Hinckley Singapore Trading Pte Ltd v Sogo Department Stores (S) Pte Ltd (under judicial management)
[2001] SGCA 59

Case Number	: CA 600007/2001
Decision Date	: 11 September 2001
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; L P Thean JA
Counsel Name(s)	: Chan Hian Young and Marc Wang (Allen & Gledhill) for the appellant; Lee Eng Beng and Melissa Lee Ai-Lin (Rajah & Tann) for the respondent
Parties	: Hinckley Singapore Trading Pte Ltd — Sogo Department Stores (S) Pte Ltd (under judicial management)

Agency – Evidence of agency – Interpretation of concessionaire agreement – Agent collecting proceeds of sale on behalf of principal – Whether agent holds monies in trust for principal – Whether agent required to separate principal's moneys separate from own

Civil Procedure – Inherent powers – Application for leave to commence proceedings against company under judicial management – Relevant principles at application stage – Whether court should go into substantive merits at application stage – Two-step process – Whether case appropriate for telescoping two-steps into one

Companies – Receiver and manager – Judicial management order – Leave to commence proceedings against company under judicial management – Concessionaire agreement – No express term creating trust – No express prohibition against mixing sale proceeds with other monies – Appellant claiming return of sale proceeds – Whether respondent holds sale proceeds in trust – ss 227B(1), 227C(c) & 227D(4)(c) Companies Act (Cap 50, 1994 Ed)

Companies – Receiver and manager – Judicial management order – Objectives – Effect – Moratorium on enforcement of rights against company under judicial management – ss 227B(1), 227C(c) & 227D(4)(c) Nature of moratorium – Companies Act (Cap 50, 1994 Ed)

Judgment:

Delivered by Chao Hick Tin, Judge of Appeal

1 This is an appeal against the decision of the High Court refusing the application for leave of the plaintiff-appellant, Hinckley Singapore Trading Pte Ltd (Hinckley), pursuant to s 227C(c) or 227D(4)(c) of the Companies Act, to have a certain question between Hinckley and the respondent, Sogo Department Stores (S) Pte Ltd (Sogo), determined by the court. The question as formulated by Hinckley is: whether monies collected by Sogo on behalf of Hinckley, pursuant to a concessionaire agreement dated 1 June 1990 between Sogo and Hinckley, were held on trust by Sogo for Hinckley.

The background

2 Sogo was, until recently, operating a department store at Raffles City. Hinckley was a company which dealt with the import and sales of Polo Ralph Lauren products (RL goods) consisting mainly of clothing and assessories.

3 Business relationship between Hinckley and Sogo commenced in 1990 when Sogo agreed, by way of a written agreement dated 1 June 1990, and with effect from the same day, to grant Hinckley a concession to carry out retail sales of the RL goods in an area of about 72 m2 in the department store. The initial validity period of the concessionaire agreement was for 36 months. By mutual consent, the agreement continued until it was terminated on 31 July 2000.

4 Under the concessionaire agreement, payments by purchasers of the RL goods were to be made to Sogo's cashiers located all over the store. Sogo was entitled to 20% of the sale proceeds as its commission which it was authorised to deduct direct from the proceeds of sale in its hands. As the question to be answered depends very much on what is provided in the agreement, we shall set out the pertinent provisions below:-

> "5(b) The Concessionaire (Hinckley) shall pay to the Company the sum equivalent to 20% of the total nett monthly sales. This payment is made through deduction from the monies collected for the respective month by the Company, the balance to be payable to the Concessionaire within fifteen (15) days of each calendar month."
>
> "5(d) The Concessionaire shall receive from the company at the end of each calendar month a statement of the total sales for that month which statement shall be deemed conclusive."
>
> "6 The Concessionaire hereby agrees with the Company as follows:- . . (c) All payments made by customers in respect of the goods sold by the Concessionaire shall be made direct to the Company's cashiers stationed in the Company's premises."

5 On 19 July 2000, interim judicial managers were appointed for Sogo. On 18 August 2000, by order of the High Court, Sogo was placed under judicial management.

