[2013] JMCC Comm. 17

**JUDGMENT**

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**
**CLAIM NO. 2013 CD00142**
**IN THE COMMERCIAL DIVISION**

| | | |
|---|---|---|
| **BETWEEN** | **JADE OVERSEAS HOLDINGS LIMITED** | **CLAIMANT** |
| **AND** | **PALMYRA PROPERTIES LIMITED (In Receivership)** | **1ST DEFENDANT** |
| **AND** | **SANCTUARY SYSTEMS LIMITED (In Receivership)** | **2ND DEFENDANT** |
| **AND** | **KENNETH TOMLINSON** | **3RD DEFENDANT** |

**IN CHAMBERS**

**Mrs. Caroline Hay instructed by Grant Stewart Phillips & Co., Attorneys-at-law for the Claimant.**
**Mr. Kwame Gordon, and Ms. Nadine Amos, instructed by Samuda & Johnson, Attorneys-at-Law for the Defendants.**

**HEARD: 15, 25 October, 22, 29 November 2013**

**INTERLOCUTORY INJUNCTION - COURSE LIKELY TO CAUSE THE LEAST IRREMEDIABLE PREJUDICE - NEED FOR COURT TO ENGAGE IN ASSESSMENT**

**OF STRENGTH OF PARTIES' CASES - CASE INVOLVING MAINLY CONSTRUCTION OF AGREEMENT/WRITTEN INSTRUMENTS/POINTS OF LAW – WHETHER COURT CAN FEEL HIGH DEGREE OF ASSURANCE THAT AT TRIAL WOULD APPEAR INJUNCTION RIGHTLY GRANTED - WHETHER CLAIMANT GUILTY OF DELAY**

**SECURITIES - FIXED OR FLOATING CHARGE – DEBENTURE - RESTRICTIVE CLAUSES IN DEBENTURE -PRIORITY OF CHARGES - WHETHER MANAGEMENT AGREEMENT VOID AS MAINTENANCE OR CHAMPERTY - WHETHER MANAGEMENT AGREEMENT CONSTITUTES SALE OR DISPOSAL OF ASSETS IN THE ORDINARY COURSE OF BUSINESS – WHETHER PRIOR WRITTEN OR OTHER CONSENT OF DEBENTURE-HOLDERS REQUIRED FOR ASSIGNMENT UNDER MANAGEMENT AGREEMENT-WHETHER ENTRY INTO MANAGEMENT AGREEMENT TRIGGERED AUTOMATIC CRYSTALISATION OF FLOATING CHARGE INTO FIXED CHARGE**

**Mangatal J:**

[1] This claim was filed on the 2nd of September 2013. It is a very interesting and novel case, involving a wide range of legal issues, including the not-so-common public policy considerations of champerty and maintenance, the law of securities, debentures, fixed and floating charges, and equitable charges. It calls for a consideration of the meaning of the phrase "in the ordinary course of business" in the relevant debentures and requires the construction of a number of Instruments. I thank all Counsel on both sides for the high level of preparation. This litigation comes at a time just before Jamaica, (from all indications) expects to pass the much talked-about and somewhat controversial new legislation, "SIPP", the Security Interests in Personal Property Act. That Act is expected to deal with security interests in personal property in a variety of ways. The present application is for an interlocutory injunction.

## THE PARTIES

[2] The Claimant Jade Overseas Holdings Limited ("Jade") in its Particulars of Claim states that it is a limited liability company duly incorporated under the laws of the British Virgin Islands with registered office at Omar Hodge Building, Wickham Cay, Road Town, Tortola, British Virgin Islands.

[3] The 1st Defendant Palmyra Properties Limited (In Receivership) ("PPL") is a limited liability company duly incorporated under the laws of St. Lucia with registered office at Bourbon Street, P.O. Box 1695, Castries, St. Lucia.

[4] The 2nd Defendant Sanctuary Systems Limited (In Receivership) ("SSL") is a limited liability company duly incorporated under the laws of Jamaica with registered office at Rose Hall, Montego Bay in the Parish of Saint James.

[5] The 3rd Defendant Kenneth Tomlinson ("the Receiver") has been appointed Receiver in relation to PPL and SSL pursuant to Instruments of Debenture discussed later in this judgment. The Receiver was so appointed on the 23rd.day of July 2011.

## THE BACKGROUND

### The Development

[6] The Palmyra Resort and Spa is a luxury condominium and hotel development ("the Development") situated on 12 acres at Rose Hall, Montego Bay in the Parish of Saint James. In broad terms, the Development consists( or was intended to consist) of 11 villas; 288 units of accommodation of varying sizes, divided between three 12 – storey towers, a 25,000 square foot spa, a 52,000 square foot clubhouse, two swimming pools and adjacent whirlpools. Integral to the Development was the operation of a hotel using a variety of these facilities and properties.

[7] The Development was commenced on or about mid-2005 and is at least partially complete. The hotel on the Development opened in December 2010 and operated until November 2011. The management of the hotel was, principally, conducted by Solis

Hotels and Resorts (Solis) a company with offices in Atlanta, Georgia in the United States of America with expertise in managing luxury 5 star hotels and resorts internationally. A number of units within the Development have been sold to third parties.

**JADE, PPL AND SSL**

[8] Mr. Kwang Sim, in an Affidavit filed September 9th 2013, describes himself as an Officer of Jade. At paragraph 2 of his Affidavit Mr. Sim states that Jade is an associated company of PPL and SSL and he states that Jade, PPL and SSL have common officers. In a letter dated 29 March 2012, from Mishcon de Reya, Solicitors in London, England, who represent Jade, responding to a letter from Messrs. Samuda & Johnson, Attorneys-at-Law for the Defendants, it is stated that the sole shareholder of Jade is Resorts Properties Group Limited and the sole director is Servco Limited (BVI). Jade's Attorneys-at-Law on the 24th of October 2013, served a Notice of Intention to refer to and rely upon the Affidavit of Robert Thomas Trotta, filed on 24 August 2009, in an earlier Suit, Claim No. 2009, HCV 04344. This Suit is referred to in greater detail below. In paragraphs 2, 10, 12 and 13 of that Affidavit, Mr. Trotta states as follows:

> **"2. I am the Chairman of Resort Property Group ("RPG"), a group of companies specializing in luxury resort development across the world. Both .... Claimants-.... SSL and....PPL –are part of RPG. ....SSL, a Jamaican company, is a wholly owned subsidiary of PPL, a St. Lucian company, and I confirm that I am authorised to act on behalf of both PPL and SSL by PPL's Directors and that I am duly authorised by both companies to make this Affidavit on their behalf.**
>
> **...**
>
> **10. I am the founder and Chairman of RPG. RPG was formed by me in 1983 and is at the forefront of the world's hotel and resort development industry. To date, RPG has, under my leadership, been responsible for the development of 13 different luxury resorts across Europe, the US and the Caribbean. RPG's resorts are renowned for**

**their level of luxury, their environmental and cultural synergy, and their value for money.....**

**12. SSL, is part of the RPG Group of Companies and incorporated under the laws of Jamaica..... SSL was incorporated on 16 August 2005 with the specific purpose of carrying on the development of the Palmyra. It is a wholly owned subsidiary of PPL.**

**13. PPL, another of the RPG Group of Companies was incorporated in St. Lucia on 6 December 2004 and is the company within RPG responsible for contracting with buyers for the "construction contract" element of the condo purchases. The land where the Palmyra is being developed is located in Jamaica and also owned by the RPG Group."**

**THE DEBENTURES**

[9] On or about the 23rd of April 2007, PPL, together with Palmyra Resort and Spa Limited ( PRSL)as borrowers, entered into a Facility Agreement (" the Syndicate Loan Facility Agreement") with National Commercial Bank Jamaica Limited ("NCB"), RBC Royal Bank(Jamaica) Limited (formerly RBTT Bank Jamaica Limited, "RBC Jamaica"), RBC Royal Bank (Trinidad and Tobago) Limited (formerly RBTT Bank Limited, "RBC T&T") and NCB Capital Markets Limited ("NCBCM") collectively referred to as "the Banks". The sums to be advanced under the Syndicate Loan Agreement were for the purpose of the construction of the Development. The aggregate principal sum made available to PRSL and PPL under the Syndicated Loan Facility Agreement was eighty eight million United States Dollars (US$88,000,000.00), stated to be J$5,865,200,000.00 for stamp duty purposes.

