

Jurong Data Centre Development Pte Ltd (provisional liquidator appointed) (receivers and managers appointed) v M+W Singapore Pte Ltd and others
[2011] SGHC 58

Case Number : Originating Summons No 389 of 2010
Decision Date : 16 March 2011
Tribunal/Court : High Court
Coram : Judith Prakash J
Counsel Name(s) : Ashok Kumar and Linda Esther Foo (Stamford Law Corporation) for the plaintiff; Andre Maniam SC, Chua Sui Tong and Lim Wei Lee (WongPartnership LLP) for the first defendant; Cavinder Bull SC, Tan Mei Yen and Mohamed Nawaz Kamil (Drew & Napier LLC) for the second to fourth defendants.
Parties : Jurong Data Centre Development Pte Ltd (provisional liquidator appointed) (receivers and managers appointed) — M+W Singapore Pte Ltd and others

Credit and Security

16 March 2011

Judith Prakash J:

Introduction

1 On 8 April 2010, the directors of the plaintiff, Jurong Data Centre Development Pte Ltd (“JDD”), passed a resolution acknowledging that JDD could not continue business by reason of its liabilities. A provisional liquidator was appointed the same day. On 22 April 2010, this action was commenced to challenge certain security given to the first defendant, M+W Singapore Pte Ltd (“M+W”), and the appointment of the second to fourth defendants (“the Receivers”) as receivers and managers under M+W’s security. The purpose of the action is to determine whether particular assets of JDD are available for the benefit of its unsecured creditors or whether M+W is a secured creditor with priority.

Background

2 JDD was incorporated on 21 January 2008 for the purpose of developing, building and owning a state-of-the-art data centre (“the Data Centre”). JDD is currently a wholly owned subsidiary of Japan Land Limited (“JLL”), an investment holding company listed on the Singapore Exchange.

3 For the purposes of its business, JDD applied to the Jurong Town Corporation (“JTC”) for permission to develop and then lease the piece of land known as Private Lot A2534304, also known as Government Survey Lot 8441A of Mukim 5 (“the property”). By a letter dated 8 April 2008, JTC offered JDD a three-year licence of the property commencing 16 June 2008 and pursuant to this offer, on 22 December 2008, JTC and JDD executed a building agreement relating to the property (“the building agreement”). Under the building agreement, JDD was granted a licence of and authority to enter onto the property for a period of three years from 16 June 2008 for the purpose of building the Data Centre (“the project”) on the property. The building agreement also provided that upon completion of the project (and subject to certain conditions), JTC would grant JDD a 30-year lease of the property commencing retrospectively from 16 June 2008.

4 Following a tender exercise, M+W was appointed the main contractor for the project. On 19 February 2009, a construction agreement was concluded between JDD and M+W ("the construction agreement"). M+W was to design, construct and complete the project for a price of approximately \$213m to be paid by JDD in a progressive manner in accordance with the terms of the construction agreement. Construction work commenced shortly thereafter.

5 Until June 2009, JDD funded the construction costs of the project by using its own capital and obtaining loans from other companies which were related or associated with JLL (collectively "JL Group"). In the meantime, JLL was actively looking for other sources of funds. Around June 2009, JDD started negotiations with an external investor, Elchemi Group Limited ("Elchemi"), which was a private investment firm incorporated in the British Virgin Islands.

6 On 21 August 2009, Elchemi entered into a memorandum of understanding with certain JL Group companies which envisaged that Elchemi would take up a 50% shareholding in JDD. It was subsequently agreed that Elchemi's wholly owned subsidiary, ConnectedPlanet Holding Limited ("ConnectedPlanet") would front the investment. At about the same time, JDD's financial resources ran out and it started defaulting on the progress payments due to M+W. In order to reassure M+W about payment, on 14 September 2009, JDD introduced Elchemi to M+W and told M + W that Elchemi would be providing equity and debt funding to JDD to enable the project to be completed. JLL itself took steps to inject further capital into JDD and by 23 October 2009, JDD had an increased share capital of \$25m and JLL had become its sole shareholder.

7 None of the new money moved to M+W although, at about the same time, M+W had been demanding assurances from JDD regarding payment of its outstanding bills amounting to \$59,382,859.95. It threatened to stop work on the project unless payment was made.

8 On 24 October 2009, a meeting initiated by M+W to discuss JDD's financial situation took place in Tokyo. There are differing accounts of what happened there. M+W's CEO, Mr Kurzboeck, demanded a first pledge over JDD's assets in order for M+W to continue work on the project. M+W alleged that this demand was accepted on behalf of JDD. JDD, however, averred that no such agreement was reached at that time as the JL Group needed to get certain internal approvals.

9 On the afternoon of 27 October 2009, M+W's solicitors, WongPartnership LLP ("WongPartnership") sent, *inter alia*, a draft debenture ("the Debenture") and a draft security undertaking ("the Security Undertaking") to Mr Leow Tet Sin, a director of JDD, for execution. The next morning, M+W's managing director, Mr Cris Dedigama ("Mr Dedigama"), went to JDD's office to discuss and execute the Debenture and Security Undertaking. That afternoon, there was an urgent board meeting of the directors of JLL to obtain approval for the execution of the Security Undertaking and Debenture. Mr Leow informed the meeting that approximately \$59m was owing to M+W and in order for M+W to seek permission from its head office in Germany to continue to fund the construction and completion of the project, M+W required execution of the documents. Mr Leow also informed the meeting that if the documents were not executed, M+W would take immediate legal action to enforce recovery and would cease to carry out any work under the construction agreement. JDD executed the two documents that same evening (28 October 2009).

10 On the face of the document, cl 3 of the Debenture granted M+W a first fixed and floating charge over JDD's present and future assets, with the exception of the property which was to be subject to a mortgage upon the written consent of JTC being obtained. Clause 6.3 of the Debenture obliged JDD to use its best endeavours to obtain any consent necessary to enable its assets to be the subject of an effective fixed charge or assignment as contemplated by cl 3. Similarly, as provided under cl 5.2(a) of the Security Undertaking, JDD undertook to procure the written consent of JTC to

the entry of a mortgage of the property in favour of M+W. In consideration of JDD's performance of its obligations under the Security Undertaking, M+W agreed in cl 4 that it would not cease to perform its obligations under the construction agreement.

11 On 30 October 2009, M+W lodged a caveat ("the first caveat") against the property on the ground that it was a mortgagee under the documents that had been executed. On 6 November 2009, JDD objected to the lodging of the first caveat, contending that it was inconsistent with the JDD directors' understanding that the Debenture and the Security Undertaking were not meant to take full effect, registered or enforced, pending JDD's negotiations with Elchemi. On 10 November 2009, M+W denied that such an understanding existed. The first caveat, however, remained and JDD did not take any steps to have it removed.

12 On 3 November 2009, the negotiations between Elchemi and the JL Group ended. Pursuant thereto, JDD and ConnectedPlanet entered into an investment agreement whereunder ConnectedPlanet was to invest \$71m to acquire a portion of JLL's shares in JDD ("the investment agreement"). On completion of the transaction, ConnectedPlanet would own 85% of the enlarged issued share capital of JDD.

13 On 18 November 2009, representatives from JDD, M+W and Elchemi met officers of JTC ("the JTC meeting") to explain to them what was happening with the project and to seek JTC's consent for the grant of a mortgage over the property in favour of M+W. There is a dispute over whether the Debenture was mentioned during the meeting but the JTC officers were definitely told of JDD's desire to grant a mortgage in favour of M+W pending the receipt of the investment from ConnectedPlanet. After the meeting, Mr Leow wrote a letter, dated 18 November 2009, to JTC in which he reiterated the reason for the meeting and the fact that JDD needed a new investor to complete the project. Mr Leow forwarded a copy of the investment agreement with ConnectedPlanet to JTC and said that pending the investment, the mortgage would provide security to M+W "for the purpose of a 'Bridge Financing' to complete the project".

