IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2018] SGHC 215

Originating Summons No 1178 of 2017 and Originating Summons No 1180 of 2017

In the matter of Order 15, Rule 16 of the Rules of Court (Cap. 322, Rule 5)

Between

(1) Jurong Aromatics Corporation Pte Ltd (Receivers and Managers appointed)
(2) Cosimo Borrelli
(3) Jason Kardachi

… *Plaintiffs*

And

BP Singapore Pte Ltd

… *Defendant in OS 1178/2017*

Glencore Singapore Pte Ltd

… *Defendant in OS 1180/2017*

JUDGMENT

[Debt and recovery] — [Right of set-off] — [Insolvency set-off]
[Debt and recovery] — [Right of set-off] — [Equitable set-off]
[Credit and Security] — [Charges]

[Contract] — [Assignment]

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v
BP Singapore Pte Ltd and another matter

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High Court — Originating Summons No 1178 of 2017 and Originating Summons No 1180 of 2017
Aedit Abdullah J
15 November 2017, 23–25 January, 8 February, 1 March 2018

3 October 2018 Judgment reserved.

Aedit Abdullah J:

Introduction

1 The plaintiffs, namely Jurong Aromatics Corporation Pte Ltd ("JAC") and its two receivers and managers (collectively "the Plaintiffs"), seek in Originating Summons No 1178 of 2017 and Originating Summons No 1180 of 2017 declarations against BP Singapore Pte Ltd ("BP") and Glencore Singapore Pte Ltd ("Glencore") respectively (collectively "the Defendants") that the Defendants are not entitled to set-off debts owed to the Plaintiffs under various agreements between the parties. The Plaintiffs also seek a declaration that in failing to pay the sums due, the Defendants are in breach of the agreements, with damages to be assessed. The Defendants resist the Plaintiffs' claims, contending essentially that set-off is available.

2 The essential disputes in this case concern the nature of a charge, the effect of a prohibition against assignment clause on assets ostensibly subject to a charge, and the availability or otherwise of set-off.

3 A winding-up petition against JAC, brought by Glencore, is also pending.

Background

4 JAC was incorporated on 30 May 2005 as a joint venture project for the purposes of, *inter alia*, constructing, developing and operating a condensate splitter integrated with an aromatics plant ("the Plant").[1] The Defendants were both suppliers and customers of JAC.

5 In March 2011, Glencore and JAC entered into an agreement for the supply of condensate by Glencore to JAC ("the Glencore–JAC Feedstock Supply Agreement"). In that month, Glencore and JAC also entered into an agreement for the purchase by Glencore of cargoes of product produced by JAC from the condensates supplied by Glencore and others (the "Glencore–JAC Product Offtake Agreement"). BP's arrangements with JAC were similar: there was a BP–JAC Feedstock Supply Agreement and a BP–JAC Product Offtake Agreement.[2]

6 The dispute arises out of loans to JAC amounting to approximately US$1.6 billion issued by a syndicate of senior secured finance parties comprising a number of banks and financial institutions ("the Senior Lenders").

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1 Plaintiffs' written submissions dated 13 November 2017 ("Plaintiffs' opening submissions") at para 13.

2 Plaintiffs' opening submissions at para 14.

The Senior Lenders obtained from JAC a comprehensive security package to secure their loans, by way of a debenture dated 30 April 2011 ("the Debenture") entered into between JAC, and BNP Paribas Singapore Branch ("the Agent") (for and on behalf of the Senior Lenders). The Senior Lenders took security in the form of a first fixed charge, covering *inter alia* present and future book debts, as well as a first floating charge over all assets of JAC both present and future. There was also an assignment between JAC and the Agent on 28 April 2011 ("the Assignment"), under which receivables payable to JAC under the Glencore–JAC Feedstock Supply Agreement and Glencore–JAC Product Offtake Agreement, amongst other agreements, were assigned to the Senior Lenders.[3]

7 On 23 December 2014, a set-off agreement was entered into between Glencore and JAC for the set-off of mutual claims arising out of the Glencore–JAC Feedstock Supply Agreement and Glencore–JAC Product Offtake Agreement ("the Set-Off Agreement").[4]

8 In 2014 and 2015, JAC encountered difficulties. On 28 September 2015, receivers and managers were appointed, and they took control and managed the assets of JAC.[5] The Defendants were notified by 29 September 2015 of the appointment of the receivers and managers.[6]

9 A tolling agreement was entered into on 19 April 2016 between JAC and the Defendants ("Tolling Agreement"), to allow the operations of the Plant to

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3 Plaintiffs' opening submissions at para 17.

4 Plaintiffs' opening submissions at para 41.

5 Plaintiffs 'opening submissions at para 21.

6 Plaintiffs' opening submissions at para 72.

resume while a purchaser for the Plant was sought. Tolling is essentially the processing of raw materials for a fee. Thus under the Tolling Agreement, the Defendants continued to supply feedstock to JAC for processing into aromatics and petroleum products and would thereafter receive and sell the products. In exchange, JAC received a tolling fee. Funds were injected by the Senior Lenders.[7]

10 Subsequently, a purchaser for the Plant, ExxonMobil Asia Pacific Pte Ltd ("ExxonMobil"), was found. ExxonMobil and the Plaintiffs entered into a Put and Call Option Agreement dated 9 May 2017, as amended by two supplemental deeds (collectively, the "PCOA"). In addition, agreements were entered into between BP, Glencore, ExxonMobil and JAC on 16 June 2017 ("the Transitional Agreement" and "the Transitional Supplemental Agreement") to allow for a 'hot transition' to take place. A 'hot transition' would allow the Plant to be transferred to ExxonMobil without having to be shut down. This required that provisions be made in relation to the raw materials used and the products manufactured during the transfer process.[8]

11 On 28 August 2017, the sale of the Plant was completed.[9]

12 The Plaintiffs currently seek to claim amounts due from the Defendants. In relation to both Defendants, *ie*, Glencore and BP, the Plaintiffs claim:

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7 Plaintiffs' opening submissions at paras 23–27; Glencore's written submissions dated 23 February 2018 ("Glencore's closing submissions") at paras 38– 41; Plaintiffs' written submissions dated 23 February 2018 ("Plaintiffs' closing submissions") at para 24(8)(a).

8 Plaintiffs' opening submissions at paras 28–31; Plaintiffs' closing submissions at para 24(8).

9 Plaintiffs' opening submissions at para 30.

(a) the tolling fee debt arising from the Tolling Agreement dated 19 April 2016 ("tolling fee debt"); and

(b) the final payment amount arising from the Transitional Supplemental Agreement dated 16 June 2017 ("final payment amount debt").

13 In relation to Glencore, the Plaintiffs also additionally claim the debt arising from the Set-Off Agreement dated 23 December 2014 between Glencore and JAC ("Set-Off Agreement debt").

14 The Defendants claim that they are entitled to set-off the Plaintiffs' claimed amounts against debts owed to them by JAC under their respective Feedstock Supply Agreements with JAC ("feedstock debt").

15 In summary therefore, the relevant contracts and transactions are:[10]

(a) the Glencore–JAC Feedstock Supply Agreement dated 9 March 2011 and the BP–JAC Feedstock Supply Agreement dated 16 March 2011;

(b) the Glencore–JAC Product Offtake Agreement dated 31 March 2011 and the BP–JAC Product Offtake Agreement dated 16 March 2011;

(c) the Assignment between the Agent and JAC on 28 April 2011;

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10 Glencore's core bundle of documents, vol 1–2; Plaintiffs' core bundle of documents.

(d) the Debenture between the Agent (for and on behalf of the Senior Lenders) and JAC dated 30 April 2011;

(e) the Set-Off Agreement dated 23 December 2014 between Glencore and JAC;

(f) the Tolling Agreement dated 19 April 2016 between BP, Glencore and JAC;

(g) the PCOA dated 9 May 2017 between ExxonMobil and the Plaintiffs; and

(h) the Transitional Agreement executed by BP, Glencore, JAC, and ExxonMobil, and the Transitional Supplemental Agreement between BP, Glencore, and JAC, both dated 16 June 2017.

Summary of the Plaintiffs' case

16 The Plaintiffs argue that as the receivables of JAC are charged and are now beneficially owned by the Senior Lenders, mutuality of debt is not established and thus insolvency set-off cannot apply. All of the receivables are caught by the Senior Lenders' security package given that pursuant to the Debenture, the Senior Lenders were given both a first fixed charge and a first floating charge over all undertakings and assets of JAC.[11]

17 In relation to the tolling fee debt and final payment amount debt, these were incurred after the commencement of receivership, and therefore would have been assigned in equity to the Senior Lenders on creation in the light of

[11] Plaintiffs' Core Bundle of Documents, Tab 7 at pp 65 and 67; Plaintiffs' closing submissions at paras 29–45; Plaintiffs' opening submissions at paras 61–65.

the crystallised floating charge. This operated automatically under the law. The debts were not expressly excluded from the Senior Lenders' security package either.[12]

18 In addition, according to the Plaintiffs, the prohibition against assignment clauses in the Tolling Agreement and Transitional Agreement do not affect the Senior Lenders' security interest in the tolling fee debt and final payment amount debt. Such clauses may entitle the Defendants (the debtors) to refuse to deal with the Senior Lenders (the assignees) and continue to make payment to JAC (the assignor), but they cannot affect the assignment or security arrangement between JAC and the Senior Lenders, in particular the proprietary effects of such assignment. The prohibition against assignment clauses also only apply to prohibit JAC from entering into assignments going forward, as from the dates of the Tolling Agreement and Transitional Agreement respectively. They have no effect on the tolling fee debt and final payment amount debt given that these receivables were subject to the security interest of the Senior Lenders by virtue of a floating charge which was entered into and which crystallised before the Tolling Agreement and Transitional Agreement were entered into. Moreover, on a proper interpretation of the prohibition against assignment clauses, the clauses cannot exclude the Senior Lenders' beneficial interests.[13] Therefore, there is no mutuality between the tolling fee debt and final payment amount debt (owed by the Defendants) on the one hand, and the feedstock debt (owed by JAC) on the other. Hence, no right of set-off arises.