[10] As security in support of the Syndicate Loan Agreement, on or about the 23rd of April 2007:

i. PRSL executed a debenture in favour of NCB and RBC Jamaica ("the PRSL Debenture");

ii. PPL executed a debenture in favour of NCB and RBC Jamaica (" the PPL Debenture").

The PRSL and the PPL Debenture are collectively referred to as the 2007 Debentures.

[11] Further loan agreements were negotiated and entered into between SSL together with Caribbean Green Power Systems Limited (CGPSL) as borrowers, and RBC Jamaica as lenders, in the period from June 2009. The sums to be advanced were for the purpose of the construction of the Development and the Power Plant. Sums ("the Completion Loans") were advanced under such agreements.

[12] As security in support of the Completion Loans (or parts thereof), on or about 11 August 2009 CGPSL and SSL executed a debenture in favour of RBC ("the 2009 Debenture").

[13] By virtue of Clause 5(a) of the 2007 Debentures, PPL and SSL agreed with the Banks to the creation of a charge as a continuing security "over all the undertakings and assets of the Borrower, both present and future." Clause 5, sub-paragraphs (a) and (b) provide as follows:

> **"5) CHARGE**
>
> **a) As security for the due and proper performance of the Borrower's obligations under the Facility Agreement and this Debenture and the Securities, including but not limited to the repayment of the Principal Sum and the payment of all interest thereon and all fees, charges, costs and expenses incurred by the Lender and NCBCML. In connection with or for preserving or enforcing this or any other security, and as security for the repayment of any other monies hereafter owing in respect of further advances under the Facility Agreement or otherwise owing to the Lender and NCBCML to or, for the account of the Borrower, and as security**

**for any other liability or obligation(actual or contingent) now or hereafter owed by the Borrower to the Lender and NCBCML, the Borrower AS BENEFICIAL OWNER HEREBY CHARGES, and so that the charge is hereby created shall be a continuing security, over all of the undertaking and assets of the Borrower, both present and future, of whatsoever kind and wheresoever situate.**

**b) The charge hereby created shall be a first fixed charge on the freehold and leasehold land and buildings, plant, machinery, equipment, furniture, furnishings fixtures, (including all accessories, spare parts, additions, renewals and replacements to the foregoing from time to time) shares and other securities held legally or beneficially by the Borrower issued by other legal entities, and unpaid and uncalled capital of the Borrower, both present and future, and a first floating charge on its stock-in-trade, book debts, other accounts receivable and any other property of the Borrower, both present and future, of whatsoever kind and wheresoever situate.**

**....."**

(My emphasis)

[14] Clause 7 of the 2007 Debentures provides:

**"7) NO ENCUMBRANCE**

**The Borrower shall not without the prior written consent of the Lender and NCBCML create any mortgage, charge, assignment, sale-and –lease-back or other security interest or encumbrance over its undertaking or assets or any part thereof except as permitted under the Facility Agreement."**

[15] Clause 9 provides for crystallization of the floating charge and states:

**"9) CRYSTALLIZATION OF FLOATING CHARGE**

**Notwithstanding anything hereinbefore contained, the floating charge hereby created pursuant to clause 5 above, shall become crystallized and automatically converted into a fixed charge and the principal monies hereby secured shall become immediately payable and this security enforceable on the occurrence of any of the following, each an event of default:-**

**i) if the Borrower makes default in the payment of any interest or any part of the Principal Sum falling due for payment under this Debenture, or fails to pay to NCB, on behalf of the Lender and NCBCML, any other sum whatsoever falling due for payment under this Debenture and/or the Facility Agreement and fails to cure such non-payment according to the terms provided under the Facility Agreement;**

**ii) if the Borrower makes default in the observance and performance of any covenant set forth in the Facility Agreement or is otherwise in breach of the Facility Agreement and fails to cure the same according to the terms provided under the Facility Agreement;**

**iii) if any of the representations and warranties set forth in the Facility Agreement are untrue in any material respect;**

**iv) .....**

**v) if the Borrower makes default in the observance and performance of any covenant set forth in this Debenture or in any of the other part of the Security Package, or is otherwise in breach of this Debenture or of any of the other documents comprising the Security Package and such default continues beyond the time allowed in the Facility Agreement;**

**vi) .....**

**vii) If any charge purported or intended hereunder or under the facility Agreement to be created in favour of the Lender and NCBCML is not duly created or if the Borrower shall declare or**

**otherwise contend that any such charge is not binding on the Borrower according to the terms of such security document ;**

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

**ix) If the beneficiary of any other charge or security takes, attempts, or purports to take possession of, or a Receiver or similar officer is appointed in respect of, all or any part of the assets of the Borrower;**

**x) If any action is taken for or with a view to the winding-up or re-organization of the Borrower (otherwise than for the purpose of a re-organization approved in writing by the Lender) or if any of the Borrower becomes unable to pay its debts within the meaning of section 221 of the Companies Act of Jamaica or enters into dealings with any of its creditors with a view to avoiding, or in expectation of insolvency, or stopping or threatening to stop payments generally;**

**xi) If anything analogous to any of the events specified in sub-clauses (ix) and/or (x) of this Clause occurs under the laws of any applicable jurisdiction with respect to the Borrower, PR Holdings Limited, Sanctuary Systems Limited or PRSL (hereinafter together called the "Corporate Guarantor");**

**...**

**xiv) If the Borrower shall dispose of or enter into any contract to dispose of all or substantially all of the assets of the Borrower;**

**...**

**xv) If the Borrower shall fail to perform or comply with any term or condition or agreement agreed hereafter between the Lender, NCBCML and the Borrower;"**

**...**

[16] Clauses 12.2, 12.2.1, 12.2.2, 12.2.2.1, 12.2.2.2, and 12.2.2.3. of the Facility Agreement provide as follows:

> **"12. UNDERTAKINGS**
>
> **.....**
>
> **12.2. That from the date hereof until all its liabilities under this Agreement have been discharged:**
>
> **12.2.1. neither the Borrower nor the Co-Obligor will, without the consent of the Lender, undertake any of the following, as long as any obligations are outstanding under the Syndicated Facilities and this will include:-**
>
> *** acquisitions and mergers;**
>
> *** sale or disposal of assets except in the ordinary course of business but for the condominiums to be constructed on the Hotel Lands and which PRSL has communicated to the Lender will be sold; and**
>
> *** additional indebtedness except as defined under the following clause.**
>
> **12.2.2. no Debt additional to the Syndicated Facilities will be permitted except for:**
>
> > **12.2.2.1. current liabilities arising in the normal course of trading;**
> >
> > **12.2.2.2. incremental facilities arranged by the Lender; and**
> >
> > **12.2.2.3. incremental debt on a fully subordinated basis to the Syndicated Facilities, with the explicit written consent of the Lender obtained at least thirty (30) days prior to the anticipated funding date."**

[17] Clauses 4.1(c), 4.2(b), 4.4, 5.2, 9(a) and (h), 18(h), and 36 of the SSL Debenture which was dated August 11, 2009, are the most relevant provisions and there are clauses which are similar to those in the PPL Debenture. In the SSL Debenture, the Borrowers made certain warranties and representations.

[18] At some point in 2009, before the entry into the SSL Debenture, PPL and SSL discovered that acts amounting to breach of fiduciary duty, breach of contract and fraud, amongst other matters, had taken place. These acts had been perpetrated by the then President of PPL, Dennis Constanzo in conspiracy with a number of other individuals and companies, including persons and companies which had been contracted to provide services to PPL and SSL in the construction of the Development. According to paragraph 16 of Mr. Sim's Affidavit:

> **" In order to fund the extensive litigation and supporting investigation which was required to recover the sums lost, PPL and SSL agreed with JADE that JADE would, inter alia, act on their behalf in securing and paying for legal and other services which would be necessary to be pursued in several jurisdictions around the world against those several parties and in consideration thereof, PPL and SSL agreed to assign to JADE the awards from such litigation subject to JADE providing an accurate accounting to PPL and SSL for the sums expended and those recovered."**

[19] A copy of the Management Agreement upon which Jade relies is exhibited to the Affidavit of Mr. Sim. The Management Agreement is not written or typed on any company letterhead but is under the signature of Mr. Robert Trotta, who is a Director of both PPL and SSL. I should note that Mr. Gordon, has, on behalf of the Defendants demanded, and not received, sight of the original Management Agreement and he has asked the Court to attach significance to that lack and to view the non-production as telling, if not suspicious. Mrs. Hay's response has been that the original will be made available at the appropriate stage and that, in any event, based upon correspondence between the parties, a copy of the Management Agreement has previously been provided to the Receiver.