14 On 25 November 2009, JDD, M+W and ConnectedPlanet entered into an agreement ("the refinancing agreement"). By this agreement, JDD acknowledged that the filing of the Debenture with the Accounting and Corporate Regulatory Authority by M+W had been lawfully and properly carried out. It further agreed to submit a request for, and obtain, JTC's approval in respect of the creation of a deed of assignment of the building agreement and a mortgage over the property to secure JDD's obligations under, *inter alia*, the Debenture and the construction agreement. In return, M+W agreed that JDD would not be required to make any payment under the construction agreement until three days had elapsed from its receipt of Elchemi's investment or 31 January 2010, whichever was the earlier.

15 In the meantime, on 19 November 2009, JTC had given its in principle agreement or consent to the arrangement. The formal approval was set out in a subsequent letter dated 4 December 2009 ("the JTC consent letter") and this contained the following conditions which had to be observed by JDD:

2 We are pleased to inform you that your request to *Mortgage* the [property] to the aforesaid Mortgagee has been approved by JTC, subject to your irrevocable and unconditional:-

- (a) return of a duly completed Annex A (Non-financial Institution) based on the format attached with this letter;
- (b) acceptance of all the conditions in the attached Appendix; and

(c) acceptance of all the following which are conditions precedent to JTC's consent, and (amongst other rights and remedies available to JTC) JTC's consent is revocable in the event any of the following are not observed or complied with:

(i) the *Mortgage* shall only be for the purpose of completion of [M+W's] development of a data centre at the International Business Park...;

(ii) [M+W] will remain the main design & build contractor for [JDD] ... throughout the term of the Mortgage; and

(iii) the *Mortgage* is only an interim financing solution of [JDD's] to bridge the period from the date of the *Mortgage* until [ConnectedPlanet] is brought into the Project as a strategic investor.

[emphasis in original]

16 On the same day, JDD accepted the terms and conditions imposed by JTC for its consent to the mortgage and returned an acceptance letter to JTC ("the acceptance letter"). The acceptance letter was stated (in Annex B) that the mortgage was intended to secure:

The performance of all obligations that [JDD] may at any time have to [M+W] under or pursuant to the [Debenture] ...; the [construction agreement] ..., the [Security Undertaking] ..., the Deed of Assignment, the Mortgage and any other security, including but not limited to the repayment of all sums outstanding from [JDD] to [M+W] under the [construction agreement], including contractual interest payable pursuant to the terms of the [construction agreement], as well as any other interest, costs and fees thereon (including but not limited to legal fees incurred in connection therewith), whether present or future, actual or contingent (and whether incurred solely or jointly and whether as principal or as surety or in some other capacity).

17 Within the next few days, JDD and M+W executed an Assignment of Building Agreement ("the Deed of Assignment") and JDD also executed a mortgage document in escrow (the "Mortgage"). The Mortgage contained a certification by JDD's lawyers that "[M+W] has agreed that the Mortgage shall be subject to all the terms and conditions of [JTC's] letter dated 4 December 2009 consenting to this Mortgage". M+W then lodged a caveat ("the second caveat") against the property, purportedly to register M+W's interest on the land on the basis of the Deed of Assignment and the Mortgage. Hereafter the Debenture, the Security Undertaking, the Deed of Assignment and the Mortgage are sometimes collectively referred to as ("the Security Documents").

18 In an unrelated but important development, on 15 January 2010, the relevant government authority refunded to JDD a sum of \$6,456,230.09 representing the net surplus of goods and services tax that had been paid ("the GST Refund"). At the time of the proceedings, whilst most of the GST Refund had been spent, \$1,107,816.58 remained. This money is in the hands of the Receivers and is being claimed by JDD for the benefit of the unsecured creditors.

19 After the execution of the Security Documents, M+W continued work on the project and on 2 February 2010, the Building and Construction Authority issued a temporary occupation permit ("TOP") in respect of the Data Centre.

20 As things turned out, due to internal problems, Elchemi and ConnectedPlanet eventually failed to make the promised investment in JDD or to pay any part of the construction costs due to M+W.

21 ConnectedPlanet had agreed to pay M+W the sum of \$154,984,800.40 pursuant to an assignment agreement dated 12 January 2010. By this document, in consideration of such promise, M+W had assigned its rights under the construction agreement to ConnectedPlanet. On 12 March 2010, M+W gave notice to JDD that the assignment agreement would be terminated with immediate effect unless ConnectedPlanet and/or Elchemi complied fully with their obligations. Similarly, on 18 March 2010, JDD's solicitors wrote to ConnectedPlanet's solicitors to inform them that JDD would consider ConnectedPlanet to be in breach of the investment agreement unless completion took place on 19 March 2010. Completion was not effected on the specified date and on 23 March 2010, JDD sent a notice of immediate termination of the investment agreement to ConnectedPlanet.

22 Meanwhile, as between M+W and JDD, M+W had made a payment claim against JDD in relation to an outstanding progress payment which was due on 27 October 2009. On 18 March 2010, an adjudication award was made in favour of M+W for a total amount of \$29,086,796.35. On 19 March 2010, M+W gave notice to JDD that monies were due and owing under the construction agreement, and that events of default had occurred pursuant to the terms of the Debenture. M+W then asserted that it would be taking steps to enforce its rights under the Debenture. On 22 March 2010, M+W appointed the second, third and fourth defendants as the joint and several receivers and managers of JDD's properties, assets and undertaking comprised in the Debenture. On 2 April 2010, the Receivers were further appointed receivers and managers of JDD's assets pursuant to the Mortgage and the Deed of Assignment.

23 On 8 April 2010, JDD went into provisional liquidation. Some two weeks later these proceedings were filed to challenge the validity of the Security Documents. On 5 May 2010, JDD convened an extraordinary general meeting, during which resolutions were passed to voluntarily wind up JDD on the basis of its inability to continue its business by reason of its liabilities, as well as to appoint Mr Tam Chee Chong of M/s Deloitte Singapore & Southeast Asia as the liquidator of the company ("the liquidator"). The liquidator thereafter continued with these proceedings.

24 As of the date of the winding up, while the TOP had been issued, external works such as the landscaping, pavements and roads remained to be carried out, and final touch-up works were also outstanding. JTC had not by then granted JDD a lease in respect of the property. As at the date of the hearing, JDD still remained a licensee of the property.

The issues

25 JDD asserts that it is entitled to the reliefs claimed in the proceedings because it is able to show that:

- (a) JDD has no legal or equitable interest in the land comprised in the property that could be the subject matter of a valid charge or mortgage granted in favour of M+W;
- (b) JDD could not charge or mortgage its contractual rights (as a licensee) over the property in favour of M+W because such rights were governed by the underlying contracts – namely the building agreement and the Debenture respectively, both of which required valid and effective consent from JTC, which JDD failed to obtain;
- (c) JDD did not obtain valid and effective JTC consent under cl 2.22(a) of the building agreement because not all the conditions precedent in JTC's consent letter dated 4 December 2009 were met;
- (d) JDD did not obtain valid and effective JTC consent to enter into the Debenture with M+W

because there is no evidence before the court that JTC's approval for this specific purpose was ever sought, let alone obtained;

(e) JTC granted consent to JDD to mortgage the property as an interim financing solution to bridge the period from the date of the Mortgage until ConnectedPlanet was brought into the project as a strategic investor, therefore such consent did not apply to the Debenture which related to repayment of costs incurred under the construction agreement;

(f) even if JTC had granted consent to JDD to enter into the Debenture, this approval was only valid for prospective costs incurred from, at the earliest, the date of the Mortgage;

(g) the Debenture did not create any fixed charge over JDD's assets because, prior to the appointment of the Receivers, JDD operated and dealt with its assets – including its bank account(s) and the property – without any restrictions from M+W;

(h) any floating charge created pursuant to the Debenture was invalid pursuant to s 330 of the Companies Act (Cap 50, 2006 Rev Ed) ("the Act") because it was created within six months of the commencement of JDD's winding up and no valid cash consideration was extended by M+W at the time of or subsequent to the creation of any such security; and

(i) the requirement under the refinancing agreement for JTC's consent to the Deed of Assignment and the Mortgage was not satisfied.

26 It would be noted that depending on how I determine some of the issues others may not need to be dealt with. Whether JDD had any interest in the property that could be the subject of a valid charge or mortgage or whether it had a contractual interest that was capable of being used as security must, however, be a threshold issue. I will consider the first two points raised by JDD in tandem and then move on to consider the other issues, as necessary.