6 In respect of the sales of the RL goods effected during the period May to July 2000, a net sum of $212,212.99 is due to Hinckley, after deducting the commission which Sogo was entitled to. Notwithstanding a demand made by the solicitors for Hinckley that the sum of $212,212.99 was and is held by Sogo as its agent and on trust for Hinckley, the judicial managers rejected the assertion of the existence of a trust. The solicitors for the judicial managers stated that the sum due to Hinckley, being 80% of the sale proceeds, was truly a debt owed by Sogo to Hinckley. They asked Hinckley to submit its claim in the usual manner as an unsecured creditor.

7 As Sogo is under judicial management, and unless the judicial managers consented, leave of court is necessary for Hinckley to commence any proceeding against Sogo: see s 227D(4)(c) of the Companies Act (the Act). Thus, this application for leave. We should mention that under the Act, even before the making of a judicial management order, but after the presentation of a petition for such an order, no proceeding may be taken against a company without leave of court (s 227C[c]).

Principles governing the grant of leave

8 The English equivalent to s 227C(c) and 227D(4)(c) of our Companies Act are to be found in ss 10(1)(c) and 11(3)(d) of the English Insolvency Act 1986. A leading English authority on the subject is Re Atlantic Computer Systems plc (No. 1) [1991] BCLC 606, where among the many issues dealt with therein was the question of the object of granting an "administration" order (which in our Act is termed "judicial management" order). The Court there differentiated between the objects of a winding-up and an administration order. In the former case, where an insolvent company is concerned, the object is to achieve an equal distribution of the company's assets among the unsecured creditors. So in respect of a secured creditor, who wishes to enforce his security, leave would normally be granted. In contrast, an administration is intended only to be an interim and temporary regime. It is really to provide some breathing space to the company, which is or will be

unable to pay its debts and, under the new temporary management of the administrator, to seek to achieve one or more of the following purposes (of which our s 227B(1) is in pari materia):-

> (i) the survival of the company, or the whole or part of its undertaking as a going concern;
>
> (ii) the approval of a compromise or arrangement between the company and its creditors/members;
>
> (iii) a more advantageous realisation of the company's assets would be effected than on a winding-up.

9 Therefore, the effect of the making of an administration order, or in our case a judicial management order, is that there is a moratorium on the enforcement of debts and rights, proprietary or otherwise, against the company, so as to give the administrators/judicial managers time to formulate proposals and lay them before the creditors, and then implement any proposals approved by the creditors. This is why the law imposes a restraint on the taking of proceedings or levying of execution against a company which is under judicial management. The moratorium is, however, not absolute and is, as indicated above, subject to the grant of leave by either the judicial managers (after their appointment), or the court.

10 In Re Atlantic Computer Systems, Nicholls LJ, delivering the judgment of the Court of Appeal also made detailed observations on how the discretion of granting leave should be exercised. We will only set out hereunder those parts which we think are more germane to the matter in hand (at 632-634) and, in order to fully appreciate those observations, it would be necessary that we first set out the provisions of s 227D(4)(c) and (d) [the English equivalent are in s 11(3)(c) and (d)]:-

During the period for which a judicial management order is in force -

> . . (c) no other proceedings and no execution or other legal process shall be commenced or continued and no distress may be levied against the company or its property except with the consent of the judicial manager or with leave of the Court and (where the Court gives leave) subject to such terms as the Court may impose; and
>
> (d) no steps shall be taken to enforce security over the company's property or to repossess any goods under any hire-purchase agreement, chattels leasing agreement or retention of title agreement except with the consent of the judicial manager or with leave of the Court and (where the Court gives leave) subject to such terms as the Court may impose.

These are, inter alia, the observations of Nicholls LJ:-

> 1. It is in every case for the person who seeks leave to make out a case for him to be given leave.
>
> 2. The prohibition to s 11(3)(c) and (d) is intended to assist the company, under the management of the administrator, to achieve the purpose for which the administration order was made. If granting leave to a lessor of land or the hirer of goods (a 'lessor') to exercise his proprietary rights and repossess his land or goods is unlikely to impede the achievement of that purpose, leave should

normally be given ....

3. In other cases when a lessor seeks possession the court has to carry out a balancing exercise, balancing the legitimate interests of the lessor and the legitimate interests of the other creditors of the company (see Peter Gibson J in Royal Trust Bank v Buchler [1989] BCLC 130 at 135) .....