[20 ] It is useful to set out the terms of the Management Agreement in full:

**"JADE OVERSEAS HOLDINGS LIMITED**
**Omar Hodge Building**
**Wickham's Cay**
**Road Town**
**Tortola**
**British Virgin Islands**

**May 25th 2009**

**Dear Mr. Kwang Sim,**

**As an ultimate subsidiary of Resort Properties Group Limited we ask you to assist us by accepting assignment of multiple legal cases on our behalf. We neither have the staff nor capacity to handle this directly within our companies. From our initial discussion with Mischcon de Reya Solicitors we believe that it will take multiple years and possibly several million Pounds Sterling to pursue these cases without certainty of outcome. We believe that multiple other jurisdictions including Hong Kong, Jamaica, Canada, and several others may become relevant.**

**The initial cases are being investigated against Mr. Dennis Constanzo personally for defrauding our companies as well as Cosco International as well as their agents and numerous individual associated with Mr. Constanzo and Cosco in relation to the Palmyra Resort and Spa construction. We are certain that there will be many follow on cases as we open discovery against these individuals and companies and related companies.**

**We hereby agree with you the following:**

**(a) That Jade Overseas Holdings Limited (JADE) hires solicitors on our behalf and in their judgment directs our companies, employees and agents to provide supporting evidence for the conduct of the aforementioned cases as well as any related or follow on cases as may arise from discovery.**

**(b) JADE makes payments to such solicitors on our behalf as well as hire consultants and/or managers as may be necessary to manage such cases.**

**(c) For such services, we agree that:**

**i. JADE apply any financial recovery (awards by courts, arbitrators, or private settlements) from such cases won, to any costs it may have incurred on behalf of Sanctuary Systems Ltd and Palmyra Properties Ltd prior to distribution of any excess to the claimants.**

**ii. Such financial recovery of costs incurred is limited to the amount of funds that JADE incurred and/or advanced for legal and professional fees and services in conducting these cases PLUS an administrative charge of 5% of all amounts paid by JADE. Such an administrative charge being collected by JADE from any awards directly.**

**iii. Furthermore, for each year that JADE has an advance balance outstanding against Sanctuary Systems Ltd and/or Palmyra Properties Ltd, JADE will charge a per annum of LIBOR(3Month) + 4% for any balance advanced and incurred for the conduct of the aforementioned cases.**

**iv. For the avoidance of doubt Sanctuary Systems Ltd and Palmyra Properties Ltd assign any awards from these and related cases to JADE and JADE will provide an accurate accounting of funds advanced, awards received, and fees charged on a quarterly basis to the claimants.**

**v. Furthermore, should there not be any recoveries or awards within a 10 Year period the claimants**

**guarantee the recovery of costs and fees to JADE with its full assets.**

**This agreement is made on the 25th day of May, 2009 under the laws of the British Virgin Islands and shall remain in effect ....for an initial 10 years.**

**(sgd.)**
**Accepted and Agreed**
**Robert T. Trotta**
**(Director) Palmyra Properties Ltd**

**(sgd.)**
**Accepted and Agreed**
**Robert T. Trotta**
**(Director) Sanctuary Systems Ltd.**

**(sgd.)**
**Accepted and Agreed on behalf of Jade Overseas Holdings Limited.**
**Mr. Kwang Sim"**

[21] Both the Palmyra Debenture and the Sanctuary Debenture were registered with the Companies Office of Jamaica in accordance with section 93 of the Companies Act of Jamaica. The Management Agreement was not so registered but it is Jade's position that the charge in its favour was not required to be registered, given its nature.

[22] Jade claims that in reliance on the Management Agreement it expended considerable funds in excess of US$5,626,617.68 in pursuing and funding the litigation in Jamaica (Claim 2009 HCV 04344), Canada, and Hong Kong. Summary Judgment was obtained in Jamaica as detailed in grounds 4, 9 and 10 of the application referred to below.

[23] Mr. Tomlinson was on the 23rd of July 2011 appointed by the Banks/ Debenture-holders as Receiver and Manager under the PPL and SSL Debentures.

**THE CORRESPONDENCE**

[24] By letter dated 23 September 2011, Mishcon de Reya wrote to Mr. Tomlinson in which they stated, amongst other matters, as follows:

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

**Jade and likewise we believe to the other solicitors acting in those matters as referred to above. We are happy to obtain verification if you wish.**

**.....”**

(My emphasis)

[25] There have been a number of other letters between the parties and their Counsel, some of which are discussed below.

[26] During the period 2012 to 2013 Mr. Tomlinson exercised his right as Receiver to settle the law suits and a Settlement Agreement was entered into by PPL and SSL through Mr. Tomlinson of the one part, and Dennis and Katherine Constanzo, Mango Manor Limited, John Wong and Pacific Crown International Company Limited, of the other part. In consideration of certain payments to be made, the parties agreed that Claim 2009 HCV 04344 would be discontinued. A joint Notice of Discontinuance was filed on the 7th June 2013 by the Claimants and the 1st, 3rd and 4th Defendants in the 2009 Suit. On the 8th of October 2013 the Claimants, having filed the Notice of 7th June 2013, were granted permission to discontinue as against the 2nd, 5th and 6th Defendants.

[27] In the letter dated June 10 2013, from Grant Stewart Phillips & Co to Samuda & Johnson, it is stated, amongst other matters, after discussing the Management Agreement, that:

**“ .....It came to our client’s attention last week that the Receiver, on behalf of the Claimants, and the Defendants have purported to negotiate a Settlement Agreement dated the 30th April 2013, by which steps have been taken to arrive at a compromise of the outstanding judgment debt.**

**It is apparent therefore that the Receiver has intermeddled in assets that had been assigned to JOHL in respect of which our client reserves its rights. However, without prejudice to that position we assert that at the absolute minimum the assets and income and any**

**other benefits which the Receiver is to or has recovered under the Settlement Agreement are assets of JOHL pursuant to the Management Agreement. We therefore invite the Receiver to agree to account to JOHL for such sums as are recovered and to transfer the same immediately upon receipt by him to JOHL. In any event we ask that the Receiver not deal or part with the same in any manner prejudicial to or inconsistent with JOHL's rights. At the very least the Receiver should be prepared to provide a court binding undertaking to deposit such monies as may be received into an interest bearing escrow account pending the resolution of our client's claim to those assets.**

**....."**

[28] In their letter dated June 20 2013 Samuda & Johnson responded, amongst other ways, as follows:

**"....**

**(ii) The purported agreement was first brought to our client's attention by Mischon de Reya( Mischon). However, although the letter stated that the agreement was enclosed it was in fact not enclosed hence the Receiver remained unaware of the contents of the purported agreement;**

**.....**

**(v) Until your letter dated June 10, 2013 the Receiver had no information to support any claim or interest which Jade may have in any asset belonging to the Companies;**

**(vi) The purported assignment of the benefit of any recovery by the Companies in respect of the claims against Dennis Constanzo et al was in breach of the provisions of the Loan Agreement and the security interests created by the Companies in favour of National Commercial Bank and Royal Bank of Canada (the Banks) as the Companies failed to obtain the permission of the Banks to grant this**

**purported assignment. As a result the purported assignment is invalid;**

**(i) The Banks interest in the assets of the Companies were recorded at the appropriate registries required by law and hence notice to the world was given therefore any claim Jade may have would be subject to the interest of the Banks and by extension the Receiver whom they appointed to realize their interests.**

**For these and many other reasons the Receiver disputes the claim of Jade to any interest in any recovery under or through the court cases filed against Dennis Constanzo et al.**