What is the nature of JDD's interest?

27 JDD submits that it has no legal or equitable interest in the property that could be the subject matter of a valid charge or mortgage granted in favour of M+W. All JDD had or has is a licence, and its only right was to occupy and use the property as provided by cl 2.1 of the building agreement. Apart from that, JDD had no proprietary interest in the property as at the date of execution of the Debenture that could be granted to M+W as security. JDD further argues that whatever its interest in the property is, the same cannot amount to the kind of transmissible interest alluded to in *In re Cosslett (Contractors) Ltd* [1998] Ch 495 at 508A which is a necessary ingredient of a security interest. At the very minimum, to have a transmissible interest, JDD argues that it must have been party to an agreement to lease with JTC. In this case, however, it contends there was no such agreement to lease. In the alternative, even if an equitable interest could have arisen from JTC's agreement to grant a lease pursuant to cl 3.1 of the building agreement, JDD argues that the requirements contained therein had yet to be fulfilled at the time the Debenture and Security Undertaking were executed on 28 October 2009; as at that date, the building works were not completely finished and the TOP had not been issued. In those circumstances, JTC would not have granted a lease to JDD on 28 October 2009, and, on the same basis, JDD would not have been able to obtain an order of specific performance of the grant of the lease even if JDD had wanted such relief. At best, JDD had only contractual rights as licensee of the property.

28 JDD also took pains to distinguish its situation from that existing in *Power Knight Pte Ltd v Natural Fuel Pte Ltd (in compulsory liquidation) & ors* [2010] 3 SLR 82 ("*Power Knight*"). In that case,

the defendant, Natural Fuel Pte Ltd, entered into two building agreements with JTC where it would have been granted 30-year leases over the relevant properties once certain conditions were met. Until then, the defendant was a licensee who had the right to build and operate its production plants on the properties as if a lease had actually been granted. The defendant subsequently borrowed money and as security for the repayment of the same, it granted a charge over its assets to Power Knight Pte Ltd. The main question posed in *Power Knight* was whether the liquidator's caveat (for the unsecured creditors) over the properties ought to be removed. This is not an issue that concerns me here; the reason why JDD seeks to distinguish *Power Knight* is that in the course of my judgment in that case, I observed that the defendant had an agreement for a lease with JTC and that this agreement had created an equitable lease. JDD submits that *Power Knight* should be distinguished on the basis that the issues decided there were markedly different from the present dispute (*ie* whether a statutory trust came into being upon the winding up of a company), that there was no indication that a clause requiring JTC consent was required, and lastly, that the question of whether the defendant was in principle entitled to mortgage or charge the property was not raised in *Power Knight* and all parties had proceeded on the basis that the defendant there had an interest which it could mortgage or charge. JDD thus submits that *Power Knight* does not apply.

29 I was somewhat bemused by the fact that JDD had sought at all to argue that it had no interest in the property which was capable of being charged or mortgaged to M+W. As I pointed out to counsel in the course of argument, over the past 40 years or more, JTC has been entering into building agreements, with various parties who sought to build factories and other industrial buildings, in terms that were more or less similar to those of the building agreement in this case *ie* that upon the completion of construction on JTC land within a specified period, JTC would grant a lease of the land involved to the developer for a specific period. Further, in many if not most of those cases, the developers have borrowed money to finance the construction costs and have secured repayment by charging or mortgaging their interests under those similar building agreements. Many lawyers have acted in these transactions and have opined that such security constitutes good and enforceable security for the lenders. If I accept JDD's argument, it would mean completely overturning the conventional wisdom which itself was illustrated in the *Power Knight* case when all parties involved took it as a given that the defendant had had a sufficient interest in the property covered by the building agreement there to create a mortgage or charge.

30 It also appeared to me that JDD was making a u-turn from the position that it had held at the time the Security Documents were negotiated. In October 2009, when M+W asked for security over JDD's assets, JDD did not respond that it had no interest which was capable of constituting security. Subsequently, it signed the Debenture by which it charged all its real property to M+W and specifically agreed that the real property referred to would include the property once JTC had consented to Mortgage over the same. At the same time, it signed the Security Undertaking and undertook to procure the written consent of JTC to the execution of the Mortgage and the lodging of a caveat with the Singapore Land Authority in respect of the executed mortgage. In due course, JDD met with JTC to explain the transaction and applied in writing for JTC's consent to the granting of the Mortgage. During this entire period from October 2009 to early December 2009, both JDD and M+W acted on the basis that JDD had the necessary interest in the property to mortgage the same. It appears to me that M+W would have had strong ground to contend that an estoppel by convention had arisen and that JDD was precluded from raising the issue of a lack of interest. M+W did not, however, make full arguments on this basis and since JDD has not addressed the point, I will not deal with it further.

31 The issue I have to address relates to the nature of JDD's interest in the property at the time of the execution of the Security Documents. What is clear, and what is not disputed by the parties is that, at that time, JDD's interest in the property was labelled as a licence. Clause 2.1 of the building

agreement states:

Until the Land is comprised in a lease to be granted as provided in this Agreement, to hold the Land as licensee upon the same terms relating to the lease contained in the formal of [*sic*] Lease set out in the FIRST SCHEDULE ("First Schedule Lease") in this Agreement at the same rent and subject to the same covenants, conditions and stipulations so far as applicable as if a lease had actually been granted, and so that the Owner shall have all the remedies by whatever means for rent in arrears that are incidental to the relationship of landlord and tenant. But nothing contained in this Agreement shall be construed as creating a legal demise or any greater interest in the licence than tenancy at will.

[emphasis as underlined in original]

What is in dispute is the exact scope of this licence and whether security may be attached to it.

32 It is relevant that cl 3 of the building agreement contains an agreement to grant a lease. It reads:

3 3.1 If:

(a) Within the Licence Term –

(a1) the Building Works shall have been completely finished to [JTC's] satisfaction and in accordance in each and every way with the endorsed and approved plans;

(a2) the Temporary Occupation Permits for the Building Works have been obtained from the Authorities; and

(b) [JDD] has performed and observed all the stipulations contained in this [building agreement]

then [*JTC*] shall grant and [*JDD*] shall accept a lease or sub-lease of the [property] together with the buildings so erected on it and the appurtenances for the term of **thirty (30) years** ... retrospectively from the Licence Commencement Date.

[emphasis in bold in original, emphasis in italics added]

It is clear from the above that when the provisions set out in cl 3.1 were met, JTC would be obliged to grant, and JDD would have to accept, a 30 year lease of the property. The effect of cll 2.1 and 3.1, read together, is that JDD's interest in the property was not just a plain vanilla possessory interest entitling JDD to remain on the property. The building agreement provides for something more: at the very least, it grants JDD an equitable interest in the property. Had JDD fulfilled the conditions in cl 3.1, and JTC subsequently decided to renege on its promise, theoretically JDD could apply to court for specific performance to compel JTC to grant it a 30 year lease as provided under the building agreement. I therefore hold that JDD had, at the very least, a licence coupled with an equity.

33 JDD also makes the further point that no agreement existed between JTC and JDD when the Debenture and Security Undertaking were executed on 28 October 2009. At that point in time, JDD had not fulfilled the conditions in cl 3.1 and, *ipso facto*, no lease was created. I think this misses the point. JDD's argument presupposes that all requirements had to be met for the lease before JDD could charge its interest in the building agreement. However, that need not be the case here since the

Debenture is broadly worded and sufficiently wide to include *any* interest JDD had in the property. What was important, at the time of execution, was that JDD had *some* form of interest in the property, *ie* the licence coupled with an equity, that the security could be attached to.

34 In my view, it is also maintainable that the building agreement is not just a licence agreement; it is also an agreement to lease. Clause 2.1 of the building agreement (see [\[31\]](#) above) recognises that the building agreement is not only a licence agreement, it is also an agreement for "a lease to be granted". The building agreement itself is said not to create a legal demise but that stipulation does not prevent an equitable lease from arising, once the conditions for the grant of the lease are satisfied.