4. In carrying out the balancing exercise great importance, or weight, is normally to be given to the proprietary interests of the lessor ....

5. Thus it will normally be a sufficient ground for the grant of leave if significant loss would be caused to the lessor by a refusal. For this purpose loss comprises any kind of financial loss, direct or indirect, including loss by reason of delay, and may extend to loss which is not financial. But if substantially greater loss would be caused to others by the grant of leave, or loss which is out of all proportion to the benefit which leave would confer on the lessor, that may outweigh the loss to the lessor caused by a refusal ....

12. In some cases there will be a dispute over the existence, validity or nature of the security which the applicant is seeking leave to enforce. It is not for the court on the leave application to seek to adjudicate upon that issue, unless (as in the present case, on the fixed or floating charge point) the issue raises a short point of law which it is convenient to determine without further ado. Otherwise the court needs to be satisfied only that the applicant has a seriously arguable case.

11 Although in the petition for an order for judicial management, it is stated that the purpose of seeking such an order is to prevent a scramble by creditors for Sogo's assets, as well as to give Sogo an opportunity to seek buyers for its franchises or retail operators, before the court below, as well as before us, it was not seriously argued that the contemplated proceeding by Hinckley would in any way undermine the objective which the making of the judicial management order was intended to achieve. Indeed, in the meantime on 23 March 2001, an order for the winding up of the company was made. So most of the considerations relating to balancing of interests referred to by Nicholls LJ in Re Atlantic Computer Systems, which the court should take into account in determining whether to grant leave, do not arise in our present case.

12 The position taken by the judicial managers was and is a straightforward one, namely, that Sogo was not holding the sale proceeds of the RL goods in trust for Hinckley and thus the latter has no proprietary right to those moneys. What Hinckley has is only a claim in debt simpliciter. There is no material dispute on facts. The monies collected from the sales of RL goods were never kept separate from the general account of Sogo. They were banked, like the sale proceeds of all other goods in the store, into a current account maintained with the Development Bank of Singapore (DBS) and this account was used for all the businesses of Sogo. During the period, May to July 2000, DBS account was vaccillating between credit and debit.

13 In an ordinary case, especially where facts are in dispute, to obtain leave, besides the other considerations alluded to by Nicholls LJ, all that the applicant needs to show is the existence of a seriously arguable case. In Hinckley's Case, it submits that it is not for the court to go into the substantive merits at the leave stage. Indeed, this is the general position to take in leave applications. However, in a case where the facts are not in dispute, like the present, and the issue is a direct point of law, the court would be entitled, if it thinks expedient, to proceed to determine the

legal issue outright rather than take the two step-approach, first of granting leave and then making the substantive determination at the next stage.

14 In a case such as this, where the point is one of law and where it has been adequately argued, we do not see why the court may not go into the merits now, rather than later, and decide whether in fact there are merits in the legal point. It is highly unproductive to grant leave first and later having to dismiss the substantive application. In an appropriate case, like the present, the court should be entitled to take a robust approach of telescoping the two steps into one.

15 We therefore agree, in the circumstances of this case, that the course taken by the judge below was appropriate. So for the purposes of this appeal, we will also be going into the merits to determine the legal issue outright.

Decision below

16 In arriving at her decision that Sogo did not hold the sum of $212,212.99 in trust for Hinckley, who would not thereby have a proprietary claim to it, the judge below had taken into consideration the following factors -

> (i) Purchasers of the RL goods paid the price of the goods to the cashiers of Sogo located throughout the store and such moneys were not kept separately from the moneys of Sogo obtained from the sales of the latter's own goods or of other concessionaires.
>
> (ii) Sogo was free to intermingle the proceeds from the sale of RL goods with the proceeds of sale of their own goods and they were in fact mixed.
>
> (iii) The 20% commission due to Sogo from the sales of RL goods was not taken immediately out of the money received. Similarly, the 80% of the sale proceeds due to Hinckley was not paid to Hinckley from the moneys received from purchasers but an equivalent sum of 80% was paid to Hinckley when accounts were settled between Sogo and Hinckley monthly, 15 days after the end of each calendar month. There was no settling of account at the end of, or soon after, each transaction;
>
> (iv) The size of the Sogo department store, the concessionaire agreement being in standard form, the variety of merchandize being sold thereat under such an arrangement and the very large number of daily transactions. In the light of all that, she held there was clearly no intention to create a trust relationship.