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12 Plaintiffs' closing submissions at paras 46–58; Plaintiffs' opening submissions at paras 68–73.

13 Plaintiffs' closing submissions at paras 80–99.

19 In addition, the Set-Off Agreement debt is also caught by the Debenture under both the fixed charge and the floating charge (once it crystallised), and the Senior Lenders' interest in the debt is likewise unaffected by the prohibition against assignment clause in the Set-Off Agreement.[14] Further, the Set-Off Agreement debt is also subject to the Senior Lenders' security by virtue of the direct assignment of the Set-Off Agreement debt to the Senior Lenders pursuant to the Assignment. There has been no subsequent release of the security back to JAC pursuant to a deed of reassignment, contrary to Glencore's submission.[15] Mutuality of debt is therefore also destroyed as between the Set-Off Agreement debt (owed by Glencore) and feedstock debt (owed by JAC).

20 The Plaintiffs further submit that contrary to the Defendants' arguments, there has been no relinquish of control in the charges by the Senior Lenders which would lead to a waiver, decrystallisation or other discharge of the security. The appointment of receivers and managers itself constitutes assertion of control by the Senior Lenders. In any event, the receivers and managers have acted in consultation with the Senior Lenders. The concept of decrystallisation is also unsupported by any case authority.[16]

21 According to the Plaintiffs, the Defendants asserted their right of insolvency set-off in bad faith to circumvent the *pari passu* rule. The Defendants had notice of JAC's insolvency. No set-off could be created or manufactured by the Defendants to steal a march over secured creditors. The prohibition in s

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14 Plaintiffs' opening submissions at para 73.

15 Plaintiffs' closing submissions at paras 35–39.

16 Plaintiffs' closing submissions at paras 60–79.

88(2) of the Bankruptcy Act (Cap 20, 2009 Rev Ed) ("Bankruptcy Act") applies. No other form of set-off, including equitable set-off could apply either.[17]

Summary of Glencore's case

22 Glencore argues that there is mutuality in the debts sought to be set-off and therefore insolvency set-off applies.

23 The debts owed by Glencore to JAC, in particular, the tolling fee debt, final payment amount debt and the Set-Off Agreement debt (collectively "Glencore's debts") have not been effectively assigned or charged to the Senior Lenders. In relation to the tolling fee debt, the parties had actually agreed to an express prohibition against assignment clause in the Tolling Agreement, which would prevent the charging of assets under the Tolling Agreement. In addition, the Transitional Supplemental Agreement relates to and arises out of the Tolling Agreement and therefore the prohibition against assignment in the Tolling Agreement applies to the final payment amount debt.[18]

24 In relation to the Set-Off Agreement between JAC and Glencore, the parties had agreed to an express prohibition against assignment clause as well, and this would prevent the charging of the Set-Off Agreement debt in favour of the Senior Lenders. In addition, the Assignment did not apply to the Set-Off Agreement debt as it was the Glencore–JAC Feedstock Supply Agreement and Glencore–JAC Product Offtake Agreement which were assigned to the Senior Lenders, rather than the Set-Off Agreement. In addition, any assignment of the Glencore–JAC Feedstock Supply Agreement and Glencore–JAC Product

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17 Plaintiffs' closing submissions at paras 101–126.

18 Glencore's closing submissions at paras 111–159.

Offtake Agreement to the Senior Lenders under the Assignment was not complete since the security constituted by the Assignment had not become enforceable. Beneficial interest therefore had not passed. In addition, notices of reassignment had been sent by the Agent to Glencore which suggested that the Senior Lenders had reassigned their interests in the Glencore–JAC Feedstock Supply Agreement and Glencore–JAC Product Offtake Agreement back to JAC. While the Plaintiffs claim that the notices were sent in error, they have not discharged their burden of proof to show that there was no actual release of security by the Senior Lenders.[19]

25 Glencore submits that the express prohibition against assignment clauses in the Tolling Agreement, Transitional Agreement and Set-Off Agreement were effective to prevent security being created over the rights under the agreements. Therefore, any attempt to assign the benefits of the agreements in the face of such prohibition was rendered ineffective in the sense that it did not give the assignee (here, the Senior Lenders) any rights against the debtors (here, the Defendants). The fact that the Senior Lenders had a pre-existing security did not prevent the prohibition against assignment from being effective.[20]

26 Even if the prohibition against assignment clauses were not applicable, the security created over Glencore's debts did not destroy mutuality. Whether or not the contractual prohibitions against assignment apply, mutuality is not destroyed because fixed and floating charges do not operate to transfer any ownership interest, including beneficial ownership interest, in the charged

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19 Glencore's closing submissions at paras 167–204.

20 Glencore's closing submissions at paras 67–99.

assets to the chargee. Therefore, any security created did not transfer ownership and thus did not operate to destroy mutuality.[21]

27 Glencore further argues that should the court find that a charge has been validly created over Glencore's debts, the charge is a floating charge rather than a fixed charge, and therefore mutuality is not destroyed. The requirement of control is the hallmark of a fixed charge as distinguished from a floating charge, *per* the authority of *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 ("*Spectrum Plus*"), and here the Senior Lenders have not exercised control over the charges. The Plaintiffs' argument that there has been no ceding of control by the Senior Lenders as evidenced by the appointment of receivers and managers should be rejected, because the receivers were and are agents of JAC rather than the Senior Lenders for all purposes. It is not shown that the Senior Lenders themselves exercised control over the receivables.[22]

28 Lastly, Glencore submits that any assignment of Glencore's debts is subject to Glencore's right of equitable set-off. The requirements for equitable set-off are fulfilled: there is a close connection between the feedstock debt and Glencore's debts, and it would be manifestly unjust not to allow the set-off.[23] Glencore also has not acted in bad faith, as may be gleaned from the objective evidence.[24]

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21 Glencore's closing submissions at paras 209–214

22 Glencore's closing submissions at paras 216–236.

23 Glencore's closing submissions at paras 247–294.

24 Glencore's closing submissions at paras 295–300.

Summary of BP's case

29 BP argues that the debts which it owes to JAC, in particular, the tolling fee debt and final payment amount debt (collectively "BP's debts") are subject to insolvency set-off as JAC was prohibited from assigning or charging the legal or beneficial ownership of the debts, or creating any kind of security over them. It submits that the prohibition against assignment in cl 28.1 of the Tolling Agreement and cl 10 of the Transitional Agreement were incorporated into the Transitional Supplemental Agreement.[25]

30 BP further contends that the Plaintiffs' arguments on the effect of the prohibition against assignment clauses are not sound. The Plaintiffs' reliance on *Foamcrete (UK) Ltd v Thrust Engineering Ltd* [2002] BCC 221 ("*Foamcrete*"), *N. W. Robbie & Co. Ltd. v Witney Warehouse Co. Ltd.* [1963] 1 WLR 1324 ("*N W Robbie*") and *Rendell v Doors and Doors Ltd (in liquidation)* [1975] 2 NZLR 191 ("*Rendell*") is also misplaced.[26]

31 BP also submits in the alternative that mutuality is not broken because there was no fixed charge created over BP's debts. Whether a charge is fixed or floating does not depend on how it is termed in the agreement but on the actual nature of the security. The critical feature which distinguishes a floating charge from a fixed charge is the chargor's ability, under a floating charge, to control and manage the charged assets freely and without the chargee's consent. In this case, there was no fixed charge as JAC had an ability to freely control the charged assets. For the same reasons, even if the floating charge had crystallised

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25 BP's written submissions dated 23 February 2018 ("BP's closing submissions") at paras 62–86.

26 BP's closing submissions at paras 119–172.

at some point, it had subsequently decrystallised due to the ceding of control over the charged assets by the Senior Lenders.[27]

32 In any event, even if the Senior Lenders had security over BP's debts, the Senior Lenders gave up or waived their security over BP's debts and are estopped from asserting any security. According to BP, the negotiating history of the Tolling Agreement shows that the Senior Lenders agreed to exclude the tolling fee debt from their security as the tolling fee was intended to be used to meet JAC's operating costs only.[28]

33 Finally, BP argues that its debts to JAC are subject to equitable set-off, which is not displaced by insolvency set-off. The requirements for equitable set-off are satisfied given that the feedstock debt and BP's debts are so closely connected that it would be manifestly unjust to allow the latter to be enforced without regard to the former.[29]

34 The allegations made by the Plaintiffs of bad faith are baseless and in any event irrelevant to the central issue in the case, which is whether insolvency set-off applies.[30]

The decision

35 No set-off can arise between the tolling fee debt, the final payment amount debt and the Set-Off Agreement debt respectively on the one hand, and the feedstock debt on the other. As soon as they arose, the receivables were

27 BP's closing submissions dated 23 February 2018 at paras 87–108.

28 BP's closing submissions dated 23 February 2018 at paras 109–118.

29 BP's closing submissions dated 23 February 2018 at paras 173–192.

30 BP's closing submissions dated 23 February 2018 at paras 161–172.

subject to the fixed charge or crystallised floating charge and hence to the equitable interest of the debenture holders. The requirement of mutuality for insolvency set-off to operate is thus not met. There has also been no ceding of control by the Senior Lenders releasing their security in the charges, nor any estoppel, waiver or decrystallisation. Further, the prohibition against assignment clauses in the relevant agreements cannot prevent the equitable interest in the receivables from being vested in the debenture holders.

Analysis

36 The focus of the parties' arguments centres around the effect of the clauses prohibiting assignment in the agreements. The clauses in question are cl 28.1 of the Tolling Agreement, cl 10 of the Transitional Agreement and cl 2(a) of the Set-Off Agreement. The immediate question is whether these clauses capture the charges operating in favour of the Senior Lenders. In other words, whether the clauses precluded the charging of the receivables in favour of the Senior Lenders pursuant to the fixed charge and floating charge (which has since crystallised) under the Debenture. Answering the question requires a consideration of the nature of a charge, and then an interpretation of the clauses.