35 Indeed, that is exactly what is provided in cl 3.1 read with cl 3.3: that once the conditions for the grant of a lease are satisfied, the licensee shall be deemed to be the lessee of the land:

... From the time of the granting of the lease under clause 3.1 above until the Instrument of Lease is executed, the Licensee shall be deemed to be the Lessee of the [property] for the Lease Term ... as though a lease had been executed...

36 In any event, the building agreement itself contemplated that the licensee JDD might attempt to create a charge over its interest under that agreement. Clause 2.22(a) of the same provides:

2 [JDD] agrees to perform and observe the following stipulations:-

...

2.22(a) Not to assign, charge, mortgage, create a trust or agency, let, sublet, or permit underletting, or grant a licence or part with or share his interest under this [building agreement], or the possession or occupation of the [property] from the Licence Commencement Date until the day [JDD] has:

(a1) complied with the Business Park Guidelines stipulated by URA and Urban Design Guidelines; and

(a2) obtained all the necessary Temporary Occupation Permits issued by the Authorities for the Building Works at the [property],

... Except That, *subject to [JTC's] prior written consent (which consent shall not be unreasonably withheld), [JDD] may mortgage or charge his interest under this [building agreement] by way of assignment or debenture* (as the case may be) to secure the repayment of such sum or sums as [JDD] may require for erecting or completing the Building Works in according with this [building agreement] PROVIDED THAT [JDD] shall thereafter continue to be liable for the observance and performance of the several stipulations contained in this [building agreement] until the grant of the lease as provided in clause 3 below.

[emphasis added]

It is apparent from the foregoing that JTC did not make a blanket objection to the granting of such a charge, but instead provided that a charge was permissible if its prior written consent had been given. Further, it even limited its discretion to withhold consent by providing specifically that such consent, once requested by the licensee, could not be unreasonably withheld by JTC. Thus, JTC too was of the view that the interest provided to JDD under the building agreement was capable of being

charged even prior to the completion of the Data Centre and it had no objection in theory to such a charge as long as it had the necessary control to ensure that the charge was created only for purposes of which it approved and which were consonant with its policy.

37 In any event, it is clear that the interest necessary to meet the interest requirement of a charge is to be interpreted broadly and the general principle is that most interests can be subject to a charge unless they are, *inter alia*, of a personal nature. *Goode on Legal Problems of Credit and Security* (Sweet & Maxwell, 4th Ed, 2008) ("*Goode*") at para 1-55, the permissible objects of security are described thus:

We have previously seen that a pledge cannot be taken over pure intangibles. Subject to this, a security interest may be principle be taken over any kind of property or class of property, tangible or intangible, present or future, including land, goods, negotiable and non-negotiable instruments, documents of title, securities (whether held directly from the issuer or through a securities account with an intermediary), intellectual property rights of various kinds, policies of insurance, transferable licences and quotas, bank deposits and letters of credit, drawing rights under facility agreements with banks, subscription agreements with underwriters, rights under construction contracts, transferable membership rights, and indeed anything which is identifiable and transferable, whether in gross or as appurtenant to land or other property. Moreover, security interests may themselves be given in security, so that a pledgee may grant a sub-pledge, a charge may grant a sub-charge and a mortgagee a sub-mortgage or a charge.

...

There are, however, certain categories of property which, by reason of their personal nature, considerations of public policy or a contractual prohibition against assignment, are incapable of transfer...

38 In its submissions, M+W argues that it was not necessary for JDD to have a legal or equitable interest in real property in order to grant valid security by way of the Security Documents. In support, it cites the passage from *Goode* quoted above and the following extract from *Fisher & Lightwood's Law of Mortgage* (LexisNexis Butterworths, 12th Ed, 2006) at 198:

17.1 Insurance policies, shares, stocks, book and other debts, equitable interests in land and personalty, and other things in action, legal or equitable, are frequently mortgaged. Save where some special method of disposition is provided by statute, a mortgage of a thing in action is usually effected by an assignment of the thing.

39 On this basis, M+W says that whatever the precise nature of JDD's rights/interest in the property is (contractual or proprietary; legal or equitable), by executing the Security Documents, JDD had granted a fixed charge over the same to M+W. This was because the Security Documents do not limit M+W's rights to merely taking possession of and using the property; on the contrary, M+W has been granted all the rights of a mortgagee – to appoint receivers and managers, to sell JDD's rights/interest in the property, and to have the proceeds thereof applied towards the secured obligations. The particular provisions in the Security Documents that M+W relied on are:

- (a) cl 3.1 of the Debenture which provides that JDD charges in favour of M+W "as security for the payment and discharge of the Secured Obligations, by way of first fixed charge ... all [its] right[s], title and interest from time to time in and to each of the following assets ..."

(b) cl 3.1 of the Deed of Assignment, which provides:

[JDD] as legal and beneficial owner, and as continuing security for the due and punctual payment and discharge of all the Secured Obligations and for the observance and performance by it of its obligations under the Finance Documents, hereby assigns and agrees to assign absolutely to [M+W], free from all liens, charges and other encumbrances:

(a) all the present and future rights title interest benefits advantages permits licences and remedies which [JDD] has in under or arising out of the [building agreement] and the Head Lease; and

(b) all the present and future estate right title and interest of [JDD] in and to the [property].

(c) cl 3.3 of the Deed of Assignment, which provides:

Contemporaneous with the execution of this Assignment, [JDD] shall execute and deliver to [M+W] the Mortgage with the intent that, upon the delivery by the Lessor to [JDD] of the Head Lease or other documents of title relating to the [property], the Mortgage shall be registered and take effect as a first legal mortgage over the [property] accordingly;

(d) cl 10.2 of the Mortgage, which provides:

Upon the occurrence of an Event of Default, the whole of the Secured Obligations shall immediately become due and payable without further demand and the security created hereunder shall become enforceable and [M+W] shall be entitled to exercise all or any of the powers (statutory or otherwise) of a mortgagee in respect of the Mortgage Property ...

40 I accept this argument and agree that the net effect of the provisions of the Security Documents is that JDD's rights and interest under the building agreement were charged to M+W as security for the debt which JDD owed M+W or would owe it from time to time. The Security Documents further gave M+W the right to further transmit such rights and interest when taking enforcement action. The legal position as enunciated in *Goode* and other texts is that practically any interest can be charged as long as it is not purely intangible. In my judgment, JDD's rights and interest under the building agreement were far from being purely intangible because, as I have held above, they amounted to a licence coupled with an equity. Even if they were purely contractual, however, a valid security interest could be taken over them and, at the least, such security interests were created by the Security Documents.

41 For the reasons given above, I conclude that JDD had sufficient interest in the property and the building agreement to provide M+W with a valid security over the same *provided* the necessary consents were obtained.

Did JDD obtain valid and effective consent from JTC to charge its interest in the property to M+W?

42 JDD contends that given that any rights it had to charge or mortgage its interest in the property were governed by the building agreement, JDD could not charge or mortgage such interest

unless and until it had satisfied the condition in cl 2.22(a) of the building agreement. As that clause provides for such a mortgage or charge to be "by way of assignment or debenture" and to require JTC's consent, then if there is no valid assignment or debenture between JDD and M+W, there can be no valid charge or mortgage even if JTC's consent had been obtained. JDD went on to point out that whilst it did execute the Debenture, cl 3.4(b) thereof provided that the security created by the Debenture would not extend to the property "for as long as the consent of [JTC] has not been obtained for the entry into of this Debenture and upon the written consent of [JTC] being obtained, the security created hereby shall extend to the Data Centre". Therefore, it says that to assert a contractual right to grant a mortgage in favour of M+W, JDD needed the following consents:

- (a) JTC's consent for JDD for JDD to charge or mortgage its interest under the building agreement to M+W; and

- (b) JTC's consent for JDD's entry into the Debenture pursuant to cl 3.4 of the Debenture.

It is JDD's position that neither of the above consents was ever obtained from JTC.