17 In coming to her conclusion the judge followed the approach adopted in Henry v Hammond [1913] 2 KB 515 and Neste Oy v Lloyds Bank plc [1983] 2 Lloyd's Rep 658. She also considered and distinguished the case Re Fleet Street Disposal Services Ltd [1995] 1 BCLC 345.

The Law

18 We now turn to examine the law on the issue raised in Hinckley's application. Like the judge below, we will begin with the consideration of Henry v Hammond, where the defendant, a shipping agent, was instructed by the plaintiff, who acted on behalf of foreign insurers, to dispose of the cargo on a vessel which was wrecked off the coast of Kent. The defendant was further instructed to pay all claims and expenses in connection with the cargo out of the proceeds of sale. There remained a

balance of 96 which the defendant did not inform the plaintiff; neither did he pay it over to the plaintiff. Some 30 years later, having discovered this, the plaintiff brought an action to recover it. The defendant pleaded limitation. In response, the plaintiff contended that the defendant had made himself an express trustee of the sum and that the defence of limitation did not apply. The court held that as this was an ordinary commercial transaction between the parties, there was no trust. The court also noted that there was no question of constructive trust arising in the circumstances. We need only cite the following passage in the judgment of Channell J where the applicable principle was enunciated (at 521):-

> "It is clear that if the terms upon which the person receives the money are that he is bound to keep it separate, either in a bank or elsewhere, and to hand that money so kept as a separate fund to the person entitled to it, then he is a trustee of that money and must hand it over to the person who is his cestui que trust. If on the other hand he is not bound to keep the money separate, but is entitled to mix it with his own money and deal with it as he pleases, and when called upon to hand over an equivalent sum of money, then, in my opinion, he is not a trustee of the money, but merely a debtor." (Emphasis added).

19 Channell J made that pronouncement after having cited what Giffard LJ said in Burdick v Garrick LR 5 Ch 243 that

> "I do not hesitate to say that where the duty of persons is to receive property, and to hold it for another, and to keep it until it is called for, they cannot discharge themselves from that trust by appealing to the lapse of time. They can only discharge themselves by handing over that property to somebody entitled to it."

20 The approach taken in Henry v Hammond is consistent with that in the earlier case Kirkham v Peel (1880) 43 LT 171 where the defendants, ordinary merchants and commission agents, would receive goods from the public and sell them on their behalf. There, the defendants bartered the plaintiffs' goods for other goods. The plaintiffs' assertion that the defendants were either bailees or trustees was rejected. Jessel MR said (at p. 172):-

> "No person in their (the defendants') position ever dreamed of keeping separate accounts at their bankers, and no consignee of goods ever dreamed of such a thing being done. Such an idea, I am sure, was never entertained by anyone."

21 So even in respect of physical assets placed in the hands of an agent, it does not follow that trust would necessarily arise. Much would depend on the reasons why the assets were placed with the agent and the nature of the dealings between the parties. 22 On the authority of Henry v Hammond, it is clear that where under an arrangement there is no prohibition against the mixing of funds by the agent, that is a very significant consideration in the overall determination of the question whether there is a trust. In the absence of an express term creating a trust, the maintenance of a separate account by the agent is crucial to constituting the money as trust money: see In Re Nanwa Gold Mines Ltd [1955] 1 WLR 1080 and In re Kayford Ltd [1975] 1 WLR 279. Here we are reminded of the words of Slade J in In re Bond Worth Ltd [1980] Ch 228 at 261:-

> "... where an alleged trustee has the right to mix tangible assets or moneys with his own other assets or moneys and to deal with them as he pleases, this is incompatible with the existence of a presently subsisting fiduciary relationship in regard to such particular assets or money."