37 If the charges are not captured by the clauses prohibiting assignment such that they are effective and in operation, the next question is whether notwithstanding the charges, there was any waiver by the Senior Lenders, decrystallisation of the charges, or other release, such that the receivables are free of the encumbrances in favour of the Senior Lenders.

38 If the receivables are encumbered by the charges in favour of the Senior Lenders, the effect of such an encumbrance on the possibility of set-off is to be considered.

39 The analysis thus proceeds in the following order:

(a) the nature of a charge and the scope of the charges in question;

(b) whether the prohibition against assignment clauses prohibited charging of the receivables;

(c) whether there was any estoppel, waiver or decrystallisation which released the Senior Lenders' interest in the receivables;

(d) whether there was any reassignment of the receivables by the Senior Lenders back to JAC in relation to the Set-Off Agreement debt; and

(e) whether insolvency set-off or equitable set-off is applicable.

The charges

The nature of a charge

40 The parties seem to have accepted that a charge could be described as a species of assignment; in other words, a charge operates as an assignment of the property to which it relates. I do not think this is accurate.

41 A charge has been described as follows (see *Goode on Legal Problems of Credit and Security* (Professor Louise Gullifer gen ed) (Sweet & Maxwell, 5th Ed, 2013) ("*Goode on Legal Problems of Credit and Security*") at para 1-55):

> [A] charge … does not depend on either the delivery of possession or the transfer of ownership, but represents an agreement between creditor and debtor by which a particular asset or class of assets is appropriated to the satisfaction of a debt, so that the creditor is entitled to look to the asset and its

> proceeds to discharge the indebtedness, in priority to the claims of unsecured creditors and junior incumbrancers. The charge does not transfer ownership to the creditor; it is merely an incumbrance, a weight hanging on the asset which travels with it into the hands of third parties other than a bona fide purchaser of the legal title for value and without notice.

42 A charge is thus an equitable encumbrance upon a particular property. The basis for Professor Gullifer's description of a charge is the judgment of Atkin LJ in *National Provincial and Union Bank of England v Charnley* [1924] 1 KB 431 at 449:

> It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an order of the Court. If those conditions exist I think there is a charge. If, on the other hand, the parties do not intend that there should be a present right to have the security made available, but only that there should be a right in the future by agreement, such as a licence, to seize the goods, there will be no charge.

43 What is clear is that a charge does not require the transfer of any ownership or possession – it is a creation of equity, appropriating the subject matter to an equitable interest that binds the world other than a *bona fide* purchaser of the legal title for value without notice.

44 Commentaries cited by the Defendants are also to the same effect. Professor W J Gough states in W J Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) ("*Company Charges*") at p 19:

> The technical difference between a mortgage and a charge is that a mortgage involves a conveyance of property subject to a right of redemption, whereas a charge conveys nothing and

> merely gives the chargee certain rights over the property as security for a loan.

I do note that Professor W J Gough goes on to say:

> The creditor under a charge acquires as assignee a proprietary interest by assignment from the debtor as assignor, since there is vested in him under the charge a right of non-possessory control extending to the right of the debtor of free alienation of the property charged, which is enforceable immediately even in advance of default.

I am doubtful, with respect, that there is any assignment involved in the creation of a charge. This view has also been expressed by Professor Bridge in M G Bridge, *Personal Property Law* (Oxford University Press, 3rd Ed*,* 2002) at p 181:[31]

> … a charge involves no conveyance or assignment of an interest in the property to the grantee. …

45 As a charge is an encumbrance on the full equitable ownership which exists to benefit the chargee, it differs from an assignment, as currently understood, which is a transfer of ownership of some portion of interest in the property. This is reflected in the definition of a charge as a non-possessory security whereby the charged property is appropriated to the discharge of an obligation without any transfer of ownership (see para 6.17 of *The Law of Security and Title-Based Financing* by Hugh Beale, Michael Bridge, Louise Gullifer & Eva Lomnicka (Oxford University Press, 2nd Ed, 2012)). The important aspect is the appropriation of the property for a specific purpose, *ie*, the discharge of a primary obligation, by way of the security interest.

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[31] Glencore's bundle of authorities dated 23 February 2018 at tab 43.

46 While an appropriation of an asset through a charge may appear to be similar to a transfer, the significant difference is that under a charge, the whole asset remains with the chargor, subject to the chargee looking to it to satisfy what is owed to him. The chargee does not get an ownership right that allows for the disposal of the asset itself. What resides in the charge is only a limited right. In comparison, an assignment is a transfer of an interest or a part of it: it results in some part being taken away from the scope of ownership of the assignor and given to the assignee.

47 A charged interest can possibly be assigned by the chargee to another. But a charge in itself is not an assignment. Neither is an assignment necessary to create a charge. There is no transfer of ownership of an existing interest or part of an interest in the creation of a charge.

48 The Plaintiffs have, like the Defendants, referred to an "assignment by way of a charge" in their arguments, but this does not affect the proper characterisation of a charge. While s 136(1) of the Law of Property Act 1925 (c 20) (UK) and s 4(8) of the Civil Law Act (Cap 43, 1999 Rev Ed) suggest the possibility of an assignment of an interest by way of a charge, I do not consider that the use of the term "assignment" in the provisions compels the conclusion that a charge is a form of assignment. Its use in the two provisions does not mean that a charge is to be equated with an assignment for all purposes, in particular in terms of legal nature and effect. Certainly s 4(8) of the Civil Law Act would not be applicable here. The subsection reads:

> ***Assignment of debts and choses in action effectual to pass right and remedy***
>
> (8) Any absolute assignment by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom

> the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law, subject to all equities which would have been entitled to priority over the right of the assignee under the law as it existed before 23rd July 1909, to pass and transfer the legal right to such debt or chose in action, from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor.

The subsection is only concerned with the effect at law of an assignment in writing (not purporting to be by way of charge only) of which express notice has been given to the debtor, which is that such an assignment takes effect without the agreement of the assignor.

49 On the nature of a charge, Glencore takes the position that a charge does not involve a transfer of any ownership interest (including beneficial ownership) from the chargor to the chargee. A charge creates a beneficial interest in, or an equitable assignment of, only the proceeds of the realisation of an asset. Glencore argues that the courts have on occasion failed to distinguish between the asset itself and the proceeds of the realisation of the asset.[32] I would agree with the first part of Glencore's statement of what a charge is, *ie*, that there is an equitable interest created. However, I do not agree that a charge is an equitable *assignment*, in that there is a purported transfer of the proceeds of the realisation of an asset upon inception. What is created through a charge is an encumbrance or appropriation of an interest in the asset to the satisfaction of whatever obligation is owed by the chargor to the chargee.

50 BP argues that it is a principle of law that a charge operates as an equitable assignment, citing a number of cases. In *Duncan, Cameron Lindsay*

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[32] Glencore's closing submissions at paras 66 and 209.

and another v Diablo Fortune Inc and another matter [2018] 4 SLR 240, the High Court stated at [35] that English authorities have held that a contractual lien gives rise to an equitable assignment by way of a charge, which is registrable under the UK Companies Act. I do not read this as laying down the position that a charge and an assignment are the same. The High Court agreed with the English authorities that a contractual lien over sub-freights should be construed as an equitable assignment (at [50]), without going into the issue of whether a charge is of the same nature and effect as an assignment, as this was not required in the circumstances of that case. I do not see anything in the Court of Appeal's decision of the case (see *Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129) that would lead to a different conclusion either.

51 In *National Mutual Life Nominees Ltd and others v National Capital Development Commission and others* (1975) 6 ACTR 1, at 3, Blackburn J stated that a charge, once crystallised, operates as an equitable assignment of the property to which it relates. Similarly, in *In re ELS LTD.* [1995] Ch 11, at 25, Ferris J treated the crystallisation of the floating charge in question as completion of the assignment of goods effected by the floating charge contained in the debenture. In addition, Professor W J Gough, in *Company Charges* at p 100, states that there is a present but incomplete equitable assignment under a floating charge before crystallisation, referring to *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93 at 106.

52 With respect, I am doubtful that the characterisations in these cases and commentary fully describe the nature of a charge. As noted above, a charge is not a transfer of an interest in the way an assignment is. When an asset is charged, the beneficial ownership and legal ownership remain where they were

before the act of charging. The equitable interest represented by a charge is not the sort of interest that would normally be alienable or transferable from one person to another in the ordinary course of events. A charge is not a mortgage. The primary purpose of the charge is to give security, without any transfer of ownership rights; it does this by appropriating such value or beneficial interest of the asset in question to the satisfaction of the debt. In any event, it does not follow that each asset has to be separately assigned for it to fall under the charge – that is not how fixed or floating charges work. Once a charge is in effect, regardless of the precise mechanism, any asset that comes into the hands of the chargor is appropriated to the chargee without anything more.

53 I do not read any of the Singapore cases as prescribing the nature of a charge as an assignment rather than an encumbrance – the issue of whether a charge is an assignment did not arise in those cases. What was set out was, at most, a strand of common law jurisprudence that were considered in the determination of the legal issues that were at hand in those cases, which did not include the question of whether a charge is an assignment.

54 The consequence of a charge being an encumbrance is that if notice is had of an existing charge, a person dealing with the chargor who attempts to protect assets such as receivables from coming under the charge cannot, to my mind, simply invoke a contractual clause to prohibit the existing charge from applying. Whatever may be the position between that person and the chargor, if the asset in question falls under the scope of the charge, it is encumbered by the charge on inception. Only if the chargee waives the rights under the charge can such an asset remain free.

55 In the present case, the receivables which arose out of the Tolling Agreement, Transitional Supplemental Agreement and Set-Off Agreement which were concluded subsequent to the Debenture, are caught by and subject to the fixed charge and the floating charge under the Debenture which were expressed to include future assets of JAC. By the time the prohibition against assignment clauses in the agreements came into being, the charges were already operational.