**.....”**

**THE APPLICATION FOR INJUNCTION**

[29] The application before me is Jade’s application for an injunction restraining the Defendants until trial whether by themselves, their servants or agents or any of them or otherwise howsoever from doing any of the following acts:

> **“from dealing with, disposing and/or otherwise dissipating any property or other valuable security or benefit paid, frozen, held or otherwise obtained including the property held by MML known as Mango Manor, pursuant to Summary Judgment by the 1st and 2nd Defendants in Claim No. 2009 HCV 04344 on the 13th January 2011 by Mangatal J. and that the 1st to 3rd Defendants be restrained from utilizing any such sums of money received pursuant to the said judgment otherwise than by payment into a joint escrow account issued in the joint names of the parties hereto pending the determination of this claim or further order..”**

**GROUNDS**

[30] The grounds for the application are stated quite extensively, but I think they deserve being set out in some detail as they demonstrate important assertions by the applicant Jade. I set out some of the stated grounds as follows:

**“ ...**

**4. The...Management Agreement constituted a valid equitable assignment of all of the fruits of the said litigation, in Jade’s favour, such that Jade had a proprietary right to such fruits as soon as they accrued. ...**

**By virtue of the funding provided by Jade...., Claim No. 2009 HCV 04344, was filed in the Supreme Court of Judicature of Jamaica, by which PPL and SSL, claimed against Dennis Hughes Constanzo, Johnie Wong also called John Wong, Katherine Elaine Constanzo, Mango Manor Limited, and Pacific Crown International Company Limited and Huang Ciang-He; damages for breach of fiduciary duty, breach of contract, orders for an account and for restitution of monies and profits. More specifically, the claim of breach of fiduciary duty, breach of contract, orders for an account and for restitution of monies and profits. More specifically, the claim of breach of fiduciary duty alleging the receipt of bribes was specifically made against Dennis Hughes Constanzo (“Constanzo”), Mango Manor Limited (“MML”) and Johnie Wong (“Wong”). Tracing remedies identified monies defrauded from the 1st and 2nd Claimants therein to realty of which MML was the registered proprietor and funds in accounts in the names of Dennis Constanzo inter alia.**

**.....**

**9. By order of Mangatal J. dated 13 January 2011, Summary Judgment was obtained against Constanzo and MML on the basis that neither party had any realistic prospect of successfully defending the claim.**

**10. In finding for the Claimants in that action, Mangatal J. made Orders against Constanzo and MML declaring that, inter alia, by way of debt or of monies had and received or breach of fiduciary duty, the sum of US 2,270,000.00 was received by Constanzo, whilst a fiduciary of the Claimants and was therefore recoverable by the**

**Claimants therein. Orders were also made for accounts and inquiries into the monies obtained secretly and placed towards improvements on the property registered in the name of MML. An Order was also made for monies in account number 23-6F05-B at TD Waterhouse, Inc. in the name of Constanzo, which had been established by equitable tracing to be the property of PPL and SSL, to be paid to the Claimants therein.**

**11. In the premises, the proceeds of the orders made by Mangatal J. in the litigation referred to above, were the property of JADE by virtue of the equitable assignment referred to above, and JADE was solely entitled to receive the entirety of those proceeds.**

**.....**

**15.By several letters written by Jade's solicitors between 2011 and 2012, the interest of Jade as equitable assignee pursuant to the Management Agreement of the proceeds mentioned and referred to in the Summary Judgment was communicated to the Receiver.**

**...**

**18. The terms of the Settlement Agreement provide**(dated April 30 2013) **for the parties to divide the proceeds of the funds, the subject of the aforesaid Summary Judgment between PPL and SSL and the 1st Defendant therein in proportion as set out therein. The said Settlement Agreement has been entered into in breach of the assignment of the proceeds of the litigation to Jade.**

**.....**

**21. Unless the Defendants are restrained by this Honourable Court the Defendants will proceed to concretize the arrangements which are ongoing and the Receiver will use up all of the Claimant's proceeds of the litigation and the Claimant will suffer loss, for which damages cannot adequately compensate the Claimant."**

**JADE'S CASE**

[31] Jade's case is made upon a number of bases, but some of its main ingredients are substantially captured in paragraph 35 of both the Particulars of Claim and of the Affidavit of Mr. Sim. Paragraphs 35-37 of the Particulars of Claim state:

> **"35. Although it is admitted that the proceeds of future court or arbitration awards or settlement proceeds are a part of the assets of PPL and SSL which could be the subject of a floating charge, as the Management Agreement between JADE and PPL and SSL was made prior to any event of default on the part of PPL or SSL with respect to the 2007 Debentures, there was no crystallization of the charge up to 25 May 2009 and accordingly PPL and SSL were entitled to treat with the same in the ordinary course of business. Further, the Management Agreement was made prior to the execution of the 2009 Debenture. In the premises neither of the 2007 and 2009 Debentures have any effect on the equitable assignment of the proceeds of the Orders made by Mangatal J. in the litigation referred to in paragraph 25, above.**
>
> **36. Further JADE contends that PPL and SSL did not require the consent of the Banks to assign their interest in future "other accounts receivables" as they were properly the subject of floating charges.**
>
> **37. Accordingly JADE contends that the Receiver cannot be in any position superior to that of PPL and SSL in that the Receiver is obliged to acknowledge that which was lawfully done by the companies over which he has been appointed. The Receiver is therefore not entitled to assert that lack of notice to or consent on the part of the Banks to PPL and SSL in respect of the assignment of future "other accounts receivable" invalidates the assignment."**

**THE DEFENDANTS' CASE**

[32] In the Defence, it is alleged and asserted at paragraphs 4, 5, and 11-14, as follows:

> **"4.Paragraphs 12-14 of the Particulars of Claim are admitted. Further the Defendants say that Paragraph 9 of the Palmyra Debenture specifically speaks to the automatic crystallization of the floating charge into a fixed charge. Matters such as the Borrower making default in the observance and performance of any covenant in the Debenture, any situation which causes any or all of the charges ceasing or failing to rank as a first priority charge against the assets of the 1st Defendant and circumstances where the 1st Defendant disposes of or enters into a contract to dispose of all or substantially all of its assets, among others will result in the automatic crystallization of the floating charge.**
>
> **5. The Defendants further say that the purported Management Agreement is in breach of several of the clauses that would trigger an automatic crystallization of the charge.**
>
> **...**
>
> **11. If, which is not admitted, the alleged agreement was legally entered into the Defendants say that the proper interpretation of the Management Agreement was the assignment of the bare right to sue in exchange for a possible share of the proceeds of the litigation. That paragraph (a) of the alleged agreement in its proper interpretation completely removed control of the litigation from the 1st and 2nd Defendants and vested such control in the Claimant which had no interest or no genuine interest in the litigation other than to secure a profit for itself from the conduct of the litigation and that such an agreement is void and cannot be enforced.**
>
> **12. If, which is not admitted, the alleged Management Agreement was legally entered into the Defendants say that the 1st and 2nd**

**Defendants were not entitled to give a charge over the same assets to the Palmyra Debenture Holders previously unless the charge to the Claimant was subject to the charge to the Palmyra Debenture.**

**13. In the alternative the Defendants say that the alleged Management Agreement was a simple contract to provide services to the 1st and 2nd Defendants and as such the Claimant, if successful at trial, will be nothing more than an unsecured creditor.**

**14. In the alternative the Defendants say that the alleged Management Agreement provided no benefit to PPL and SSL and was a sham designed to move assets from one associated company to the next in order to avoid the charge which had been legally created in favour of the Palmyra Debenture Holders.**

**.....”**

**THE PRINCIPLES GOVERNING THE GRANT OF AN INTERLOCUTORY INJUNCTION**

[33] Paragraphs 16-19 of the oft-cited decision of the Judicial Committee of the Privy Council, **NCB v. Olint** [2009] UKPC 16, delivered by Lord Hoffman, provides concise guidance as follows:

**“16. ..... The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to achieve a just result. As the House of Lords has pointed out in American Cynamid Co. v. Ethicon [1975] A.C. 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant’s freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if**