23 We next turn to the more recent case, Neste Oy v Lloyds Bank plc [1983] 2 Lloyd's Rep 658, where the shipowner-plaintiffs, a Finnish company, which owned three vessels operating to UK, appointed a company, PSL, as their agents in UK. To enable PSL to perform their functions, (e.g., discharging liabilities incurred by the vessels such as jetty and river dues, pilotage, towage, berth fees and other similar expenses), the plaintiffs put PSL in funds, sometimes in advance and sometimes in reimbursement of expenses already incurred by PSL in respect of the vessels. The funds were paid into the main account of PSL held at Lloyds Bank. The plaintiffs also paid PSL an agency fee. PSL got into financial difficulties and a receiver was appointed. Lloyds Bank exercised its right of set-off between PSL's accounts which were in credit and those which were in debit. Bingham J (as he then was) affirmed the dictum of Channell J which we have quoted above (18). Except for one payment, which was received by PSL after it was resolved that PSL should immediately cease trading, the court held that the other five payments were not moneys held on trust. The judge identified the following features, among others, which led him to that conclusion:-

> (i) The payments were made into a PSL account which gave no indication whatsoever that it was a trust or owner's account.
>
> (ii) It was not shown that it was intended that the sums received should be kept separate;
>
> (iii) In asking for the funds, no indication was given that PSL would hold them "on the plaintiffs' behalf or to their account or to their order."
>
> (iv) There were occasions when PSL made disbursements on the plaintiffs' behalf even when inadequately funded.
>
> (v) There was nothing in the arrangement to show that the funds should only be applied for specified purposes, and if not so applied, would be returned.

24 In Re Holiday Promotions (Europe) Ltd [1996] 2 BCLC 618, the importance of the requirement that moneys collected on behalf of a principal should be segregated from the moneys of the agent was again emphasised in determining whether these moneys were held on trust for the principal. In that case, the company received from its numerous customers a refundable deposit of 150 each which it banked into two accounts maintained with Lloyds Bank. The court found that the deposits were mixed with the company's money in the two accounts and the company had used moneys in the accounts for its general purposes and there was nothing in the agreement which prevented the funds from forming part of the general assets of the company. There was, accordingly, no trust relationship between the customers and the company. The Deputy Judge (Timothy Lloyd QC) said (at p. 624):-

> "I cannot accept that the terms of the contract carry an implication that the deposit was to be kept separate. It is not a necessary implication from the express terms of the contract. As a matter of language the term is equally consistent with a mere debtor/creditor relationship and it seems to me that business efficacy does not require any more than a mere contractual relationship. Nor does it seem to me that such an implied term would pass the officious by-stander test. It may be that a depositor would have said, oh yes, I assume that the deposit will be kept separate. But I cannot believe that the company would have said that or accepted it."

25 Henry v Hammond was endorsed in Australia in Walker v Corboy [1990] 19 NSWLR 382, a decision of the Court of Appeal of New South Wales. There an agent selling the produce of fruit and vegetable

growers went into liquidation. The growers claimed that the proceeds of sale of their produce were held by the agent in trust for them. The Court held that in the absence of any contrary express or imputed intention of the parties, and having regard to the complex and multiple transactions, the agent was not holding the proceeds in trust for the growers; the proper relationship between them was that of debtor and creditors.

26 We now turn to Re Fleet Disposal Services Ltd [1995] 1 BCLC 345, a case which the judge below distinguished. The facts there were rather special. The company acted as a selling agent for major car leasing companies. The arrangement with one of the leasing companies (Nortel) was that the company would pay the proceeds of sale into a designated bank account and remit the proceeds less commission and costs within five days of receipt, all repayments to be by separate cheques. The company went into liquidation. There was a credit in the designated account. But it must be pointed out that not only moneys from sales of the Nortel cars were paid into the designated account, moneys of other principals of the company were also paid into it (but those principals conceded that no trust existed in their case). Lightman J, while noting the general disinclination of the court to import trust law into everyday commercial transaction, found in the circumstances present in the case that the proceeds of sale of Nortel's car were held in trust for Nortel.

27 Two factors seemed to play a key consideration in Lightman J's evaluation:

> (i) the proceeds were paid into a designated account;
>
> (ii) the company was to pay out the proceeds, less commission, within five days of each sale by separate cheque. Lightman J also said the fact that the proceeds of sale of Nortel's cars were also mixed with proceeds of sale of other principal's cars, while a factor to be taken into account, was not a bar to the existence of a proprietary claim. Nevertheless, it can be seen that there are clear distinguishing features in Re Fleet Disposal Services which are not present in the instant case.