The floating charge

56 A floating charge does not fix on specific assets until crystallisation occurs. Before that point, the assets subject to a floating charge remain free to be dealt with and may be disposed of by the chargor, without more.

57 Under cl 4.1 of the Debenture, the Senior Lenders were given a first floating charge over JAC's "undertaking and all its assets, both present and future", including the assets that are already subject to the fixed charge under cl 3.1 of the Debenture.

58 The floating charge here was crystallised by the appointment of the receivers and managers: *Haw Par Brothers International Ltd v Overseas Textiles Co Ltd* [1977-1978] SLR(R) 352 at [16]. Clause 4.4 of the Debenture provides for automatic crystallisation:[33]

> 4.4 **Automatic conversion**
>
> If:
>
> (a) the Borrower takes any step to create any Security in breach of Clause 5.1 … over any of the Charged Assets not subject to a fixed Charge; or

[33] Glencore's core bundle of documents vol 2 at p 0637

> (b) any person takes any step to effect any expropriation, attachment, sequestration, distress or execution against any of those Charged Assets,
>
> the floating Charge over the relevant Charged Assets shall automatically and immediately be converted into a fixed Charge.

Clause 4.4(b) is capable of applying to the appointment of receivers and managers by the Senior Lenders themselves, as was the case here.

59 Once the floating charge crystallised, the assets, including the receivables of JAC, became subject to the equitable interest of the Senior Lenders.

60 The floating charge is valid and the tolling fee debt, final payment amount debt and Set-Off Agreement debt fell within its scope. No issue is taken by the Defendants as to the validity and enforceability of the floating charge as such, though the Defendants argue, which I will deal with in later sections, that the prohibition against assignment clauses operated to prevent crystallisation of the floating charge or the crystallised floating charge from affixing to the receivables, and that there was in any event decrystallisation.[34]

The fixed charges

61 There are in effect two fixed charges:

(a) The first is the fixed charge created as such from its inception.

(b) The second is the crystallised floating charge.

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[34] Glencore's closing submissions at para 207; BP's closing submissions at paras 87–108.

62 A fixed charge is an appropriation of the asset, by way of an equitable interest in the asset, to the satisfaction of the debt. It operates over a specific asset or assets and once in place, the charge remains and the asset cannot be dealt with free from that encumbrance or appropriation.

63 The Plaintiffs argue that the receivables are caught by the fixed charge under cl 3.1 of the Debenture, covering various assets including "present and future Book Debts". "Book Debts" is defined widely to include "debts of any nature" and "all other rights to receive money" be it "now or in the future due, owing or payable".[35]

64 BP on the other hand argues that the debts owed by BP to JAC are not subject to any fixed charge. Whether a charge is fixed or floating does not depend on how it is termed in the security instrument but on the actual nature of the security. In this case, the charge is not fixed because the requirement of exercise of control by the chargee (in this case, the Senior Lenders) for a fixed charge as established in *Spectrum Plus* is not met. BP contends that the Plaintiffs have not shown that the chargor (*ie*, JAC) had complied with the obligations and restrictions in the Debenture and a common terms agreement concluded between JAC and the Senior Lenders dated 13 April 2011 ("Common Terms Agreement") such that the chargee (*ie*, the Senior Lenders) exercised control. This is since, contrary to the requirements in the agreements, JAC failed to give the Agent various documents including a draft operating budget setting out the budgeted operating costs and other revenue and expenditure items. In addition, according to BP, there is a lack of control exercised by the Senior Lenders as JAC has been dealing and continues to deal with the sums due to it under the

[35] Glencore's core bundle of documents vol 2 at pp 0632, 0635; Plaintiffs' closing submissions at para 30.

agreements as moneys that it beneficially owns, to cover its operational costs. Thus according to BP, the chargor here had the ability to freely and without the chargee's consent, control and manage the charged assets, and hence the charge is not fixed.[36] Glencore similarly argues that there has been no control in the sense required by *Spectrum Plus* exercised by the Senior Lenders.[37]

65 What is in issue here therefore is whether JAC has been given such freedom to deal with the receivables as to render the charge ambulatory and shifting. In other words, the issue is whether the use of JAC's funds for its operations goes against the existence of a fixed charge.

66 I do not consider the matters raised as showing that there is no fixed charge. The use of the funds of JAC falls within the receivers and managers' work to continue running the company for a better realisation of the Senior Lenders' security. This extends to the assets that are subject to the fixed charge originally.

67 As for any failure by JAC to comply with the terms of the Debenture or the Common Terms Agreement due to the failure to furnish the necessary documents, it does not establish such freedom in the use of the funds that a fixed charge over the debt could not be said to have existed. If JAC had been permitted by the Senior Lenders to sell or assign the debts to others, that would clearly negate the fixed charge, but there was nothing of that nature here. The receivers and managers took control of the assets of JAC.

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36 BP's closing submissions at paras 87–104.

37 Glencore's closing submissions at paras 216–246.

68 It is also argued by the Defendants that pursuant to cl 16.4 of the Debenture,[38] the receivers and managers are the agents of JAC and not the Senior Lenders and hence control exercised by them does not constitute control exercised by the chargee, *ie*, the Senior Lenders.

69 A receiver and manager is usually the agent of the company by virtue of the security instruments but this does not mean that the property subject to the charge remains within the control of the company. The receiver and manager's primary duty is to the debenture holders: *In re B. Johnson & Co. (Builders) Ltd* [1955] Ch 634 at 661. The agency that is generally created permits the receiver and manager to bind the company in transactions and avoid liability for the debenture holder. As noted by David Milman in "Receivers as Agents" (1981) 44(6) MLR 658 at pp 660–663, the receiver and manager actually owes little by way of duties as an agent to the company. The receiver and manager's agency does not affect the equitable interest held by the debenture holder in the charged assets; there is no transfer or surrender of that equitable interest.

70 The fact of the matter is that the receivers and managers were appointed by the Agent in respect of the charged assets,[39] and the activities of the receivers and managers including the use of the funds were pursuant to that appointment. Therefore, I accept the Plaintiffs' arguments that there was control exercised by the receivers and managers, and that this constituted control exercised by the Senior Lenders.

71 The receivables (*ie*, the tolling fee debt, final payment amount debt and Set-Off Agreement debt), are therefore subject to the equitable interest of the

38 Glencore's core bundle of documents vol 2 at pp 0649.

39 Plaintiffs' core bundle of documents at p 280.

Senior Lenders, pursuant to both the fixed charge under cl 3.1 and floating charge (which has crystallised) under cl 4.1 of the Debenture.

The prohibition against assignment and its effect on charged assets

72 In relation to the tolling fee debt, the Defendants rely on the prohibition against assignment contained in cl 28.1 of the Tolling Agreement. Under cl 28.1, JAC was not to:[40]

> novate, assign, licence, sub-licence or otherwise transfer any of its rights, obligations or liabilities under or in connection with this Agreement without the prior written consent of all Suppliers [*ie*, BP and Glencore];
>
> …

73 The Defendants also invoke cl 10 of the Transitional Agreement:[41]

> **10. ASSIGNMENT**
>
> No Party shall, without the previous consent in writing of the other Parties, assign this Agreement or any rights or obligations hereunder. Any assignment not made in accordance with the terms of this Clause 10 (Assignment) shall be void.

74 In relation to the Set-Off Agreement debt, Glencore relies on cl 2(a) of the Set-Off Agreement between Glencore and JAC which reads:[42]

> **2 MISCELLANEOUS**
>
> (a) This Agreement may not be assigned except upon the written consent of both Parties, such consent not to [*sic*] unreasonably withheld, and any assignment without such consent shall be null and void.

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40 Glencore's bundle of documents vol 2 at p 0859.

41 Glencore's bundle of documents vol 2 at p 1034.

42 Glencore's bundle of documents vol 2 at p 0733.

75 I leave aside the question of whether cl 10 of the Transitional Agreement or cl 28.1 of the Tolling Agreement has been incorporated or is otherwise applicable to the Transitional Supplemental Agreement as put forth by the Defendants, which would take the determination of the issue further than necessary, given my finding on the proper interpretation of the prohibition against assignment clauses and the effect of such clauses.

Interpretation of the clauses

The text

76 As argued by the Defendants and I believe accepted by the Plaintiffs, the scope of the prohibition against assignment is a matter of construction of the relevant clauses. The Defendants argue that on a proper interpretation of the clauses, the debts owed by the Defendants to JAC fall within the prohibition against assignment clauses and could not be assigned, citing the principles of contractual interpretation in *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029 and other cases.

77 The Defendants also cite *The Assignment of Contractual Rights* by Professor Greg Tolhurst (Hart Publishing, 2nd Ed, 2016) ("*The Assignment of Contractual Rights*") at p 292 as follows:[43]

> … [U]sually, unless there is clear evidence to the contrary, where the clause expressly extends to prohibiting 'assignments', 'encumbrances' or 'any dealings' it will, as a matter of construction, also capture a charge and a declaration of trust.

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[43] BP's closing submissions at para 19; Glencore's closing submissions at para 102.

78 This position may be true of a clause that expressly refers to encumbrances or uses similar language. It may even extend to one that refers to dealings. But the clauses here, whether cl 28.1 of the Tolling Agreement, cl 10 of the Transitional Agreement or cl 2(a) of the Set-Off Agreement, do not refer to encumbrances and dealings. The prohibition under cl 28.1 covers only novations, assignments, licences, sub-licences and transfers. Clause 10 of the Transitional Agreement and cl 2(a) of the Set-Off Agreement refer to assignments only. None of the terms used in either cl 28.1, cl 10 or cl 2(a) would be sufficient to capture a charge. With respect, while an encumbrance or dealing may capture a charge or trust, I cannot see that the term 'assignment' is itself of such a wide effect, unless there is something in the context that requires such a conclusion to be reached. A charge does not involve either an assignment or a transfer at all (see above at [40]–[54]). I do note that the Plaintiffs themselves use language in their submissions which indicates that they view the charge as a form of assignment in equity. The Plaintiffs' characterisation is however immaterial; they maintain that the prohibition against assignment clauses are not applicable.