**it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.**

**17. .....The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. ....**

**18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the defendant may suffer if it is; the likelihood of such prejudice actually occurring; the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties' cases.**

**19. There is however no reason to suppose that in stating these principles, Lord Diplock was intending to confine them to injunctions which could be described as prohibitory rather than mandatory. In both cases the underlying principle is the same, namely, that the court should take the course which seems likely to cause the least irremediable prejudice to one party or the other.....What is required in each case is to examine what on the particular facts of the case the consequences of granting or withholding of the injunction is likely to be. If it appears that the injunction is likely to cause irremediable prejudice to the defendant, a court may be reluctant to grant it unless satisfied that the chances it will turn out to have been wrongly granted are low; that is to say, that the court will feel, as Megarry J. said in Shephard Homes Ltd. v. Sandham [1971] Ch 340, 351, " a high degree of assurance that at the trial it will appear that at the trial the injunction was rightly granted."**

**RESOLUTION OF THE ISSUES**

[34] In my judgment, the following are some of the serious issues that at first blush seem to arise for trial:

> **(1) WHETHER THE MANAGEMENT AGREEMENT IS VOID AS OFFENDING THE COMMON LAW RULES OF CHAMPERTY AND MAINTENANCE**
>
> **(2) WHETHER THE RESTRICTION IN THE PPL DEBENTURE PROHIBITING THE COMPANIES FROM ENTERING INTO ANY CHARGE IN PRIORITY OR RANKING PARI PASSU WITH THE DEBENTURES EXCEPT IN THE ORDINARY COURSE OF BUSINESS APPLIES TO THE MANAGEMENT AGREEMENT**
>
> **(3) WHETHER JADE HAD NOTICE OF THE CLAUSES IN THE PPL DEBENTURE PROHIBITING PPL AND SSL FROM CREATING OTHER CHARGES**
>
> **(4) IF THE MANAGEMENT AGREEMENT WAS NOT IN THE ORDINARY COURSE OF BUSINESS, DID IT REQUIRE THE PRIOR WRITTEN OR OTHER CONSENT OF THE DEBENTURE HOLDERS?**
>
> **(5) WHETHER THE ENTRY BY PPL, SSL AND JADE INTO THE MANAGEMENT AGREEMENT TRIGGERED THE AUTOMATIC CRYSTALLISATION OF THE FLOATING CHARGE INTO A FIXED CHARGE.**

**WHETHER DAMAGES ADEQUATE REMEDY**

[35] In my judgment, damages would have been an adequate remedy to Jade if the Defendants were in a position to pay those damages. However, they do not seem to be in a financial position to furnish damages. On the question of the adequacy of damages, Mr. Sim in his Affidavit at paragraphs 41-42 states as follows:

> **"41. That the Receiver has already stated on oath in a winding up Petition before this Honourable Court in Claim No. B00005 of 2012 that on a comprehensive review by him of the financials of the companies under his management which**

**include the 1st and 2nd Defendants herein the companies have no money to satisfy the Claim of the Petitioners in that Claim in relation to a total claim of US$154,425.00 against Palmyra Resort and Spa Limited and Palmyra Properties Limited. ..... Accordingly were the Court to decline to preserve the proceeds of the litigation at this stage, there is a real and substantial likelihood that the Receiver would utilize the proceeds of the litigation and would thereafter be unable to honour any proprietary right which this Honourable Court might find in favour of the Claimant.**

**42. That the Receiver will not sustain any loss as a result of the same as the funds would be in an interest bearing account and accruing interest which would be vested in the successful party together with the principal amount."**

[36] On the other hand, in his Affidavit in opposition to the application for an injunction, filed October 8, 2013, Mr. Tomlinson states, at paragraphs 4-7:

**"4. Since assuming control of the First and Second Defendants I have been advertising for and meeting with potential purchasers in an attempt to sell the assets and recover the moneys owed to Debenture Holders.**

**5. In the meantime the Debenture Holders are financing the operations of the First and Second Defendants to the amount of at least United States Three Hundred and Twenty Thousand Dollars ($320,000) per month. As a result there is a continuous increase in the amount owed to the Debenture Holders in addition to the principal and interest which is due and owing on the original loans.**

**6. It is therefore in the immediate interest of the First and Second Defendants and the Debenture Holders that any funds which can be derived from the assets is used to cover operating expenses and to reduce the indebtedness to the Debenture Holders.**

**7. It is my opinion that an injunction preventing the use of any funds or assets derived from the Settlement of the Suit Claim No. 2009HCV 04344 would not be in the best interests of either the First or Second Defendants or the Debenture Holders. "**

[37] It is therefore the Defendants' case that damages will not be an adequate remedy for them either. In their written submissions filed October 11 2013, the Defendants' Attorneys at paragraph 36 submit that damages would not be a sufficient remedy to the Defendants as Jade is a company incorporated in a foreign jurisdiction and there is no evidence of any assets which it owns and which could support such an undertaking. In any event, I note that Jade has not offered an undertaking as to damages, and seem to think that by asking the Court to have the funds placed into a joint escrow interest-bearing account that will take care of any losses. However, I agree with the Defendants' Attorneys submission at paragraph 37 of those filed October 11 2013, where they state that the claim by Jade that that would suffice does not answer the case because, "In addition to the funds which would be frozen the Receiver would have to incur additional principal and interest payments to the Debenture Holders for money advanced to cover operational costs which could have been paid out of the frozen funds and/or additional interest payments on the original loan." At paragraph 38 it is submitted that there are also the costs of legal fees and other expenses incurred by the Receiver in realizing these assets which would not have been expended had the Receiver had any cause to believe that the assets were pledged to another which ranked in priority the debenture holders. Again, the needs or remedy of the Debenture Holders could undoubtedly be satisfied by money or damages, but there is no evidence of Jade being in any position or desirous of offering and furnishing an adequate or bolstered cross undertaking as to damages.

[38] It therefore appears to me that damages would not prove an adequate remedy for either Jade or the Defendants and the extent of the uncompensatable disadvantages to the parties do not differ widely. In **American Cynamid** Lord Diplock stated (at page 511 b) " Where other factors appear to be evenly balanced it is a counsel of prudence to

take such measures as are calculated to preserve the status quo". In **Smellie et al v. NCB**, [2013] Comm 1, which was cited by Counsel for the Defendants, I referred to (at paragraph 7) the English decision in **Garden Cottage Foods Ltd. v. Milk Marketing Board** [1983] 2 All E.R. 770, at 774(j) as authority for the proposition that the relevant status quo is the state of affairs existing during the period immediately preceding the issue of the Claim Form. In this case, the status quo is that the Receiver having been appointed by the Debenture Holders from as far back as July 2011, is free to sell or deal with the assets of the 1st and 2nd Defendants, in such a way as to see to the interests of the Debenture Holders in recovering monies owed to them and reducing the indebtedness to them. To require the Receiver to place the funds or assets derived from the Settlement of Claim No.2009 HCV 04344 would require the Receiver to do something which he has never previously had to do and would curtail him in his management of the 1st and 2nd Defendants as Receiver. Preserving the status quo would point in the direction of refusing the injunction.