43 Before I go on to discuss the nature and effect of the consent that JTC did give, I would like to deal with the argument that JTC had to consent *specifically* to JDD's entry into the Debenture for the Debenture to be valid and enforceable. I do not think that this is the effect of cl 2.22(a) of the building agreement. The material portion of this clause reads:

[S]ubject to [JTC's] prior written consent (which consent shall not be unreasonably withheld), [JDD] may mortgage or charge his interest under this Agreement by way of assignment or debenture (as the case may be) to secure the repayment of such sum or sums as [JDD] may require for erecting or completing the Building Works ...

The intention of the clause is to permit JDD to mortgage or charge its interest in the building agreement to secure payment of the construction costs. As I read the clause, the consent required is for the creation of the mortgage or the charge which is the security interest given to the creditor in respect of JDD's interest in the agreement. How such mortgage or charge is created is not the subject of the consent. There are two methods suggested in the clause but what is purported to be controlled by the necessity for obtaining consent is the fact of creating security and not the manner of creating security. Thus, as long as JTC has agreed to the creation of the security, it is irrelevant that it has not agreed specifically to the particular document, whether it is an assignment or debenture, which contains the provisions creating the security.

44 The requirement of JTC consent for its execution was not, in my view, imposed by the Debenture either. The Debenture as drafted was meant to create security (by way of both fixed and floating charges) over a wide range of JDD's assets: from its real property to its choses in action and chattels. JTC had no interest in the charges over the choses in action and chattels and no power to prevent JDD from charging the same. The validity of the Debenture in general and as it affected those other assets could not be impugned by a lack of JTC's consent. *The only consequence of the Debenture that depended on JTC's consent was the validity of the charge over the property which it also contained.* To prevent any argument that failure to get consent to the charge over the property would affect the validity of the rest of the Debenture, the parties used cl 3.4(b) of the Debenture to ring-fence the charge over the property so that the same would not be included as part of the security created by the Debenture until JTC's consent therefor had been obtained. Clause 3.4(b) was

not intended to impose a requirement that JTC had to give its consent to the *entire* Debenture before the same could be executed. Its purpose was much more limited than that and was only, as I have stated, to make it plain that the parties recognised that JTC's consent was required for a charge over the property and that they were not attempting in any way to avoid complying with that requirement.

45 With the above in mind, I go on to consider the grounds on which JDD contends that JTC's written consent did not take effect because not all of the conditions precedent were fulfilled. These conditions were contained in para 2 of JTC's consent letter (see [\[15\]](#) above).

46 JDD's position is that when this paragraph of the consent letter is read in the context of the correspondence from JDD to JTC before and shortly after the meeting in November 2009, it becomes clear that JTC's consent was predicated on, *inter alia*, a new investor such as ConnectedPlanet being brought in to the project. This condition precedent was not fulfilled because Elchemi failed to honour its obligation to complete the investment agreement. Consequently, JDD says, JTC's consent never took effect for the purpose of satisfying the requirement of cl 2.22(a) of the building agreement.

47 I have no hesitation in rejecting that argument. Reading JTC's consent letter, *prima facie*, it seems that the conditions stated in para 2(c)(i)-(iii) thereof ought to be satisfied at the time consent was granted, but if there was any change thereafter, that would constitute grounds on which JTC could revoke its consent. M+W, in its submissions, correctly points out that the terms "condition precedent" and "revocable" do not sit easily with each other. Perhaps, if one were to consider the term "condition precedent" technically, it could be said that a party asserting that consent had been given had first to prove that the conditions had been met in order to show that JTC's consent was an effective consent. It is presumably on this understanding that JDD submits that it did not obtain JTC's consent for it to either charge or mortgage its interest under the building agreement to M+W. However, considering JTC's consent letter in its entirety, that could not be the case here. Para 2 of the letter stated that the Mortgage on the property in favour of M+W, the mortgagee, was *approved* (in the past tense). Had JTC intended for the conditions to be met before approval was granted, it surely would have used the term "*will approve*" instead. In my judgment, approval was granted and there can be no doubt that JTC consented to JDD using the property as security for the charge or mortgage. Further, the conditions served the additional purpose of providing the background and the understanding on which the consent was granted.

48 Turning to the specific point about ConnectedPlanet's entry as an investor, as I have alluded to above, the conditions served the additional purpose of explaining the circumstances in which the consent was granted. These were that the whole purpose of the mortgage was for JTC to allow JDD to grant a charge until ConnectedPlanet's investment materialised and enabled payment of the outstanding construction costs due to M+W. JDD wished to procure that M+W continued its forbearance in relation to the overdue construction payments and also, importantly, continued with the construction project. As M+W submitted, ConnectedPlanet's entry as an investor was not a condition *per se* but was mentioned to mark the termination of the charge, *ie* the time when M+W would be paid and consequently would have to discharge its mortgage. It was this that was noted by JTC in para 2(c)(iii) of its letter. The interpretation of that paragraph which JDD now contends for would negate the commercial purpose of the exercise. Once ConnectedPlanet put in its investment, JDD would have sufficient funds to pay M+W and there would be no need whatsoever for a mortgage in favour of M+W. It was in the interim period whilst JDD was cash-strapped that it required M+W's continued support which support M+W was not willing to give unless it had the security of a mortgage or charge. This was specifically explained to JTC at the JTC meeting.

49 I also agree with M+W that JDD's contention that para 2(c)(iii) required ConnectedPlanet to be brought on board as a strategic investor was not supported by the evidence of what had happened

at the JTC meeting or thereafter or by the evidence of any of JDD's own witnesses. Mr Ang Chee Seng ("Mr Ang"), the general manager of Elchemi, testified that whilst ConnectedPlanet's involvement in the project was an important consideration for JTC, the JTC officers did not go so far as to suggest JTC would not grant consent only if ConnectedPlanet invested in JDD. It was Mr Ang's view, too, that if completion of ConnectedPlanet's investment was postponed from the date anticipated at the time of the meeting, M+W's mortgage would continue to be effective until that completion. Mr Leow agreed with Mr Ang that JTC's officers did not say that consent would not be granted if ConnectedPlanet was not brought in as an investor. As far as Mr Leow was concerned, if the investment by ConnectedPlanet fell through, M+W would be able to enforce its security. Such a view would be inconsistent with any stand that JTC's consent required participation by ConnectedPlanet and would be nullified by the lack of such participation.

50 The second argument that JDD makes is that the consent should, by reason of paras 2(c)(i) and (iii), be construed as specific to JDD granting a mortgage to M+W for financing purposes only (*ie* in respect of costs to be incurred) and not to secure repayment of construction costs already incurred under the construction agreement. It points out that the first condition is that the mortgage can only be for the "purpose of completion" of JDD's development of the Data Centre at the property whilst the third condition is that the mortgage is "only an interim financing solution". It follows from the first condition that JTC's consent was forward-looking and intended to cover prospective costs. As for the future period that JTC's consent was meant to cover, the third condition makes it clear that it was from the date of the mortgage until ConnectedPlanet's investment in JDD took place.

51 This interpretation is, JDD says, consistent with the evidence of Mr Ang who attended the JTC meeting, that he, the directors of JDD and Mr Dedigama went for that meeting with the understanding that JTC was more likely to grant consent if M+W was in the position of a financier rather than that of a creditor and that was also why M+W and ConnectedPlanet subsequently executed the refinancing agreement.

52 Contrary to JDD's position, I observe that the JTC consent letter does not state specifically that the mortgage is to cover only prospective costs. This is the inference that JDD seeks to draw from the references to "interim financing solution" and "completion". In my view, those references do not point unequivocally to prospective payments. They are capable of meaning a temporary solution to enable completion *ie* keeping the contractor on board by providing security for outstanding payments and further costs which will accrue and thereby encouraging him to continue his work to complete the project. It is the latter interpretation that is supported by the evidence.

53 First, both Mr Leow and Mr Ang agreed that the reference to an "interim financing solution" to "bridge the period" in para 2(c)(iii) simply referred to M+W continuing to finance the construction costs itself until the funds invested by ConnectedPlanet were paid to JDD. Mr Ang's evidence was that the parties had told JTC that they were going to restructure the arrangement among themselves such that it would be M+W "financing the deal or providing financing to the deal right up to the point where the investment agreement is to be completed". He then commented that in its consent letter, JTC had pretty much used the language that the parties had used in the meeting like "bridge financing".

