does not extend to any estate or interest in property disposed of for valuable consideration and in good faith or upon good consideration and in good faith to any person not having, at the time of the disposition, notice of the intent to defraud creditors. (Amended 31 of 1988 s. 22)

[cf. 1925 c. 20 s. 172 U.K.]

- Defeated by good faith purchaser: s.60(3), CPO