**STRENGTH OF CASE**

[39] In **Smellie**, I referred to **Fellowes v. Fisher** [ 1975] 2 All. E.R. 829, for the proposition that the relative strength of the parties' cases becomes important when the case depends to a great extent on the construction of written documents, or as in **NCB v . Olint**, when it is mainly concerned with points of law. At pages 843h-844b of **Fellowes v.Fisher**, Sir John Pennycuick stated:

> **" In many classes of case, in particular those depending in whole or in great part on the construction of a written instrument, the prospect of success is a matter within the competence of the judge who hears the interlocutory application and represents a factor which can hardly be disregarded in determining whether or not it is just to give interlocutory relief. Indeed many cases of this kind never get beyond the interlocutory stage, the parties being content to accept the judge's decision as a sufficient indication of the probable upshot of the action. I venture to think that the House of Lords** ( in American Cynamid) **may not have had this class of case in mind in the patent action before them....."**

[40] The learned author Spry, in his invaluable work **Equitable Remedies**, 8th Edition, pages 466-467 states, under the sub-heading “Interlocutory Injunctions”,:

> **“ ....where there is not a conflict on the evidence as to matters of fact, but rather a dispute as to questions of law, the preparedness of the court to determine those questions depends on their difficulty and on the balance of convenience, regard being had both to the consequences of granting or refusing relief and also to the other relevant circumstances. Even where in a particular case the court is not disposed to decide a difficult question of law on an interlocutory application, it is often found that the risk of injury to the plaintiff is such that interlocutory relief should be granted. But usually the court does not regard any matters of law in dispute as so difficult that it should decline to consider them if this may affect its decision, and hence it may be prepared to adopt a view, which is to be treated merely as provisional; and both that conclusion and the degree of confidence with which it has been reached may be duly taken into account in determining whether the balance of justice favours the grant of interlocutory relief. Indeed, in the case of disputes of law there is not so great a reluctance as in the case of disputes of fact for provisional determinations to be made, since disputes on questions of law do not depend on events which may be unknown to the court and which must be duly established on the adduction of appropriate evidence. Hence although in exceptional circumstances it may be found that a question of law is of such difficulty that, in all the circumstances, the court does not see fit to determine it although the consequent legal uncertainty is important, the court does not ordinarily refuse to consider a question of law if substantial hardship to one of the parties may result from that refusal.”**

[41] In my view this is a case where substantial hardship could be experienced by either party if I do not form at least a provisional view as to the applicable law in order to adopt the course that seems likely to cause the least irremediable harm. It is a case

mostly concerned with construction of documents and points of law and there is no substantial dispute as to facts.

**CHAMPERTY AND MAINTENANCE – WHETHER MANAGEMENT AGREEMENT VOID**

[42] I will start with the issue of whether, as the Defendants argue, the Management Agreement is void as offending the common law rules of champerty and maintenance. Reference was made by the Defendants to **Trendex Trading Corporation v. Credit Suisse**[1982] A.C. 679. Jade's Attorneys on the other hand submit that Jade alleges a commercial association with PPL and SSL by virtue of which association they have shared commercial interests. According to Jade's submissions dated October 24 2013, paragraph 12:

> **" 12. ....If PPL and SSL allege fraud, loss as a result of breach of fiduciary duty and other matters resulting from wrongs done to them, then those allegations must affect the commercial interests of the associated companies. Jade therefore asserts a commercial interest and expended sums to protect the associated companies. In this regard, we refer ....to British Cash and Parcel Conveyors, Ltd. v.Lamson Store Service Company, Ltd.** [1908] 1 K.B.1006 **and Hill v. Archbold**[1968] 1 Q.B. 686. "

[43] The Headnote of **Trendtex** provides a useful summary of some of the relevant principles (pages 680 H-681A as follows:

> **"*Per* Lord Edmund-Davies, Lord Fraser of Tullybelton, Lord Keith of Kinkel and Lord Roskill. It remains a fundamental principle of English law that one cannot assign a bare right to litigate. If, however, the assignment is of a property right or interest, or if the assignee has a genuine commercial interest in taking the assignment and in enforcing it for his own benefit, there is no reason why the assignment should be struck down as an assignment of a bare cause of action or as savouring of maintenance.**

[44] In my judgment, the association which Jade has with PPL and SSL does provide it with a common commercial and substantial interest in the success and undertaking of the litigation in Claim 2009 HCV 04344 against Constanzo and the other Defendants. Unlike, the Agreement in the **Trendtex** case cited by Mr. Gordon, the Management Agreement does not manifestly involve the possibility or likelihood, of a profit being made either by Jade or any other party, out of the cause of action, such that it manifestly "savoured of champerty" as involving trafficking in litigation. My preliminary view of the Agreement is that it is not void on the grounds of public policy as offending against the rules against champertous maintenance. Further, (although this point originally gave me pause) that the fact that Jade intended to charge an administrative fee and interest does not in my provisional view savour of champerty Those charges can be viewed as the costs of providing funding and services, appendaged to the common commercial interest in pursuing the litigation.

[45] Jade has asked the Court to note that the jurisdiction of the Management Agreement is stated to be the British Virgin Islands. I do not think that assists Jade, the entity that has itself sued in Jamaica and is attempting to restrain the Receiver who is acting here in Jamaica, all and in circumstances where the original document is not before the Court. One can well understand the Receiver's consternation (my words), in not finding a copy of this Management Agreement anywhere in the papers and at the offices of PPL and SSL or at the office of the Register of Companies.

**FLOATING CHARGES**

[46] One of the Defendants' arguments is that the PPL Debenture, Clause 7, precluded assignment of any asset without the consent of the Lenders **except as permitted by the Facilities Agreement.** Jade argues that Clause 7 is wholly inapplicable because it is not applicable to a future chose in action which was the subject of the Management Agreement. The submission is that at the time of the 2007 Debenture that future chose in action did not form a part of the undertaking or assets of PPL. Further, that the now discontinued cause of action did not even exist. The applicable section of the Debenture that treats with future property is clause 5(b) by the

creation of the floating charge. However, it was submitted that that clause is not effective against future assets until crystallization occurs. It was further submitted that there had been no such crystallization at the time when the Management Agreement was entered into.

[47] Jade's Attorneys relied upon the decision in **In re Spectrum Plus Ltd (in Liquidation)** [2005] UKHL 41, [2005] 4 All E.R.209. Reliance was also placed on **Agnew and Bearsley v The Commissioner of Inland Revenue and Official Assignee for the estate in bankruptcy of Bruce William Birtwhistle and Mark Leslie Birtwhistle (New Zealand)** [2001] UKPC 28.

[48] Jade's Attorneys submit that as the Management Agreement purported to assign future debts, i.e. debts which were not in existence at the time of the agreement, such assignment disposed of future assets, capable of being covered only by a floating charge. It was further submitted that both PPL and SSL were perfectly entitled to so act without the consent of anyone.

[49] Jade's Counsel submit that until the floating charge crystallizes into a fixed charge, the asset is freely managed and disposed by the company in the ordinary course of business. Reliance was placed on Clause 12.2 of the Facility Agreement.

**ORDINARY COURSE OF BUSINESS**

[50] As to the meaning of "**ordinary course of business"**, Counsel for Jade relied upon the decision of Etherton J. sitting in the English Chancery Division in **Ashborder BV v. Green Gas Power Ltd.** [ 2004] EWHC 1517. Mrs. Hay relied upon **Ashborder** to make her submission that even "unusual" or "exceptional circumstances" may fall to be considered in the ordinary course of business.

[51] Accordingly, Mrs. Hay submitted that even if one were to take the view that the potential chose in action was indeed an asset it is patent that Clause 12 permits the disposal of assets in the ordinary course of business without the consent of the lender.

[52] I have found the extract from **Palmer's Company Law Manual**, paragraph 5-048, page 294, useful. The learned authors there state:

**"5-048**

**.....**

**(i) A charge which, as created, was a floating charge will rank after the rights of the preferential creditors of a company....and after the rights of chargeholders taking fixed charges prior to the crystallization of the floating charge ( unless the beneficiary of the charge second in time had notice of a prohibition on the company to create other charges imposed by the floating charge holder;"**

**.....**

[53] **Palmer's Company Law,** Volume 2, paragraph 13.127 is also instructive. It states:

**"13.127**

**Prohibition of Prior Charges**

**The extreme elasticity of a floating charge, and the wide powers which it thus allows to the company of dealing with property that is subject to the debenture holders' charge, are considered excessive by some floating charges, and, accordingly, it is not uncommon to insert in the instrument creating the charge a restrictive clause containing words to the effect that the floating charge is *not* to authorise the company to create any mortgage or charge ranking in priority to or *pari passu* with the debentures.**

**To the extent that a restrictive clause limits the authority of a company to enter into ordinary course dealings, notice of it must be received by third parties dealing with the company if it is to be effective against them. In the absence of such notice, the third party is entitled to believe that the company has authority to deal with its assets in the ordinary course of business....."**

[54] After I had reserved my decision on the 25th of October 2013, I asked the parties to come back and make further submissions on the law in relation to "ordinary course of business", in particular to a case from New Zealand, **Julius Harper Ltd. v. F.W. Hagedorn & Sons Ltd.** [1991] N.Z.L.R. 530, where, in the context of a bankruptcy/insolvency, an assignment to an associated company was held not to be a transaction done by the company in the ordinary course of its business. There were, as Jade's submissions pointed out/confirmed to me, were significant differences in facts and circumstances between that decision and the instant case.