54 Secondly, the wording of the acceptance letter (see [\[16\]](#) above) submitted by JDD after receipt of the consent letter showed that it did not consider that the consent letter limited the scope of the Mortgage to covering prospective costs. In that acceptance letter which was completed by JDD and submitted on 4 December 2009, JDD described the secured obligations as "including but not limited to the repayment of *all sums* outstanding from [JDD] to [M+W] under the [construction agreement]" (emphasis added). JDD knew that this was the case because it was aware that M+W's

condition for continuing with the construction work was that outstanding amounts had to be secured. This had been made plain to JDD at the meeting of 24 October 2009. In informing JTC of this position, JDD was only confirming what must have been impliedly if not expressly conveyed at the November meeting. If JDD had thought that the consent letter limited the scope of the Mortgage to prospective costs, it would have been obliged under the Security Undertaking to ask JTC to revise the terms of its consent so as to cover the outstanding costs. It made no such request.

55 In any event, even if the conditions imposed by JTC were breached, this would not nullify JTC's consent for the purpose of these proceedings. As M+W argues, it is not sufficient for JDD to establish that JTC could have revoked its consent because the conditions had been breached (whether due to ConnectedPlanet's failure to invest in JDD or the Mortgage securing the outstanding construction costs). What the letter stated was that JTC would have the right to revoke its consent in the event of such a breach. Up to the date of the hearing, there was no evidence before me that JTC had raised any issues in relation to its consent or that it had revoked its consent. Until and unless JTC revokes its consent, the consent must remain in place and the validity of the Security Documents cannot be challenged on the basis of lack of consent because of a right to revoke in certain circumstances, even though those circumstances may have occurred.

56 JDD also argues that it was required to obtain JTC's consent to execute the Deed of Assignment and to grant the Mortgage by the refinancing agreement and that it did not do so. The refinancing agreement was executed on 25 November 2009 between M+W, JDD and ConnectedPlanet for the purpose of documenting the various arrangements between the parties. These included JDD undertaking to, within three days of receiving the investment amount contributed by ConnectedPlanet, and in any event no later than 31 January 2010, use this money to satisfy the outstanding amount due to M+W and keep the balance to meet further construction costs. These obligations of JDD were referred to in the refinancing agreement as the "RA Obligations". ConnectedPlanet for its part agreed to provide the investment amount by a certain date and M+W agreed that upon JDD satisfying the RA Obligations, it would release and terminate the Debenture, discharge the Deed of Assignment and Mortgage and withdraw the caveats lodged against the property.

57 Clause 1(b) of the refinancing agreement reads as follows:

JDD shall submit a request for approval to JTC and obtain the same in relation to the creation of a deed of assignment (the "**Deed of Assignment**") of the [building agreement] ... made between JDD and JTC and a mortgage (the "**Mortgage**") by JDD in favour of [M+W] over [the property] ... to secure the performance of all obligations that JDD may at any time have to [M+W] under or pursuant to the Debenture, [the construction agreement]..., the Security Undertaking ..., the Deed of Assignment, the Mortgage and any other security ...

[emphasis in original]

58 JDD points out that there is no evidence that JDD or M+W discussed the proposed terms of the refinancing agreement with JTC. It argues that M+W was concerned about this omission after it received a copy of JTC's consent letter. On 8 November 2009, M+W's solicitors wrote to JDD's solicitors pointing out that under para 2(c)(iii) of the JTC consent letter, the Mortgage was to "bridge" the period lasting until ConnectedPlanet was brought into the project but that under the refinancing agreement, the Mortgage and Deed of Assignment would only be discharged when all the RA Obligations had been met. The solicitors were concerned that this was not the same as what was contemplated by the said para 2(c)(iii). In a further letter written on 17 December 2009, M+W's solicitors reiterated that cl 2(b) of the refinancing agreement was not the same as para 2(c)(iii) of

the JTC consent letter and said that M+W wanted JTC to be made aware of the material terms of the refinancing agreement. They explained:

This is essential as JTC may subsequently discover that it has consented to the Mortgage and Deed of Assignment based on an incomplete understanding of the factual background relating to the above matter and exercise their right to revoke their consent (which is expressly provided for in paragraph 2 of the JTC [l]etter).

59 JDD acknowledges that if this action were between the two contracting parties *inter se* then it could not rely on its own default with respect to its obligation under the refinancing agreement to obtain JTC's consent for its entry into the Deed of Assignment and the granting of the Mortgage. It submits, however, that since the conduct of this action was taken over by the liquidator, it is now being maintained and prosecuted by the liquidator on behalf of all the unsecured creditors of JDD. This it says is not an action between the contracting parties of the refinancing agreement, *ie* JDD and M+W, only. Further, M+W is not a blameless party who should be protected by the principle because it acted in disregard of the terms and conditions of the refinancing agreement when it proceeded with the execution of the Deed of Assignment on 8 December 2009 and the registration of the Mortgage on 11 December 2009 before confirming or ensuring that JDD had obtained the relevant JTC consent. M+W should not be able to rely on this default to steal a march on other creditors of JDD.

60 M+W's response is that this argument is misconceived on two bases. First, JTC did give consent for a mortgage over JDD's interest in the property in favour of M+W. The execution of the Deed of Assignment and the Mortgage were effected pursuant to that consent. Indeed, Annex A to the acceptance letter identifies the "[Mortgage] and Deed of Assignment" as the relevant documents that would be entered into pursuant to JTC's consent. In addition, JDD's then solicitors had certified on the Mortgage that the mortgagee (M+W) had agreed that the Mortgage would be subject to all the terms and conditions of the JTC consent letter. Further, nothing in the refinancing agreement was intended to "affect, supercede or replace" the provisions of any other agreements entered or to be entered into between JDD and M+W (see cl 4(c) of that agreement). The JTC meeting had taken place against the backdrop of the Security Documents in existence at that point of time and both of these required JDD to obtain JTC's consent and to execute a mortgage in favour of M+W. Accordingly, the process of obtaining JTC's consent and the consent thereby obtained could not be voided by the refinancing agreement.

61 Secondly, the refinancing agreement did not require "fresh consent" to be obtained for the Deed of Assignment and Mortgage. The refinancing agreement was concluded in the aftermath of the JTC meeting and, as Mr Ang testified, it was drawn up straight after the JTC meeting so that the parties could structure the deal in line with the representations they had made to JTC. Thus, the refinancing agreement was simply repeating what had been provided for in the Debenture and Security Undertaking and the consent process required by the refinancing agreement was duly undertaken by JDD.

62 I accept the above arguments made by M+W. I also agree that if fresh consent was required after the execution of the refinancing agreement, then it was JDD's obligation to obtain the same and it cannot now say that because it did not do so, the security is invalid. In this regard, M+W did raise the argument of estoppel by convention and noted that after 4 December 2009, both parties proceeded on the basis that the consent given by JTC was valid and effective and that M+W had valid security over the property. It was only on that basis that M+W continued to work on the construction of the project.

63 As regards JDD's assertion that there was no evidence on record that JDD or M+W discussed

the refinancing agreement with JTC after the JTC meeting in order to obtain the approval required by the refinancing agreement, M+W pointed out that there were e-mails which evidenced that JDD's solicitors had been in contact with JTC after the meeting but there was no evidence as to what JDD's solicitors had told JTC. It was wrong for JDD to suggest (and it could not do so) that its own solicitors must have failed to inform JTC of the refinancing agreement in the course of their communications with JTC. Further, in the same letter that M+W's solicitors wrote expressing their concerns, they had asked JDD to confirm that it had no objections to M+W contacting JTC directly to inform JTC of the material terms of the refinancing agreement. No such confirmation was given and in fact JDD's solicitors had informed M+W's solicitors that JDD was of the view that there was no need to disclose details of the refinancing agreement to JTC. In these circumstances, I agree that it really does not lie in JDD's mouth to contend that the provisions of the refinancing agreement affected the consent in any way.