28 Hinckley also relied upon certain opinion of Watkins LJ expressed in R v Clowes & Anor (No 2) [1994] 2 All ER 316 at 325:- "As to segregation of funds, the effect of the authorities seems to be that a requirement to keep moneys separate is normally an indicator that they are impressed with a trust, and that the absence of such a requirement, if there are no other indicators of a trust, normally negatives it. The fact that a transaction contemplates the mingling of funds is, therefore, not necessarily fatal to a trust."

29 This statement of the law is not really in dispute. Watkins LJ in fact endorsed the propositions made in Henry v Hammond and Neste Oy v Lloyds Bank plc. The question in each case is, where there is no requirement that the funds be kept separate, whether there are other indicators of a trust. Unless there are such other indicators, it would follow that there would be no trust.

30 There is a Malaysian case, which on the facts are very similar to the instant case, as it also involved a claim by concessionaires against a chain of department stores: Geh Cheng Hooi & Ors v Equipment Dynomics Sdn Bhd and other appeals [1991] 1 MLJ 293. There, payment for sales effected by the concessionaire was made to the department stores cash registers. The total amount collected for each concessionaire, less the rental and commission, was to be reimbursed to the concessionaires at fixed periods of time. Because of the financial difficulties of the stores, some of the concessionaires sought an amendment to the arrangement, and under the changed arrangement, it was provided specifically that the stores would hold the moneys collected from the sale of the concessionaires' goods in trust for those concessionaires. But such a clause was not inserted in all

the concession agreements. At the High Court, the judge held that the moneys received by the stores from purchasers of concessionaires' goods were trust moneys, even though the moneys were to be banked, and were so banked, into a common account of the stores. He found, on the facts, as well as from the conduct of the parties, that there was an implied trust clause. On appeal, the Supreme Court affirmed the decision that a trust could be so implied.

31 Interestingly, this Malaysian case is not cited in Hinckley's Case. It seems to us clear that there are distinguishing features there. The new arrangement was negotiated because of the company's financial problems and under that new arrangement, the stores expressly held themselves out as trustees of the proceeds. While some of the renegotiated arrangements did not contain an express provision on trust, in all the circumstances, it would probably be correct to imply such a trust clause, notwithstanding the absence of such an express clause in those arrangements.

32 The basic arguments of Hinckley boil down to this. The RL goods on display at the store belonged to them. On sale to a customer, it must follow that the money collected from the customer must also be held in trust by Sogo for Hinckley. There was no sale by Hinckley to Sogo and subsequently resale by Sogo to each customer. Sogo was purely the agent for Hinckley for collecting the sale proceeds. What was set out in the concessionaire agreement was an obligation on the part of Sogo to account to Hinckley for the proceeds. Hinckley submitted that it is the duty of an agent, where he holds assets or moneys of his principal, to keep them separate from his own and those of other persons. Where this is not expressly stated, it is to be implied by law.

33 The ultimate question to decide is whether, in the light of the terms of the agreement, as exemplified by the actual arrangement, there was an intention to create a trust. No general rule may be laid down in this regard. In a case where there is no express term in the agreement on the question of trust, whether the equitable rules would be implied would depend upon what may correctly be inferred to be the expectations of the parties in the light of the commercial context. Admittedly, very often in the factual circumstances of a case, the answer is not an easy one. But it is not correct to say, as Hinckley does, that an agent who holds money of the principal is automatically under a duty to segregate those moneys from those of his own. This assertion is not the answer; it only begs the question.

34 However, what the cases show is that although a trust is more readily imposed on proceeds arising from an isolated transaction, the position may not be the same where property is received in the ordinary course of an ongoing trading relationship: Palette Shoes Pty Ltd (in liquidation) v Krohn [1937] 58 CLR 1 at 30 and Walker v Corboy (supra) at 390 and 396-7.