[55] However, in making further submissions, Counsel for both sides referred to the Privy Council's decision in **Countrywide Banking Corporation Ltd. v. Brian Norman Dean as Liquidator of CB Sizzlers Limited (New Zealand)** [1997] UKPC 57, which decision was also referred to in the extensive **Ashborder** case. In **Countryside**, the Privy Council had for consideration a specific provision in the New Zealand Companies Act, 1955, which created a statutory exception to certain transactions which were voidable on the application of a liquidator. The statute provided that where a transaction was made in circumstances that resulted in one creditor obtaining more benefit than it would have done under the liquidation, then unless the creditor could show that the transaction took place in the ordinary course of business, it was voidable on the application of the liquidator. In interpreting what the term meant for the purposes of the Companies Act, Gault J. delivering the Judgment of the Board, at paragraph 34 stated:

> **"34. Plainly the transaction must be examined in the actual setting in which it took place. That defines the circumstances in which it is to be determined whether it was in the ordinary course of business. The determination then is to be made by objectively reference to the standard of what amounts to the ordinary course of business. As was said by Fisher J. in the *Modern Terrazo Ltd.* case, the transaction must be such that it would be viewed by an objective observer as having taken place in the ordinary course of business. While there is to be reference to business practices in the commercial world in general, the focus must still be the**

**ordinary operational activities of businesses as going concerns, not responses to abnormal financial difficulties....."**

**RESOLUTION**

[56] I find the present case very interesting. The very alleged association and connection that is said to exist between PPL and SSL and Jade, and is the basis upon which it may be that the Management Agreement does not offend the public policy rules against maintenance and champerty, is the same basis upon which it seems to me that other very important considerations arise. Jade has not attempted to suggest, nor indeed could they, that they did not know of or were unaware of the PPL Debenture or more importantly, the Clauses of that Debenture prohibiting PPL from making certain charges. Jade appears to have had actual notice of the restrictive clauses in the PPL Debenture. Jade's case is instead that no consent of the Debenture holders was required, because the Management Agreement was done in the ordinary course of business. Jade at the very least seem to have had constructive notice.

[57] However, whilst facts and statements in cases can often at first blush appear to be relevant, it is very important to look at what was actually agreed between and amongst the various parties, the actual language of the Instruments being construed, and what are the relevant circumstances in the particular case. I think it is fairly clear that the Management Agreement would not fall within "ordinary course of business". It is also fairly plain that in respect of the SSL Debenture the failure of the companies to notify the Debenture holders of the existence of the Management Agreement would appear to be a breach of the representations and warranties, see in particular clauses 4.1, 4.2, 4.4, 5.2, 9, 18(h), 36.

[58] Some of the main principles to be gleaned from the cases and authorities cited to me, including the **Palmer's Company Law**, paragraphs 13.126 and 13.127, are as follows:

> [A] A charge which, as created was a floating charge will rank after the rights of charge holders taking fixed charges prior to the crystallisation of the floating

charge. This is because, although a floating charge operates as an immediate and continuing charge on the property charged, nevertheless it is in the nature of a floating charge that before it crystallises the company has a licence, power or authority to deal with and dispose of the property charged in the ordinary course of business.

[B] The charges, whether legal or equitable so created by the company are not affected by notice of the floating charge per se.

[C] However, the instrument creating the floating charge may have inserted in it a restrictive clause containing words to the effect that the floating charge is not to authorise the company to create any mortgage or charge ranking in priority or pari passu to the debentures.

[D] To the extent that a restrictive clause limits the authority of a company to enter into ordinary course dealings, notice of it must be received by third parties if it is to be effective against them. In the absence of such notice, the third party is entitled to believe that the company has authority to deal with its assets in the ordinary course of business.

[E] Actual notice of the prohibition (as opposed to notice of the charge, its existence, or notice that arises from registration of the charge), is effective to prevent the second charge from taking priority to the debenture.

[F] It has been said that actual notice of the charge carries with it deemed notice of restrictive clauses. (However, see Palmer's comment on constructive notice and commercial transactions).

[59] This is not quite a case of JADE being "hoisted by its own petard" of association with PPL and SSL. However, this association is pivotal to a just resolution of the issues. The other side of the coin to Jade's claim of association and common interests, is that it is not really a third party in the true sense, and in any event, cannot reasonably be regarded as a third party without notice of the relevant prohibitions in the PPL Debenture. I set out below some of the reasons why my provisional but fairly clear view is that the Management Agreement would not fall within the description of "ordinary course of business":

(A) It is difficult to see what real benefit the Management Agreement could be said to have provided to PPL and SSL. This not a situation in which there has been a disposal of assets with payment to be made or consideration provided from Jade to SSL. There is no stated or apparent benefit to PPL and SSL and Jade is in fact claiming the entire proceeds of the Suits it allegedly funded. Of what benefit is it to PPL and SSL that the Suits were pursued if they would/ may not be entitled to anything from them? That is what the assignment means. That situation is completely distinguishable from recovery of book debts or accounts receivable or assignment of them for consideration. Thus, many of the cases cited to me in relation to future transactions and book debts are inapplicable to these facts. In addition, although some parts of the Management Agreement appear to suggest that what Jade was entitled to would be to recover the costs incurred or advanced plus an administrative fee and interest, the clause that speaks to assignment of any awards in respect of the cases plus the guarantee of the recovery of Jade's costs and fees from PPL and SSL's full assets is not easy to view as beneficial to PPL and SSL.

(B) The Management Agreement purports to guarantee the recovery of expenses, fees and interest at generous commercial rates by Jade on the security of all the assets of PPL and SSL.

(C) There is no evidence before the court and no facts pleaded from which an inference can be drawn that PPL and SSL were in the habit of routinely giving away assets without receiving any benefit in return.

(D) There is no evidence before the court and no facts pleaded from which an inference can be drawn that there was any previous provision of financial or other management type services provided by Jade to PPL and SSL.

(E) There is no evidence before the Court nor any facts pleaded from which an inference can be drawn that Jade was in the business of funding litigation or that PPL and SSL were in the business of giving away assets.

(F) It is not difficult to view the Management Agreement as a transparent attempt to transfer assets from PPL and SSL without any consideration flowing to PPL and

SSL and in circumstances where the PPL Debenture had a prohibition against the companies creating any charge ranking in priority or pari passu with the Debenture.

(G) Jade, PPL and SSL made no attempt to inform the Debenture Holders or any other third party of the existence of the Management Agreement despite plainly being aware of the transactions involving the Debenture Holders and PPL and SSL and the fact that the Management Agreement by its very nature attempts to place a charge over all the assets of PPL and SSL.

(H) One of the principal planks of the summary judgment claim was a claim that out of selection service fees of US$ 5.55 Million paid by PPL to PCI for selection services provided by PCI through Johnie Wong in relation to the Development, US$2.1 Million was “kicked-back” to Dennis Constanzo. The funds from the PPL Syndicated Loan Agreement secured by the PPL Debenture were for the purpose of construction of the Development. The funds from the Completion Loans and in respect of which the SSL Debenture was executed, were for the purpose of the Construction of the Development and the Power Plant. At the root and substratum of the summary judgment, in addition to the questions of bribe or breach of fiduciary duty would be the fact that money earmarked for the Development and related projects, which had been substantially funded by the Debenture Holders, was unlawfully siphoned off. A transaction or agreement such as the Management Agreement which purports to transfer assets from PPL and SSL without any consideration flowing to those companies, to a related company Jade, in those circumstances, is not just exceptional or unusual. My commercial instincts are that it is mighty strange, and seems odd.

(I) It is incongruous that PPL and SSL, who entered into a debenture in the terms of the PPL Debenture could have turned around, and without a word to the Debenture Holders and without their consent, written or otherwise, entered into a Management Agreement that not only attempts to place a charge over all the assets of PPL and SSL. Indeed, the Management Agreement purports to be even further removed from the clutches of the Debenture Holders by professing that the Agreement is made “under the laws of the British Virgin Islands”. Very

curious, given the location of the Development, the place where the Debentures were executed and the governing law of those instruments being Jamaica.