79 In any event, Professor Tolhurst is careful to indicate that the position at [77] above is only the usual position. He recognises the doctrinal distinction between a charge and an assignment and is of the view that whether a charge is included in a prohibition against assignment clause would depend on the construction of the relevant clause in question (see *The Assignment of Contractual Rights* at p 291):

> A charge is doctrinally distinct from an assignment and therefore arguably a simple prohibition on assignment should not prevent a party charging its interests under a contract. However, 'assignment' is a word of wide import and a judge may on the facts of a particular case either construe it to include a charge or construe it to be restricted to its technical meaning.

80 In a similar vein, Professor Roy Goode has opined that a mere prohibition against assignment would not extend to a charge. After explaining that whether or not a prohibition against assignment clause would extend to equitable charges would depend on the construction of the contract, he opines (see "Contractual Prohibitions Against Assignment" (2009) LMCLQ 300):

> Prima facie a clause precluding assignment covers equitable as well as statutory assignments, and includes mortgages as well as sales and gifts, but does not extend to declarations of trust or equitable charges, neither of which constitute a transfer of rights … a "mere" charge (that is, a charge which does not incorporate an agreement for a mortgage) is simply an encumbrance, a *ius in re aliena*, and does not operate as a transfer of rights.

81 Therefore, applying the principles of contractual interpretation articulated in various cases, including *Y.E.S. F&B Group Pte Ltd v Soup Restaurant Singapore Pte Ltd (formerly known as Soup Restaurant (Causeway Point) Pte Ltd)* [2015] 5 SLR 1187, in relation to the first step of contractual interpretation which is to consider the meaning of the text of the agreement, the words used in cl 28.1, cl 10 and cl 2(a) of the respective agreements are directed at the assignment or transfer of interests. The text of the clauses would not on its own prevent the allocation or appropriation of the equitable interest in an asset to the satisfaction of a debt; that is, the plain meaning of the clauses does not preclude a charge. The conclusion considering the plain words used, which is the starting point in contractual interpretation, is that the clauses in question do not cover charges and thus do not prohibit the charging of the receivables pursuant to cl 3.1 (fixed charge) and cl 4.1 (crystallised floating charge) of the Debenture.

The context

82 There is also nothing in the context, as adduced, which discloses objective evidence showing that an intention existed between the parties for the words used in the prohibition against assignment clauses to prohibit charging of the assets under the agreements.

83 The Defendants point to the fact that the Tolling Arrangement was put in place to increase the value of the Plant and allow the Plant to be sold. BP argues that the tolling fee was not intended to form part of the Senior Lenders' security and instead to be used to meet JAC's operating costs only.[44] The Defendants would not have otherwise entered into the agreement. According to the Defendants, the Senior Lenders agreed to this as they were incentivised by the potential for an increase in the value of the Plant from the tolling arrangements pending a sale of the Plant.[45] The Plaintiffs on the other hand argue that there was no reason for the receivers to enter into the Tolling Agreement if the tolling fees were not part of the Senior Lenders' security package, especially because the Senior Lenders had injected significant funds into JAC to get the tolling operations off the ground.[46]

84 I find that there is insufficient evidence that the parties had intended for charges to fall within the prohibition against assignment clauses, particularly when weighed in the light of the absence of any express intention or agreement for the clauses to cover charges. Here, the very fact that the Tolling Agreement

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44 BP's closing submissions at paras 114–117.

45 BP's closing submissions at paras 75, 109–118; Glencore's closing submissions at paras 124–130.

46 Plaintiffs' closing submissions at para 24(8)(a)(iv).

and Transitional Agreement were concluded after the fixed charge had been created and the floating charge had crystallised means that the parties were fully aware that the encumbrance or appropriation was already in operation. There is also nothing in the context surrounding the conclusion of the Set-Off Agreement between Glencore and JAC which shows that the parties had intended the prohibition against assignment clause in the Set-Off Agreement to preclude the operation of the pre-existing fixed charge over the Set-Off Agreement debt, or prevent the future crystallisation of the floating charge under the Debenture. Against that background and the underlying factual matrix, it cannot be said that the clauses cover charges.

85 In relation to the extrinsic evidence in the form of the parties' prior negotiations of the contracts, the Defendants argue that the negotiating history shows that the parties' intention or agreement was for the prohibition against assignment clauses to prevent the assets from being part of the security of the Senior Lenders. In particular, the Defendants highlight that in relation to the Tolling Agreement, a sub-clause, *ie*, cl 28.2, was originally considered but subsequently rejected in the course of negotiations as it was not accepted by the Defendants. According to the Defendants, cl 28.2, if included, would have carved out an exception to the prohibition against assignment in cl 28.1 to allow assignments by way of security. The Defendants argue that this shows that the agreement of the parties was for cl 28.1 to prohibit charging of the debts owed by the Defendants to JAC.[47]

86 To my mind, the fact that the negotiations led to the omission of a proposed cl 28.2 that would have expressly entitled JAC to charge the assets

[47] BP's closing submissions at paras 66–75; Glencore's closing submissions at paras 116–140.

does not aid the Defendants. The exclusion of this clause could on the one hand be an indication that JAC and its receivers accepted that there could not be any charging of the assets pursuant to cl 28.1; on the other hand, it could indicate that JAC and its receivers chose to rely on their position at general law and took the interpretation that cl 28.1 did not preclude the operation of the pre-existing charges, making a further cl 28.2 unnecessary and superfluous. As it is, this is now what the Plaintiffs claim.[48] The omission of cl 28.2 does not support a conclusion one way or the other.

87 There are also some issues raised concerning the express exclusion from the Senior Lenders' security package sought by the Defendants in relation to certain classes of assets, namely materials and processor revenue. This was obtained through an acknowledgement of the Agent ("Acknowledgement").[49] I do not consider that these arguments really lead anywhere in the light of my other findings. In any event, I would accept that the Acknowledgment, which provides that materials and processor revenue are the property of the Defendants and that the Senior Lenders do not hold security interest in those two classes of assets, does not mean that the Defendants agreed that the other asset classes are subject to the security interest of the Senior Lenders. There is sufficient ambiguity in the circumstances surrounding the Acknowledgment that, even on a balance of probabilities standard, precludes such an inference from being made.

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48 Plaintiffs' closing submissions at para 98.

49 Plaintiffs' closing submissions at paras 50–55; BP's closing submissions at paras 146–155; Glencore's closing submissions at paras 131–135.

Effect of prohibition against assignment

88 The Plaintiffs rely on *Foamcrete* for the position that the beneficial interest in the debts which the Senior Lenders acquired once the floating charge crystallised remains unaffected by prohibitions against assignment contained in agreements which post-date the floating charge. The Senior Lenders' beneficial interest in the debts were acquired by virtue of the charges which pre-dated the prohibition against assignment. It was not derived from any assignment in breach of the prohibition against assignment clauses, and therefore cannot be affected by these clauses. [50]

89 The Defendants argue that the prohibition against assignment clauses prevented the crystallised floating charge and the fixed charge in the Debenture from operating over/affixing onto the receivables. As I have found in the previous section, the prohibition against assignment clauses in this case do not prohibit charging of the assets.

90 But even assuming that the prohibition against assignment clauses can be read to cover charges or have expressly included charges, the authorities relied upon by the Defendants do not examine the issue in the specific context of a prior fixed charge or prior floating charge which crystallised before the contractual prohibition against assignment came into effect. The Defendants argue that *Foamcrete* can be distinguished, *inter alia*, as the case was concerned with the effect of a prohibition against assignment clause subsequently entered into by the chargor without the knowledge or consent of the chargee. The Defendants submit that in this case the debenture holders were aware of the prohibition against assignment clauses and were incentivised by the potential

[50] Plaintiffs' closing submissions at para 89.

for an increase in the value of JAC's Plant.[51] However, as I have found earlier, there is no evidence showing that an intention existed between the parties, or that there was consent from the Senior Lenders, for the prohibition against assignment clauses to preclude the operation of the pre-existing fixed charge and crystallised floating charge.

91 In addition, under the fixed charge and crystallised floating charge which cover future receivables, once the receivables arose, they were subject to the interest of the debenture holders. The receivables could not be an asset of JAC without ever being free from the interest of the debenture holders. That is the effect of the crystallisation of the floating charge and the operation of the fixed charge. If the equitable interest in the receivables arose in favour of the chargee as soon as the receivables were due to JAC, then there was never any point at which the prohibition against assignment clauses could operate: there was no scintilla of time for the receivables to operate free of the chargee's interest and for any other interest short of that of a *bona fide* purchaser for value without notice to latch on in priority. Therefore, even if the clauses prohibited charges in addition to assignments, the clauses would at most prevent the creation of new encumbrances, and not affect the ones already operating against the assets. The Defendants did not show that the clauses operated to release the pre-existing charges. The plain words of the clauses do not support such construction. Indeed, very clear exclusionary words would be needed before a prohibition against assignment clause could operate to prevent a pre-existing crystallised floating charge or pre-existing fixed charge from affixing onto the receivables.

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[51] BP's closing submissions at paras 133–1345; Glencore's closing submissions at paras 90–94.

92 In summary, I find that based on a construction of the prohibition against assignment clauses, the clauses do not prohibit charging of the receivables that arise under the agreements. In addition, I also find that in any event, the receivables were charged from the moment they arose and that there was no opportunity for any contractual prohibition against charging, even if it existed in the agreements, to take effect.

Estoppel / waiver / decrystallisation

93 For the reasons outlined at [91] above, a prohibition against assignment/charging contractual clause cannot apply to an asset that is already subject to a pre-existing crystallised floating charge/ fixed charge prior to the contractual clause coming into effect. In other words, such a contractual clause cannot in these circumstances unwind the charging of the asset. A charged asset will only escape the charge if for some reason the charge is to cease to operate, or to have its effect suspended, through some form of waiver, estoppel or decrystallisation. It is possible for a debenture holder to agree not to assert equitable interest in the charged assets or part thereof. The debenture holder can also release the charged assets, or decide not to have future assets subjected to the charge. In such circumstances, the doctrines of estoppel, waiver or decrystallisation may apply to prevent the operation of the charge. Based on the facts of this case, I do not find that there was an estoppel, waiver or decrystallisation applicable.