64 I should add that I do not accept the distinction that JDD sought to draw between itself and the liquidator. The liquidator cannot be in a better position than JDD itself in relation to JDD's failure to comply with its legal obligations under the refinancing agreement since the liquidator is enforcing the rights of the company and not any independent rights. The fact that the beneficiaries of the liquidator's action would be the unsecured creditors does not, to my mind, change this position and JDD has given me no authority in support of any argument to the contrary. In my view too, M+W was not blameworthy in any way. JDD's solicitors had informed M+W's solicitors that JDD had fulfilled its obligation to lodge a notice of mortgage with JTC and that there was no need to disclose the details of the refinancing agreement to JTC. M+W had a copy of the letter of consent and, in the face of JDD's stand, was entitled not to do anything further despite any misgivings it may have had.

Was the charge created under the Debenture void pursuant to s 330 of the Act?

65 Section 330 of the Act states:

330. A floating charge on the undertaking or property of the company created within 6 months of the commencement of the winding up shall, unless it is proved that the company immediately after the creation of the charge was solvent, be invalid except to the amount of any cash paid to the company at the time of or subsequently to the creation of and in consideration for the charge together with interest on that amount at the rate of 5% per annum.

66 Accordingly, says JDD, under s 330, save for any new cash paid to JDD at the time of or subsequent to the creation of the charges that were purportedly created under the Debenture and in consideration for the same, such charges would be void if they were created within six months of the commencement of JDD's winding up unless it is proven (the burden of proof being on M+W) that JDD was solvent immediately after the charges were granted. M+W's first line of reply is that s 330 does not apply to the charges created under the Debenture which it has enforced because these were fixed charges. This argument is also made by the Receivers. I will consider this position first because it is only if the charges in question are floating charges that I need to consider whether JDD was solvent at the time they were created and whether any new cash consideration was provided.

67 In *In re Yorkshire Woolcombers Association, Limited* [1903] 2 Ch 284 at 295, Romer LJ enunciated the classic description of the hallmarks of a floating charge:

... I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1.) If it is a charge on a class of assets of a company present and future; (2.) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3.) if you find that by the charge it is contemplated that, until

some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with.

68 JDD argues that the charges created under the Debenture were floating charges because:

(a) JDD continued to operate and deal with its assets from the date of execution of the Debenture until the appointment of the Receivers on 22 March 2010;

(b) before the Receivers took possession of the property, JDD's directors and management were not hindered in their day to day dealings with the property. For example, in relation to entering into contracts with suppliers and sub-contractors, negotiations with potential tenants and the ability to incur expenditure in relation to the property;

(c) the mere lodging of a caveat over real property does not create any interest in that property so M+W could not acquire a fixed interest in the property by reason of the lodging of the first and second caveats;

(d) since cl 3.4(b) of the Debenture made the creation of a fixed charge over the property contingent on JDD obtaining JTC's consent for it to enter into the Debenture, the agreement therein for JDD to grant a fixed charge over the property to M+W in the future, after JTC's consent had been procured, was a mere contract and not an equitable charge;

(e) even if the Mortgage constituted valid security, it is not a fixed charge; it is at best a floating charge since "[u]nder a fixed charge the asset is appropriated to satisfaction of the debt immediately or upon the debtor acquiring an interest in it" (see *Goode* at para 1-10). In this case, JDD had no legal or equitable interest in the property when the charge, if any came into existence with the execution of the Debenture on 28 October 2009 and therefore the charge created in that document could only be a floating charge.

69 As far as the Mortgage is concerned, I cannot accept that it is a floating charge. I have found that under the building agreement, JDD had an equitable interest in the property that was capable of being charged. Accordingly, this interest existed when the Debenture was created and therefore JDD was capable of granting a fixed charge over the property *via* the Debenture once JTC's approval was granted and, *a fortiori*, was capable of granting a fixed charge over the property *via* the Mortgage which was executed after JTC's consent had been obtained.

70 The question of whether the Debenture created fixed or floating charges over the assets in question which are the GST Refund and the property is a question that has to be answered by reference to the document itself. The nature of the rights given to M+W under the Debenture have to be scrutinised so that one can determine whether the three characteristics of a floating charge mentioned by Romer LJ (see [\[67\]](#) above) are in fact present.

71 Before embarking on this exercise, it might be helpful to refer to another case, *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 ("*Agnew*"), which is a more recent decision on the categorisation and characteristics of charges. There, the Privy Council held that a charge over the uncollected book debts of a company which left the company free to collect those debts and use the proceeds in the ordinary course of business was a floating charge. Lord Millett, who delivered the decision of the Privy Council, made it clear that the *core factor which characterised the security as a floating charge was the freedom of the charger to remove the asset from the security without the consent of the chargee*. His Lordship observed at [22]:

22 The decision [*ie Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142] was followed by the Supreme Court of Ireland in *In re Keenan Bros Ltd* [1986] BCLC 242 where the company purported to grant its bank fixed charges over its present and future book debts. The debenture prohibited the company from disposing of the book debts or creating other charges over them without the consent of the bank. It allowed the company to collect the book debts, but required it to pay the proceeds into a designated account with the bank from which the company was not to make any withdrawals without the written consent of the bank. In holding the charge to be a fixed charge, McCarthy J presciently observed, at p 247:

"It is not suggested that mere terminology itself, such as using the expression 'fixed charge', achieves the purpose; one must look, not within the narrow confines of such term, not to the declared intention of the parties alone, but to the effect of the instruments whereby they purported to carry out that intention ..."

The critical feature which led the court to characterise the charge on the book debts as a fixed charge was that their proceeds were to be segregated in a blocked account where they would be frozen and rendered unusable by the company without the bank's written consent. ...

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

72 Lord Millett also gave guidance on how a court should decide whether a particular charge before it was a fixed charge or a floating charge at [32]:

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

73 It can be easily discerned from the above citations that the essential element in determining whether a charge is fixed or floating is ascertaining whether the chargee or the charger is in control of the asset concerned prior to the occurrence of an event of default. The House of Lords in *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 expressed similar views to those of Lord Millett in *Agnew*. Lord Walker of Gestingthorpe put the position particularly succinctly at [138] and [139] of his judgment:

138 This passage brings us close to the issue of legal principle, that is the essential difference between a fixed charge and a floating charge. Under a fixed charge the assets charged as security are permanently appropriated to the payment of the sum charged, in such a way as to give the chargee a proprietary interest in the assets. So long as the charge remains unredeemed, the assets can be released from the charge only with the active concurrence of the chargee...

139 Under a floating charge, by contrast, the chargee does not have the same power to control the security for its own benefit...

74 I turn now to look at the Security Documents. Each of the Debenture, the Deed of Assignment and the Mortgage expressly prohibits and restricts JDD from disposing of the charged assets or removing them from the security without the consent of M+W. In cl 7.2 of the Debenture, JDD undertook that it would not, except as permitted by the clause, sell, transfer, execute any conveyance, lease or assignment of, or other right to use or occupy or otherwise dispose of all or any part of the charged property. It also agreed not to create any legal or equitable interest in any part of the charged property. Similarly by cl 10.1 of the same document, JDD was prohibited from, without M+W's prior written consent, withdrawing or transferring the proceeds of the realisation of any "Monetary Claims" made by it. Finally, in cl 13.16, JDD warranted that it had not sold or disposed of and would not sell or dispose of any of its rights, title and interest in the Data Centre or any of the assets subject to the Debenture. Similar restrictions on the disposal of the assigned assets charged by the Deed of Assignment were contained in cl 6.3 of that document. As for the Mortgage, it contained a specific covenant (cl 5.9) on the part of JDD not to sell, transfer, lease, let out or licence the property or agree to do any of the foregoing in respect of the same without M + W's prior consent.

75 The restrictions contained in the Security Documents unambiguously establish that JDD did not have the freedom to dispose of the property or the GST Refund or to remove the same from the security provided to M+W. In these circumstances, an essential characteristic of a floating charge was not present in relation to the charges created by the Security Documents. Accordingly, the documents created fixed charges. Although the nomenclature used is not conclusive, the fact remains that these charges were described as being "fixed" in cl 3.1 of the Debenture and it appears that the original intention was to create charges of that nature. In fact, the parties were able to give effect to such intention as is shown by the various clauses that deprived JDD of the right to control the charged assets.