(J) Whilst documentation and invoices purportedly representing the amounts incurred or spent on the litigation have now been produced in Affidavits, the wording of the Management Agreement and other factors suggest that the main thrust of the Management Agreement did not include objective assessment of the reasonableness of Jade spending amounts close to, or likely to exceed the potential recovery amount. As it turns out, Jade claims to have expended in excess of US$5.6 Million, which exceeds by a little over US$100,000 the US$ 5.55 Million paid by PPL to PCI, a sum which is described in Mischon de Reya's letter of 23 September 2011, as received by Constanzo and Wong together by way of bribes in return for misleading and deceiving PPL and SSL. It is difficult not to remark on or note how these sums almost exactly match.

[60] It does appear on my preliminary view of the law and construction of the relevant Instruments, that PPL and SSL could not without the prior written, or alternatively, other consent of the PPL Debenture Holders, create the charge or indebtedness which they purportedly created in favour of Jade- Clause 7 of the PPL Debenture and Clauses 12.2.1. and 12.2.2. of the Facility Agreement. In addition, it is my provisional view that the entry into the Management Agreement may well have effectively triggered the automatic crystallisation of the Floating Charge in the PPL Debenture into a fixed charge. However, because this is not the clearest point, I have relied more on my findings on the aspect of the case to do with whether the Management Agreement was an assignment in the ordinary course of business, and Jade's notice of the restrictive clauses in the Debentures. On this question of automatic crystallisation, I found the work of Andrew Burgess, on **Commonwealth Caribbean Company Law** under the sub-heading "Crystallisation", at pages 422-423, provides a useful summary of the legal position. The learned author states as follows:-

> **"An area in the law relating to crystallisation which remains very unsettled is that of the legal effectiveness of what are referred to as "automatic crystallization clauses." Automatic crystallisation clauses are clauses**

**found in debentures which provide for the floating charge to crystallise on the occurrence of specified events of default and this is whether or not the debenture-holder knows that the event has occurred and whether or not the debenture-holder wants to enforce the charge as a result of the happening of the event.**

**An evaluation of the case law indicates that the older authorities, without deciding the issue, point to the theory that automatic crystallisation clauses are legally ineffective ...**

**The more recent cases are somewhat equivocal but on balance appear to incline in favour of the effectiveness of automatic crystallisation ...**

**It is submitted that the crux of the doctrinal problem associated with automatic crystallisation lies in whether parties are free to contract in respect of crystallization events. If they are, automatic crystallisation clauses are *ipso jure* legally valid; if they are not, but their contractual freedom is restricted, then such clauses are invalid. The better view appears to be that courts have no legal basis on which to ignore the contractual agreements of parties."**

**ADDITIONAL FEATURES OF THIS CASE**

[61] This is a case where Jade wants the Defendants to take a positive new step which they had not previously had to do, i.e. place the Settlement Proceeds of the 2009 Suit in escrow. This is not a case where Jade is merely trying to prevent the Defendants from taking, or continuing with some course of action. It is a case in which Jade is seeking the type of injunction that has features which would ordinarily justify describing the injunction as an interlocutory mandatory injunction. If I grant the injunction, the Defendants and Debenture Holders will be further out of pocket and will have to expend more and more funds( the Receiver says US$320,000.00 per month) financing the operations of PPL and SSL. This will thereby continuously increase the amount owed to the Debenture Holders in addition to the principal and interest already due on the original loans. In short, throwing "good money" after what may seem to be "bad money", without the alleviation or reduction to be derived by immediately accessing the

Settlement funds. On the other hand, what will Jade suffer? Jade will not be continuing to incur additional costs on behalf of PPL and SSL (not the same thing as pursuing its own interests in this claim). It will lose the opportunity to recover from the Settlement proceeds the sum in excess of US5.6 $ Million (or a portion of it) it claims to have expended in pursuing the litigation in Jamaica, Canada and Hong Kong. In short, it will end up losing, or not recovering, along with its associated companies PPL and SSL. There is no evidence before me of the financial status of Jade, incorporated outside of Jamaica, such that I could attempt any assessment, if necessary, of the overall effect of non-recovery. Alternatively, if Jade can legitimately make out a case on the basis of providing services to PPL and SSL under a simple contract, it may be able to lay a claim as an unsecured creditor and take its place amongst and in the line up of other such creditors of PPL and SSL. On the face of it, the Debenture Holders in my judgment stand to suffer greater irremediable harm if the injunction were to be granted than Jade would suffer if the injunction were not to be granted. In the circumstances, without "box-ticking" as disapproved of in **NCB v. Olint**, I think that I am justified in feeling reluctant to grant the injunction sought unless satisfied that the chances of it turning out at trial to have been wrongly granted are low. Or, in the words of Megarry J. in **Shepherd Homes** , unless I feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted. I am not at all so satisfied. Indeed, I do not feel that high degree of assurance that it would turn out that the injunction was rightly granted. Indeed, my sense of the matter is pointing in the opposite direction such that I in point of fact feel a high degree of assurance that if I were to grant the injunction, it would turn out or appear at trial that the injunction was wrongly, not rightly granted.

**DELAY AND OTHER FACTORS**

[62] Jade has denied that this claim is being made late in the day. Jade asserts that by the letter from Mischon de Reya, Solicitors, to the Receiver it had disclosed the Management Agreement and made a claim to the benefits of the fruits of the 2009 Suit. However, the Defendants deny receiving a copy of the Management Agreement until the letter from Grant Stewart Phillips dated June 10 2013 enclosed a copy. Whatever the case may be, as to the enclosure or non-enclosure of a copy of the Management

Agreement, (a copy of which the Receiver says he has to date not been able to find in the records of PPL or SSL), I agree with Counsel for the Defendants submission that Jade does seem to have been guilty of delay. In any event, the motivation for not coming forward to the court to make this claim to the fruits of the 2009 Judgment until the Settlement Agreement is odd, at the very least. I note that the statement in Mischon de Reya's letter that pursuing the recovery of the assets was to the benefit of the Receiver and the Banks does not seem entirely consistent with the term of the Management Agreement by which Jade claims to be entitled to the entire fruits of the judgment, not just fees and interest. The fact that Jade claims that the fees exceed the amount recoverable is besides the point and may raise all sorts of other questions as to the bona fides of the Management Agreement. So just when the Debenture Holders think, after the Receiver on their behalf, has been actively engaged in attempting to collect assets and has secured the Settlement Agreement, that they are going to receive some funds in reduction of the huge indebtedness of PPL and SSL, Jade has "swooped down", to pluck the funds from them. I agree that as early as July 23 2011 when the Receiver was appointed, Jade, this associated company of PPL and SSL knew or ought to have known, that it was imperative to take steps to secure its alleged interests. I agree with the Defendants' submission that the fact that the Receiver did not respond promptly to Jade's letters claiming an interest ought not to have stood in the way of Jade making an application to the Court. Indeed, it could not really have been reasonable for Jade to contemplate that the Receiver would collect or make efforts to collect the assets at its expense for the benefit of Jade or any other party other than the Debenture Holders. Jade has filed this Claim over two years after the Receiver was appointed.

**DISPOSITION**

[63] My view is that there are serious issues raised, but preliminarily, when examined closely, it is my assessment that the case of the Defendants is far stronger than that of Jade. Damages do not appear to be an adequate remedy for either party, from the point of view of no demonstrable ability to pay them. The status quo would favour a refusal of the injunction, and the strength of Jade's case seems to me to be on shaky ground

when the relevant factors are properly distilled. In addition, Jade has been guilty of some amount of delay that has not been properly accounted for. In the event that this case actually reaches trial, I do not feel that if I were to grant the interlocutory injunction, the chances that at trial it would turn out to have been wrongly granted are low; quite the contrary.

[64] In my judgment, withholding the interlocutory injunction sought by Jade is the course most likely to produce a just result. Refusing to grant the injunction is the course which seems likely to cause the least irremediable prejudice to one party or the other. Therefore, the Notice of Application filed 2nd September 2013 is refused. Costs to be the Defendants' costs in the Claim.