94 The Defendants argue that the floating charge, even if crystallised at some point, has since decrystallised. Decrystallisation is a concept developed in *Goode on Legal Problems of Credit and Security* (see paras 4–62 to 4–64). It involves a charge ceasing to operate, either because of the restoration of the chargor's management powers over the assets in question which reverts the

charge to one that is floating, or the inaction of the debenture holder which allows the chargor to continue to deal with the charged assets in the ordinary course of business.

95 Though I accept that decrystallisation is possible in principle, there needs to be clear evidence before the court can conclude that there has been any decrystallisation. As decrystallisation is a form of release, it is possible for the chargee to agree to it. Indeed, as noted in *Goode on Legal Problems of Credit and Security* at para 4–62, decrystallisation is sometimes necessary to deal with unexpected situations such as unintended triggering of crystallisation. An express agreement between the parties on decrystallisation would put the possibility of decrystallisation beyond doubt, but a decrystallisation clause agreed to between the parties is likely to only cover situations of unintended crystallisation.

96 Decrystallisation has been equated with the lack of control by the debenture holder over the charged assets. Loss of control by the debenture holder has been posited as a possible indication of decrystallisation. The court would not generally find such loss of control except where it is very clear. Furthermore, as argued by the Plaintiffs and which I have accepted (see above at [66]–[70]), the very appointment of receivers and managers is a clear indication that there has been no ceding of control. Therefore, on the facts, I find that there has been no decrystallisation.

97 The Plaintiffs argue that uncertainty and grave repercussions would follow if the concept of decrystallisation were to be recognised.[52] I do not think

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[52] Plaintiffs' closing submissions at para 75–79.

that that would be so, provided decrystallisation does not occur too readily. It is a useful concept which recognises the autonomy of the parties. There is also nothing against it as a matter of principle – what the parties have created, the parties can destroy, or at least, suspend.

98 Similarly, any estoppel or waiver is only to be found on the basis of a clear and unequivocal representation. The line between decrystallisation on the one hand and estoppel or waiver on the other may be very fine. In my view, it is not clear at this juncture whether any difference really exists between the concepts.

99 As earlier mentioned, the Defendants argue that the Senior Lenders, in agreeing to omit the originally contemplated cl 28.2 from the Tolling Agreement, had agreed to the exclusion of the tolling fee debt from their security package. According to the Defendants, the Senior Lenders had agreed to this as they were incentivised by the potential increase in value of the Plant arising from the tolling arrangements pending its sale. Hence, the Senior Lenders are estopped now from asserting any security over the tolling fee debt.[53]

100 I find however that the fact that cl 28.2 was considered and ultimately not adopted does not amount to a representation that would support either waiver or estoppel. The omission is ambiguous since it could have been the result of a determination by JAC and its receivers that they did not need such a clause in the circumstances, and that they could rely on their position at general law (see above at [86]). There was no express statement showing that they agreed to exclude the tolling fee debt from the Senior Lenders' security package

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[53] BP's closing submissions at paras 75, 109–118; Glencore's closing submissions at paras 124–130.

by omitting cl 28.2. It is not necessary for the receivers and managers to testify to that effect – the onus lies on the Defendants to show that there was any such representation. Any silence of the receivers and managers, at the time of the negotiations or indeed in court, could not prejudice them.

Reassignment of Set-Off Agreement debt from Senior Lenders to JAC

101 To recapitulate, pursuant to the Assignment dated 28 April 2011, JAC assigned receivables payable to JAC under the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement to the Senior Lenders.[54] The Set-Off Agreement was subsequently entered into between Glencore and JAC in December 2014 for the set-off of mutual claims arising out of the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement. The Plaintiffs are now seeking to claim the Set-Off Agreement debt, which is the outstanding debt owed by Glencore arising from the Set-Off Agreement.

Parties' submissions

102 In relation to the Set-Off Agreement debt, the Plaintiffs submit that the debt is subject to the Senior Lenders' interest not only by virtue of the charges under the Debenture operating in favour of the Senior Lenders but also by virtue of the direct assignment of the Set-Off Agreement debt to the Senior Lenders pursuant to the Assignment. This is because the Set-Off Agreement debt stems from receivables under the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement, both of which were expressly assigned to the Senior Lenders under the Assignment. Therefore, there can be

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54 Plaintiffs' opening submissions at para 17.

no doubt that the Set-Off Agreement debt is subject to the Senior Lenders' security in the light of the direct assignment.[55]

103 Glencore on the other hand submits that the Set-Off Agreement debt was not assigned to the Senior Lenders pursuant to the Assignment given that it arises from the Set-Off Agreement, and is thus distinctive from the receivables under the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement which were assigned under the Assignment.[56]

104 Glencore further submits that even if the Set-Off Agreement debt falls under the receivables assigned pursuant to the Assignment, the interests in the debt have in any event been reassigned by the Senior Lenders back to JAC. Glencore argues that the Plaintiffs have not discharged their burden of proof in establishing that the Senior Lenders retain their security over the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement pursuant to the Assignment. In particular, Glencore contends that there was a reassignment to JAC and release of security arising from two notices of reassignment dated 28 August 2017 (the "Notices of Reassignment"). In the Notices of Reassignment, the Agent informed Glencore that the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement had been "released and discharged from the security created or expressed to be created under the Assignment and [had] been reassigned to the Assignor [*ie*, JAC] and the instructions and directions set out in the Notice of Assignment and Acknowledgement [were] hereby revoked with immediate effect". Glencore was informed in the said notices that the release was pursuant

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55 Plaintiffs' closing submissions at paras11(2) and 24(1)(b).

56 Glencore's closing submissions at paras 174–177.

to a "deed of partial discharge, reassignment and release (relating to the Assignment) dated 28 August 2017" ("the Deed of Reassignment").[57]

105 In response, the Plaintiffs explain that the Notices of Reassignment were sent in error and rectified by way of a retraction.[58] Thus, the Notices of Reassignment have no legal effect. In addition, there was no actual reassignment or release of security given that under the terms of the Deed of Reassignment, only assets which were sold and transferred to ExxonMobil under the PCOA were reassigned back to JAC. As the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement were not assets sold or transferred to ExxonMobil pursuant to the PCOA, they had not been reassigned to JAC under the Deed of Reassignment.[59]

My findings

106 I find that the Assignment captures the Set-Off Agreement debt. In addition, the Set-Off Agreement debt has not been reassigned back to JAC, and the Senior Lenders retain their interest in the debt pursuant to the Assignment. The Senior Lenders also have, in any event, an equitable interest in the Set-Off Agreement debt through the operation of the fixed charge and crystallised floating charge under the Debenture, given my preceding findings above on the charges.

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57 Glencore's core bundle of documents vol 5 at Tab 83.

58 Plaintiffs' opening submissions at para 80.

59 Plaintiffs' closing submissions at para 36.

107 There are to my mind two possible legal bases for the purported release of the equitable interest of the Senior Lenders arising under the Assignment to be effective, which I will analyse in turn:

(a) Direct release: There was an extinguishment of the equitable interest of the Senior Lenders in the Set-Off Agreement debt by virtue of the Deed of Reassignment which operates to release the security created under the Assignment.

(b) Estoppel or waiver: The Notices of Reassignment gave rise to an estoppel or waiver of the Senior Lenders' security in the Set-Off Agreement debt.

Whether there was a release of security through the Deed of Reassignment

108 I find that there was no reassignment of the interests under the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement (and therefore the Set-Off Agreement debt) based on the terms of the Deed of Reassignment.

109 Under the Deed of Reassignment, "Assets" as defined in the PCOA were released from the Senior Lenders' interest. Clause 3 of the Deed of Reassignment reads:[60]

> **3. DISCHARGE, REASSIGNMENT AND RELEASE**
>
> With effect from the Release Date, the Security Agent (for itself and the other Secured Parties) hereby irrevocably and unconditionally:
>
> (a) discharges, releases and reassigns to [JAC] all the Security Agent's present and future right, title and interest in

[60] Glencore's core bundle of documents vol 2 p1083.

> and to each of the Assets (as defined in the PCOA) and all proceeds thereof, including the benefit of all claims thereunder and all damages payables in respect of breaches thereof, in each case, subject or expressed to be subject to the Security created under the Assignment (the "**Released Assets**"), to hold the same unto [JAC] freed and discharged from all liabilities, moneys and interest secured by and from all claims and demands under the Assignment; and
>
> (b) discharges and releases [JAC] from all liabilities, obligations, claims, demands and undertakings solely in respect of the Released Assets under the Assignment and confirms that the Released Assets shall not form part of the Encumbered Property.

110 Glencore takes issue with the fact that certain portions of the PCOA were not disclosed by the Plaintiffs and submits that this prevented a verification of the "Assets" which had been released pursuant to the Deed of Reassignment. In response, the Plaintiffs submit that they cannot disclose the PCOA in full because of their confidentiality obligations to ExxonMobil. In addition, according to the Plaintiffs, it is sufficiently clear from the relevant documents disclosed that the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement did not fall within the "Assets" sold to ExxonMobil and were thus not released under the Deed of Reassignment. In Summons No 509 of 2018, I had dismissed Glencore's discovery application for certain identified provisions and schedules of the PCOA, on the basis that such discovery was unnecessary given the documents already disclosed.[61]

111 The evidence sufficiently establishes that "Assets" as defined under the PCOA do not include the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement.

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61 Minute sheet dated 8 February 2018.

112 First, the relevant portions of the PCOA which have been disclosed by the Plaintiffs concerning the definition of "Assets" show that the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement did not fall within the definition of "Assets".