35 We would mention that in a case such as this, the question is not whether there is a constructive trust, but whether in the light of all the circumstances a trust may be inferred or imputed. Constructive trust is one which arises by operation of law and not by reason of the intention of the parties, express or implied. It was suggested that the concept of constructive trust may be invoked whenever justice and good conscience required it: see Hussey v Palmer [1972] 1 WLR 1286 at 1290 per Lord Denning MR. In Carl-Zeiss Stiftung v Smith (Herbert) & Co (No 2) [1969] 2 Ch 276, Edmund Davies LJ, after noting that it was not possible to give an exhaustive definition of a constructive trust, said (at p.200) that this was so as "not to restrict the court by technicalities in deciding what the justice of a particular case may demand."

Our decision

36 Reverting to the case in hand, it would be useful to recap the essential elements of the arrangement. Until sale, the RL goods belonged to Hinckley. Upon sale, the proceeds were collected

by the cashiers of Sogo and they were banked into the general account of Sogo where they were mixed with other moneys of the latter. Accounting between the parties was only done monthly, and settlement effected within 15 days after the end of each calendar month. The equivalent of 80% of the sale proceeds of RL goods would then be paid over to Hinckley. The concessionaire agreement did not provide that payment of the RL goods could only be made at a specified cashier or specified cashiers at the store. It also did not provide that such proceeds should be paid into a specified account of Sogo. Neither did it provide that the proceeds should not be mixed with other moneys belonging to Sogo or other concessionaires operating in the store. All that the agreement provided was that within 15 days after the end of each calendar month, Sogo should pay over to Hinckley 80% of the total proceeds of sale collected in the preceding month. There is no suggestion that the actual arrangement was in any way at variance with the express terms of the agreement.

37 True, the concessionaire agreement did not expressly provide or authorise Sogo to use the proceeds of sale of Hinckley for Sogo's own purposes. But this is neither here nor there. This fact could also be relied upon to argue for the reverse proposition. If that was what Hinckley intended, why did Hinckley not insist that there be a separate account into which proceeds of sale of RL goods would be paid? After all, with modern technology, at the press of a button, the sale proceeds each day of RL goods could be readily obtained.

38 An important indicia to indicate trust is undoubtedly the fact that the money is being kept separately. This was alluded to as early as 1890 by the House of Lords in Lyell v Kennedy (1890) 62 LT 77 at 81 where the Earl of Selborne, delivering the judgment of the House, observed:-

> "A man who receives the money of another on his behalf, and places it specifically to an account with a banker earmarked and separate from his own moneys, though under his control, is in my opinion a trustee of the fund standing to the credit of that account. For the constitution of such a trust no express words are necessary; anything which may satisfy a court of equity that the money was received in a fiduciary character is enough. It is not requisite that any acknowledgement of such a trust should be made to the cestui que trust or his agent: to whomsoever made, it is evidence against the trustee."

39 We must, however, hasten to add that where there are clear indices of a trust, or where the express provisions create a trust, the fact that the trustees are allowed to or not expressly prohibited from mixing trust funds with their own, cannot render the funds, which are subject to a trust, any less a trust. As stated by Megarry J in Re Kayford (supra) at 607:- "Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements."

40 What is essential to bear in mind is that this was a business arrangement, initially for a period of three years. The parties would have realised that it would involve the sales of a huge number of items of RL goods. It would be wholly unrealistic to suggest that the parties expected a trust to arise in relation to the sum received in respect of each item of goods. The commercial context would militate against any such imputation or inference of a trust. Furthermore, at the time, there were many concessionaires operating within the department store. That may explain why sales proceeds were credited into a general account of Sogo and accounting was done once every month.

Judgment

41 In the result, we hold that no trust may be implied in the contractual arrangement entered into

between Hinckley and Sogo. What Hinckley has is a simple claim in debt against Sogo. For that, Hinckley has to lodge its proof of debt in the usual way. Therefore, there is no reason whatsoever to grant leave to Hinckley to pursue its claim in trust any further. 42 The appeal is dismissed with costs. The security for costs, together with any accrued interest, shall be paid out to the respondent (Sogo) to account of the latter's costs.

L P THEAN
JUDGE OF APPEAL

CHAO HICK TIN
JUDGE OF APPEAL

SINGAPORE

DATE: 11 SEPTEMBER 2001