76 I also agree with M+W's submission that any dealings by JDD in breach of the restrictions would not change the nature of the charge from fixed to floating. As long as M+W did not consent to JDD's non-observance of any restriction or waive any breach which it subsequently discovered, JDD would not be able to rely on its own wrong to convert a fixed charge into a floating charge. There was no allegation made by JDD of such consent, waiver or acquiescence and thus, however JDD may have acted, its actions could not affect the nature of the charge.

77 In this connection, I do not think that there is any substance in JDD's argument that the charge over the property was not a fixed charge because its directors and management continued to deal with the licence in respect of the property by, for example, paying rent to JTC. The payments that JDD made to JTC were not in my view a form of dealing with the licence that was in any way adverse to the charge over the property or the interest of M+W therein. These payments were required under the building agreement and were necessary to maintain JDD's rights and interest (and consequently M+W's rights and interest) in that agreement. In fact, JDD was required as part of its obligations under the Security Documents to ensure that the security was maintained properly and this meant making sure that it did not fail to make payments due to JTC. Such actions could have no

effect on the nature of the charge.

78 In a further attempt to show that JDD retained control of the property, Mr Leow alleged that JDD had entered into lease arrangements with third party tenants and that such arrangements were concluded in breach of the prohibitions in the Security Documents. There is, however, no assertion that M+W knew of or acquiesced in JDD's conduct. Breaches on the part of JDD cannot, as I have stated above, change the nature of the charge. In any event, as M+W remind me, under s 23 of the Conveyancing and Law of Property Act (Cap 61, 1994 Rev Ed), a mortgagor in possession may lease the property, provided that the lease does not exceed three years, at the best rent that can reasonably be obtained. Therefore, the fact that JDD may have entered into lease arrangements would not *per se* be inconsistent with M+W having a fixed charge rather than a floating charge.

79 Moving on to the GST Refund, the Receivers submit that those moneys were the subject of a fixed charge. Under cl 3.1 of the Debenture, all Monetary Claims were charged to M+W by way of first fixed charge. They say that the GST Refund constitutes a "Monetary Claim" as that term is defined in cl 1.1 the Debenture. The clause provides:

"Claims Account" means an Account to be identified by the Chargee (and any renewal or re-designation of such account) maintained by the Chargor with any bank in Singapore into which, inter alia, the proceeds of the getting in or realisation of the Monetary Claims and the dividends, interest and other monies arising from the Shares are to be paid.

...

"Monetary Claims" means any book and other debts, monetary claims, credit sales receivables and other receivables owing to the Chargor and any proceeds thereof (including any claims or sums of money deriving from or in relation to any Intellectual Property, any Investment, the proceeds of any Insurance Policy, any court order, award or judgment, any contract or agreement to which the Chargor is a party and any other assets, property, rights or undertaking of the Chargor).

80 Book debts are debts that arise in the ordinary course of business of a company. The GST Refund was paid to JDD pursuant to a GST Return which it had filed stating that it had paid out more GST than it had in fact received. Under the relevant legislation, JDD was entitled to a refund from the Comptroller of GST in respect of the excess GST paid out. The Receivers argue, and I agree, that this meant that JDD had a book debt or receivable owing to it by the Comptroller of GST since GST is a tax incurred in the ordinary course of business when goods and services are supplied by a business. I therefore agree that the GST Refund clearly fell within the definition of a Monetary Claim in the Debenture.

81 Under cl 10.1(a) of the Debenture, JDD was obliged, on receipt of a Monetary Claim, to pay the same into the Claims Account. This meant that all of the GST Refund had to be paid into the Claims Account and that JDD had no authority to deal with such moneys in any other fashion. In particular, cl 10.1 prohibited JDD from factoring or discounting any claim for the GST Refund or withdrawing or transferring any of the GST Refund in the Claims Account. Under cl 10.2, JDD was obliged to provide to the bank which held the Claims Account with an irrevocable payment instruction to transfer the money in the account to M+W on each due date. This clause clearly evidences the parties' intention that all moneys in the Claims Account including the GST Refund were to be applied in repaying the amounts due to M+W. All in all, the terms of cl 10 of the Debenture make it plain that the parties intended to ensure that JDD used all Monetary Claims (including therefore the GST Refund) for the purpose of repaying M+W and had no authority to use them for any other purpose whatsoever.

82 In the event, JDD breached its obligations under the Debenture. It did not pay the GST Refund into a designated Claims Account but instead deposited the money into an account with DBS Bank ("the DBS account") which it was able to operate as it saw fit without any restrictions imposed under the Debenture. As I have stated above, the breach by JDD of its obligation to deal with Monetary Claims in a particular fashion cannot convert the fixed charge over the Monetary Claims into a floating one. Accordingly, simply paying the GST Refund into the DBS account could not procure its release from the fixed charge and as the Receivers argue, such action resulted in JDD holding the GST Refund on a constructive trust for M+W. This result is supported by the English Court of Appeal decision in *Barclays Bank plc v Willowbrook International Ltd* (The Times, 5 February 1987) which held that where moneys secured by a fixed charge are utilised in a manner contrary to the fixed charge, the moneys will be held on a constructive trust for the beneficiary of the security. It is also pertinent that cl 10.1(a) of the Debenture provided that until a Monetary Claim that JDD had received was paid into the Claims Account it was to be held upon trust by JDD for M+W. Thus, the parties expressly contemplated and provided for the imposition of a trust on any Monetary Claims held by JDD outside the Claims Account.

83 There is one further point in relation to the GST Refund. After the money was deposited into the DBS account, other sums of money were also deposited into this account, including a deposit of \$82,666.78 made on 28 January 2010 and a further deposit of \$114,918 made on 10 March 2010. When the Receivers took control of the DBS account, the balance in the account was only \$1,107,816.58. The question that arises is whether all of this money should be attributed to the GST Refund or whether that balance also includes portions of the other sums deposited into the DBS account. The position taken by the Receivers is that JDD is deemed to have used all other non-trust moneys in the DBS account before any of the GST Refund which was held on trust should be taken to have been dissipated. This position would apply regardless of whether the other moneys were credited to the DBS account after the GST Refund was credited as the "first in, first out" rule *ie* what is known as the rule in *Clayton's Case* [1816] 1 Mer 572 ("*Clayton's Case*") does not apply to the present case.

84 The Receivers submitted that the "first in, first out" rule does not apply when the moneys in a bank account are a mixture of trust funds and private moneys. This was established in *In re Hallett's Estate. Knatchbull v Hallett* [1879–80] 13 Ch D 696. The court there held that if a person who holds money as a trustee or in a fiduciary character pays it into an account with his bankers, and mixes it with his own money, and afterwards draws out sums by cheques in the ordinary manner, the rule in *Clayton's Case* does not apply and the drawer must be taken to have drawn out his own money in preference to the trust money. This holding was applied by the Court of Appeal in *Ong Jane Rebecca v Lim Lie Hoa and Others* [2005] SGCA 4. It appears from that case that in deciding whether trust or non-trust moneys are drawn out of a mixed fund by a trustee, the court will avoid a presumption of a breach of trust. At [86] of its judgment, the court stated:

... If we were to apply the principle to the purchase of 39 Sheldon Avenue, we would be presupposing that Mdm Lim was guilty of breach of trust, a finding that AR Phang and Choo J explicitly refused to make and, as we have said, rightly so.

85 I agree that as the DBS account contained a mix of the GST Refund which was held on trust and ordinary moneys belonging to JDD, the rule in *Clayton's Case* should not apply. Therefore any withdrawals from the DBS account should be presumed to have been first taken from the non-trust moneys. It would follow that the sum of \$1,107,816.58 remaining in the DBS account when the Receivers took control of it on 25 March 2010 was comprised entirely of the balance of the GST Refund held on trust for M+W.

86 As I have determined that the charges in issue created by the Security Documents are fixed charges and not floating charges, there is no need for me to determine whether or not JDD was solvent at the time of their creation. Section 330 of the Act therefore has no application in the present case.

Conclusion

87 For the reasons given above, JDD's action against all the defendants fails and must be dismissed with costs. There is no basis on which I can grant JDD the various declarations sought against either the Receivers or M + W.

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