113 Under cl 1.1 of the PCOA, "Assets" is defined as "the property, rights and assets agreed to be sold pursuant to Clause 2". Clause 2 lists the assets included in the sale. The sub-section relevant to the issue is cl 2.3.4 which provides for the sale of "Relevant Contracts". Pursuant to the definition in cl 1.1, "Relevant Contracts" includes "Material Contracts" and "Key Contracts", and these are listed under Schedule 7 of the PCOA.[62] Glencore's solicitors inspected Schedule 7 of the PCOA on 31 January 2018 and acknowledged that the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement were not expressly listed under Schedule 7, though according to Glencore this did not preclude the possibility that the agreements fall under a potential catch-all provision.[63]

114 Second, Mr Cosimo Borrelli, the second plaintiff who is a receiver and manager of JAC, stated on oath in an affidavit dated 13 October 2017 that the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement were not part of the "Assets" as defined and listed in the PCOA.[64]

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62 Plaintiffs' core bundle of documents vol 1 at pp 492–507.

63 Glencore's submissions for HC/SUM 509/2018 at para 19(u).

64 2nd Affidavit of Cosimo Borrelli in HC/CWU 171/2017 dated 13 October 2017 at para 40(2).

115 Likewise, ExxonMobil confirmed in an email dated 24 January 2018 and a letter dated 5 February 2018 that the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement "have not been assigned, novated or otherwise transferred to ExxonMobil, and that [the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement] do not fall within the definition of Assets which are acquired by ExxonMobil pursuant to the PCOA".[65]

116 In the light of the evidence, I find on a balance of probabilities that there was no reassignment of the interests under the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement (and therefore the Set-Off Agreement debt) based on the terms of the Deed of Reassignment, and the definition of "Assets" in the PCOA.

Whether the Notices of Reassignment operated as an estoppel/ waiver

117 I also find that the Senior Lenders have not waived and are not estopped from asserting the interests that they have in the Set-Off Agreement debt by virtue of the Assignment.

118 The Notices of Reassignment were retracted by way of a letter to Glencore dated 4 October 2017 in which it was stated that the Notices of Reassignment were "erroneously executed" and that they were "void and ineffective (and have been so since they were executed)".[66] There is nothing in law or in the circumstances that would prevent the Senior Lenders from

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65 4th Affidavit of Cosimo Borrelli in HC/OS 1180/2017 dated 5 February 2018, Exhibit CB-64 at p 11 and CB-66 at p 58.

66 Glencore's core bundle of documents vol 5 at Tab 98.

reasserting their security, provided that the security itself remains valid. As I have found that the security was not released pursuant to the Deed of Reassignment, the Senior Lenders were not precluded from reasserting their security and retracting the Notices of Reassignment. Given that the Notices of Reassignment have been retracted, there has been no waiver of the Senior Lenders' security interest in the Set-Off Agreement debt. In addition, waiver has not been proved because it was not shown that the party waiving its rights (*ie*, the Senior Lenders) were necessarily aware of the facts that gave rise to the rights which were being foregone (see *Audi Construction Pte Ltd v Kian Hiap Construction Pte Ltd* [2018] 1 SLR 317 at [54]).

119 I find that no estoppel arose either as there was no detrimental reliance by Glencore on the Notices of Reassignment between the date of issue on 28 August 2017 and date of retraction on 4 October 2017. Glencore submits that it verily believed that the security over the Glencore–JAC Feedstock Supply Agreement and the Glencore–JAC Product Offtake Agreement had been released and that it had thereafter asserted its right of set-off in relation to the Set-Off Agreement debt through a letter from its solicitors to JAC's solicitors.[67] I find that there is no evidence that Glencore would not have asserted a right of set-off had it not received the Notices of Reassignment. There was in any event no loss or other detriment suffered from the assertion of such a right. Therefore, even assuming that the Notices of Reassignment constituted a clear and unequivocal representation by the Agent and JAC that the Senior Lenders' security interests in the Set-Off Agreement debt had been released, there was

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67 Glencore's closing submissions at para 194; Glencore's core bundle of documents, vol 5 at Tab 96.

no detrimental reliance on the part of Glencore prior to the retraction which would render estoppel applicable.

Applicability of set-off

120 The term "set-off" describes at least four different mechanisms, under which monetary claims may be reduced because of counterclaims by the other side:

(a) statutory set-off;

(b) common law set-off;

(c) equitable set-off; and

(d) insolvency set-off.

121 As I have found that the tolling fee debt, final payment amount debt and Set-Off Agreement debt owed by the Defendants are subject to the security interests of the Senior Lenders, the next issue is whether the security interests of the Senior Lenders in these debts preclude the Defendants' ability to set-off each of these debts against the feedstock debt owed by JAC, pursuant to an insolvency set-off.

122 The question of whether the Defendants may rely on equitable set-off also has to be considered.

Insolvency set-off

The law on insolvency set-off

123 What is at issue primarily in the present case is the applicability of insolvency set-off, which arises where mutual credits, debts and liabilities are

to be set-off with only the balance provable. This arises by way of s 88(1) of the Bankruptcy Act, read with s 327(2) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"). Section 88(1) of the Bankruptcy Act reads:

> **Mutual credit and set-off**
>
> **88.**—(1) Where there have been any mutual credits, mutual debts or other mutual dealings between a bankrupt and any creditor, the debts and liabilities to which each party is or may become subject as a result of such mutual credits, debts or dealings shall be set-off against each other and only the balance shall be a debt provable in bankruptcy.

Section 327(2) of the Companies Act reads:

> (2) Subject to section 328, in the winding up of an insolvent company the same rules shall prevail and be observed with regard to the respective rights of secured and unsecured creditors and debts provable and the valuation of annuities and future and contingent liabilities as are in force for the time being under the law relating to bankruptcy in relation to the estates of bankrupt persons, and all persons, who in any such case would be entitled to prove for and receive dividends out of the assets of the company, may come in under the winding up and make such claims against the company as they respectively are entitled to by virtue of this section.

124 While insolvency set-off is self-executing and the court has no power to disapply it, it can only operate in respect of claims which are mutual. Mutuality conveys the notion of reciprocity: *Gye v McIntyre* (1991) 171 CLR 609 at 623; Rory Derham, *Derham on the Law of Set-Off* (Oxford University Press, 4th Ed, 2010) ("*Derham on the Law of Set-Off*") at para 11.01. To satisfy mutuality, there must be identity between the holder of the beneficial interest in the claim and the person against whom the cross-claim is asserted (*N W Robbie* at 1339). In other words, the debts must be due between the same parties, in the same right (*Derham on the Law of Set-Off* at para 11.01).

125 I am satisfied that here there is no mutuality. The Defendants' claims are against JAC *qua* the company. However, the claims against the Defendants are in respect of the charged assets, whose equitable interest lies with the Senior Lenders. There is thus no mutuality.

Applicability of insolvency set-off

126 The Plaintiffs argue that insolvency set-off cannot be applied due to the lack of mutuality given that the debts owed by the Defendants are beneficially owned by the Senior Lenders and not JAC. The Plaintiffs rely on the cases of *N W Robbie* and *Rendell* for the position that the effect of the crystallisation of a floating charge at the commencement of receivership is that the debt would be assigned in equity to the Senior Lenders and there would be no mutuality for insolvency set-off to operate.[68]

127 The Defendants argue that insolvency set-off is possible despite or regardless of the charges in favour of the Senior Lenders in the Debenture. The Defendants attempt to distinguish *N W Robbie* and *Rendell* on the basis that the contracts in question in those two cases did not contain a prohibition against assignment clause.[69] As I have found that a charge is different from an assignment and that the relevant clauses do not prohibit a charge, the existence of the prohibition against assignment clauses in this case, in contrast to *N W Robbie* and *Rendell*, is immaterial.

128 In addition, BP argues that *Rendell* also recognises the possibility that set-off could be claimed if the party claiming a set-off has been involved in the

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68 Plaintiffs' closing submissions at paras 31(4) and 48.

69 BP's closing submissions at para 139.

carrying on of the company's business, such as by supplying materials or services to the company. Competing equities arise between the person claiming a set-off and the debenture holder in such circumstances, where the company is carrying on business as opposed to merely realising its assets. The case of *Leichhardt Emporium Pty. Ltd. v A. G. C. (Household Finance) Ltd.* [1979] 1 NSWLR 701 ("*Leichhardt*") is also said to support the proposition that a set-off may be possible where the company's debt was incurred by or at the behest of the receiver or in circumstances which gave the receiver or debenture holder benefit. BP also relied on *West Street Properties Pty. Limited and others v Jamison and others* [1974] 2 NSWLR 435 ("*West Street Properties*") in which Jeffrey J, at 440, opined that there is something to be said for the view that a debenture holder who authorises the continuation of the company's business should be prepared to accept the normal incidents of trading, including the possibility that its debtors may require rights of set-off.[70] Reliance is also placed on a commentary in Thomas Robinson & Peter Walton, *Kerr and Hunter on Receivers and Administrators* (Sweet & Maxwell, 20th Ed, 2017) ("*Kerr & Hunter*") (at para 22-3) that set-off may be allowed where a cross-claim arises subsequent to the appointment of a receiver, even if the cross-claim arises only after equitable assignment, at least where the claims sought to be set-off are intimately connected.[71]

129 I do not accept BP's arguments in this respect. In relation to the observations in *West Street Properties*, the view of Jeffery J appeared to be tentative and it would seem that the learned judge was cautious, presumably because of the possible impact the position may have on chargees' equitable

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70 BP's closing submissions at paras 141–142.

71 BP's closing submissions at para 143.

interests. While it may be that the debenture holder should be taken to be prepared to accept the normal incidents of trading as was said in *West Street Properties*, on the other side of the coin, a trader who knows that a charge exists in relation to receivables must also be taken to have run the risk that no set-off will be applicable and guard himself accordingly.

130 As for the commentary in *Kerr & Hunter*, I do not think it can be taken that far. The commentary was premised on at least an intimate connection between the contracts that gave rise to debts sought to be set-off; I do not think the intimate connection exists here. What would perhaps qualify as such a connection is where the two contracts are really part and parcel of the same transaction. That cannot be said for the charged debts here and the feedstock debt.

131 In the present case the charges were already in operation at the time the tolling fee debt, the final payment amount debt and the Set-Off Agreement debt arose, and there was no agreement that the charges would not operate in respect of the debts. Therefore, I believe that the court should be slow to allow set-off to arise in the manner contemplated in the *dicta* of *Rendell* and *Leichhardt* cited by BP, which suggest that an exception may apply and set-off may not necessarily be precluded where the company's debt is incurred by or at the behest of a receiver carrying on the business of the company (see *Rendell* at 202 and *Leichhardt* at 707). I am of the view that the preferable position on this is that set out in *N W Robbie*. In any event, both *Rendell* and *Leichhardt*, applying *N W Robbie*, held that there was no mutuality on the facts because the crystallisation of the floating charge upon the commencement of receivership resulted in the debts due to the company belonging in equity to the debenture holder.

132 In *N W Robbie*, Sellers LJ, after expressing some sympathy for the position that where a receiver carries on the company's business in the name of the company, those with whom he deals should not be lightly deprived of the rights of set-off, nevertheless stated at 1330–1331:

> … I have been driven to the conclusion that so to do would not give full effect to the crystallisation of the floating charge … I think that it must be held that the debenture had the effect of making each debt as it arose after the appointment of a receiver a chose in action of the company subject to an equitable charge in favour of the bank as debenture-holders.

133 Russell LJ had even less sympathy for that position. His Lordship, at 1338, rejected a quote from the 13th edition of *Kerr & Hunter* to the effect that a charge would not attach to assets of the company acquired subsequent to the date of crystallisation. The authority cited in *Kerr & Hunter* for that position was the case of *In re Yagerphone Ltd* [1935] Ch 392 ("*Yagerphone"*). Russell LJ found that *Yagerphone* was cited out of context and that the position was not justified by the decision in *Yagerphone*, which was that a claim by a liquidator for repayment to him of a fraudulent preference was not subject to the debenture holder's charge; such a claim, being one which only the liquidator was entitled to make, could never have been property of the company subject to the charge. Russell LJ then dealt with the argument that any charge that did arise on future assets was only a floating charge and found that such an approach did not give effect to crystallisation. That led Russell LJ to the conclusion, at 1338 and 1339, that,

> by force of the debenture charge an equitable charge attached in favour of the denture-holders not only on the … debt existing at the date of the appointment of the receiver and manager, but also upon the other debts … as they came into existence on delivery of goods to the defendants after such appointment. These choses in action belonging to the company became thus assigned in equity to the debenture-holders, at times when the

> defendants had no cross-claim of any kind against the company and consequently no right of set-off.
>
> …
>
> I conclude, therefore, that there is in this particular case no right of set-off because there is no "mutuality" in beneficial interest. The claimants are primarily the debenture-holders: the cross-claim is against the company alone, and is indeed one which in its origin could not be met and was not entitled to be met until the debenture-holders had been paid off in full.

Russell LJ used the language of assignment, which is not an accurate description of a charge as I have noted above, but this does not affect the rest of the reasoning.

134 Donovan LJ, dissenting from the majority in *N W Robbie*, having interpreted the relevant provisions of the charge document in that case, came to the conclusion that no charge on the debts owing to the company arising after the appointment of the receiver was necessary, where the receiver was carrying on the business of the company (see *N W Robbie* at 1334–1335).

135 The majority's approach in *N W Robbie* does give full weight to the effect of a charge, and for that reason, should be preferred to the dissenting opinion of Donovan LJ.

136 The Defendants have referred to a number of decisions which they say cast doubt on the reasoning in *N W Robbie.* The Defendants argue, citing various commentaries, that there is no transfer of beneficial ownership in a charge, *ie*, the chargor is not deprived of beneficial ownership in the charged asset. Mutuality is therefore not displaced because mutuality sees through to the real beneficial ownership: *Good Property Land Development Pte Ltd (in liquidation) v Société Générale* [1996] 1 SLR(R) 884 at [18].[72]

137 However, even though beneficial ownership may remain with the chargor, the fact that the property is appropriated to the charge means that the property must be available for the satisfaction of the chargee's security; the only thing that can prevent such satisfaction is the disposal of the property to a purchaser for value without notice. If it were otherwise, the security interest would have no meaning. With that encumbrance or appropriation, mutuality is indeed destroyed. The following passage from *Derham on the Law of Set-Off* (at para 11.46) on the effect of a fixed equitable charge (which includes a crystallised floating charge) on mutuality is to my mind instructive:

> [W]hile the charge also confers a form of proprietary interest in the debt the subject of the charge, in the sense that the chargor no longer has an unfettered title to deal with it, … it does not purport to transfer the beneficial ownership title in the debt to the chargee. Nevertheless, for the purpose of set-off a fixed equitable charge has the same effect upon mutuality as a mortgage. The important point is that the charge, while it does not involve a full transfer of the beneficial ownership, nevertheless confers an immediate proprietary interest in the debt.

138 Therefore, as the receivables, *ie*, the tolling fee debt, the final payment amount debt and the Set-Off Agreement debt are charged to the Senior Lenders, mutuality between each of these receivables and the feedstock debt is destroyed and insolvency set-off is inapplicable.

Equitable set-off

139 The Defendants also invoke equitable set-off, which applies where there is a close relationship or connection between the dealings and the transactions which give rise to the respective claims, such that it would offend one's sense

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[72] Glencore's closing submissions at 209–214.

of fairness or justice to allow one claim to be enforced without regard to the other (*Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 ("*Abdul Salam*") at [26]).

140 BP argues that equitable set-off is not displaced by insolvency set-off. Responding to the submissions of the Plaintiffs, BP argues that the Australian decision in *Hamersley Iron Pty Ltd v Forge Group Power Pty Ltd (in liquidation) (Receivers and Managers Appointed)* [2017] WASC 152, cited by the Plaintiffs, should not be followed as it concerned the position in a statute not binding in Singapore, *ie*, the Australian Corporations Act 2001 (Cth).

141 I accept that equitable set-off is not excluded by the statutory provisions on insolvency set-off. There is nothing in the Singapore statutes that expressly precludes the operation of equitable set-off, and I do not see anything in the actual operation of either form of set-off that would render one incompatible with the other as a matter of principle. The possible effect of equitable set-off on third parties, including other creditors of a bankrupt individual or insolvent company, may be a reason for the court not to effect equitable set-off. However, that is a matter of considering the specific circumstances which is the type of question that courts are constantly faced with in cases dealing with equitable remedies. I agree with the commentary in *Derham on the Law of Set-Off* at paras 6.25–6.32 that insolvency set-off should not bar equitable set-off as a matter of principle.

142 That said, on the facts, equitable set-off is not established because the cross-claims (the feedstock debt on the one hand, and the tolling fee debt, the final payment amount debt and the Set-Off Agreement debt respectively on the other) do not bear a close connection. The respective debts arose out of separate

arrangements and transactions which cannot be said to be so closely connected that it would be unjust not to allow the set-off. It is insufficient in this regard that the parties have dealt with each other along a single continuous business relationship, as submitted by Glencore.[73] The requirement that there must be a close and inseparable relationship between the claims (see *Abdul Salam* at [30] and [34]) is not met.

Miscellaneous

143 In coming to these conclusions I have noted the commercial context of the dealings between the parties. It may be true that the Defendants' officers were aghast at the thought that the debenture holders would be able to finance the operation of the Plant in this way, but their subjective concerns could not control the interpretation of the agreements, nor of the law.

144 It must be emphasised that the operation of the equitable doctrine here does not shift property interests in response to unconscionable conduct – rather, the conclusions flowed from the application of a concept in equity, namely the charge. The parties, being sophisticated, would have had an array of lawyers to advise on these aspects and the loss or gain must fall where the dictates of doctrine dictate.

145 The following additional matters can be dealt with briefly.

Procedural matters

146 By an earlier application (Summons No 5135 of 2017 and Summons No 5136 of 2017), the Defendants sought conversion of the present originating

[73] Glencore's closing submissions at paras 272 and 274.

summonses to a writ. This was opposed by the Plaintiffs. Having heard the parties, I declined to order the conversion, but granted limited cross-examination.[74] I did not consider that the factual disputes were so involved that a trial was to be preferred. The main driver for this approach was the expressed urgency at the time for a resolution of the matter. As it turned out, the matter was not as urgent as originally anticipated, though it is still hoped that these proceedings would not have taken as long as a full trial.

Adverse inferences

147 In their submissions, the parties sought the drawing of various adverse inferences. I am of the view that none of the instances invoked by the parties justify the drawing of an adverse inference. Adverse inferences should only be drawn on clear grounds; none of the instances invoked are to my mind sufficiently made out, particularly given that these proceedings were conducted with limited cross-examination.

Orders made

148 The Plaintiffs are entitled to the orders sought, namely the declarations, and also in the circumstances, to an assessment of damages. I will give directions for a hearing to draw up the specific orders, and to determine costs. I will also hear parties on the question of the winding up application against JAC, and the necessary orders or directions. In the meantime, for the avoidance of doubt, time for appeal is extended.

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74 Minute sheet dated 15 November 2017 at p 80.

Aedit Abdullah
Judge

Edwin Tong SC, Tham Hsu Hsien, Peh Aik Hin, Lee May Ling & Yeo Kok Quan Nigel (Allen & Gledhill LLP) for the plaintiffs in OS 1178/2017 and OS 1180/2017;
Jaikanth Shankar, Tan Ruo Yu & Teo Zhiwei Derrick Maximillian (Drew & Napier LLC) for the defendant in OS 1178/2017;
Balakrishnan Ashok Kumar, Leong Ji Mun Gregory, Aw Chee Yao & Tay Kang-Rui Darius (Blackoak LLC) for the defendant in OS 1180/2017.
