The Judicial Manager … **Appellant**
(L & L) Engineering Corporation Sdn Bhd
Under Judicial Management

AND

Baiduri Bank Berhad … **Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 17 of 2006)

Power, P; Mortimer and Davies, JJ.A.
4th December, 2007.

Assignment of future moneys due under contract – effective because made for consideration which passed, was expressed in present terms and was notified to debtor – against judicial manager who uses moneys to pay company debts – personal liability of judicial manager.

Mr Christopher Sawan of Messrs. Zuls Partners Law Office for the Appellant.
Miss Linda Lee of Messrs. CCW Partnership for the Respondent.

Cases cited in the Judgment:

Holroyd v. Marshall 2 [1862] 10 H.L.C. 191; 11 E.R. 999
Industrials Finance Syndicate Ltd. v. Lind[32]).
Legard v. Hodges3 [1792] 1 Ves. Jun. 478; 30 E.R. 447."[30].
Palette Shoes Pty Ltd (In Liquidation) v Krohn [1937] 58 CLR 1
Tailby v Official Receiver [1888] 13 App Cas 523,

Davies, J.A.:

This is an appeal by Allan Ronald Widdows who was appointed the Judicial Manager of L & L Engineering Corporation Sdn Bhd for a period of two years, pursuant to section 149H of the Emergency (Companies Act)(Amendment) Order 1998, by order made on 3 February 2005. The appeal is against a judgment given in the Supreme Court on 20 December 2006. The respondent to this appeal is Baiduri Bank Berhad. More specifically, the appeal is against the following orders:

1. That the judicial manager and the company, jointly and severally, the one paying the other to be absolved, pay the sum of $406,899 70 to the bank within 14 days together with interest at the rate of 11.5% per annum with monthly rests;

2. That any other money payable under the assignments be paid to the bank and that the judicial manager take any necessary steps to ensure that this money is paid directly to the bank;

3. That the judicial manager and the company, jointly and severally, the one paying the other to be absolved, pay the appellant's costs.

These orders were made on the petition of the respondent, the bank referred to in those orders. The company referred to in those orders was L & L Engineering Corporation Sdn Bhd. It has not appealed against these orders.

The circumstances in which those orders came to be made were as follows.

By five facility letters between 12 August 2002 and 12 October 2004 the respondent agreed to advance money to the company to enable it to perform construction contracts with respect to two major government projects, the Tutong Bridge and a drainage improvement project in Sumpakan. In consideration of the agreement to make those advances, which were made, the company entered into two assignment agreements, both executed on 30 January 2002, one each in respect of advances made to enable performance of each of the construction contracts. Those assignment agreements, which were in relevantly identical terms, provided relevantly as follows:

> *"In consideration of the Assignee making available to the Assignor such finance as is required by the Assignor (the receipt whereof the Assignor acknowledges) (and subject to such terms and conditions as may be imposed by the Assignee) for the commencement and completion of the said supply/work under the said Contract/Indent/Work Order the Assignor as beneficial owner assigns to the Assignee all those sums and payments and instalments thereof due and owing to become due and owing to the Assignor by the owner as aforesaid and the full benefit and advantage and right title and interest thereof TO HOLD the same unto the Assignee absolutely."*

Notice of each of these assignments was duly given to the Director of Financial Services, the Treasury, Ministry of Finance, Negara Brunei Darussalam. There is no dispute that these notices were effective notices to the Government Negara Brunei Darussalam, the owner referred to in each of the assignment agreements, the party with whom the construction contracts were entered into. Each of these assignments was duly registered as a charge pursuant to section 83 (2) of the Companies Act.

In performance of its obligations under the assignments, the company paid all sums received under the construction contracts into a specific account with the respondent.

However, on 27 June 2005 and 26 July 2005, sums totalling $406,889 70 due and owing under the construction contracts was paid, at the appellant's direction, not to that account, but to the appellant. It may be accepted that these sums were used by the appellant to enable the company to complete the construction contracts.

It is not disputed that, at the time this money was paid, the appellant was aware of the assignment agreements between the company and the respondent. On 23 March 2005 the respondent wrote to the appellant saying, amongst other things:

> *"As we have said in the past, the Bank has a registered assignment in respect of the project receivables. A copy of the assignment is enclosed for your*

> *reference. We would therefore require all receivables from the project to be paid directly to us unless otherwise agreed by us in writing."*

It need hardly be said that there was no such agreement. On the contrary, when the respondent first became aware of the diversion of the above sums to the appellant, it objected and demanded that he desist from dealing with the moneys.

The principal question before the Supreme Court and before this Court was and is the effect of the assignment agreements. The respondent submitted and the Supreme Court held that they each had the effect that the sums and payments referred to in them, upon coming into existence, became, immediately, the property of the respondent. In our opinion that is correct in law.

At law, future property was incapable of assignment. But the position was otherwise in equity. A promise, made for consideration, to assign future property, such property being capable of ascertainment or identification, operated to bind the conscience of the assignor and to bind the property itself from the moment when the contract becomes capable of being performed. *Tailby v Official Receiver* [1888] 13 App Cas 523, referred to in the Respondent's skeleton argument, is authority for this principle which is succinctly stated by Dixon J in the High Court of Australia in *Palette Shoes Pty Ltd (In Liquidation) v Krohn* [1937] 58 CLR 1 as follows:

> *"An assignment of future debts obtains its efficacy from the doctrines of equity. In Tailby v. Official Receiver [27] Lord Macnaghten stated the principles, which he described as well known. "It has long been settled," he said, "that future property, possibilities and expectancies are assignable in equity for value. The mode or form of assignment is absolutely immaterial provided the intention of the parties is clear. To effectuate the intention an assignment for value, in terms present and immediate, has always been regarded in equity as a contract binding on the conscience of the assignor and so binding on the subject matter of the contract when it comes into existence, if it is of such a nature and so described as to be capable of being ascertained and identified." He expounds, explains and exemplifies this statement in a way that has made his speech the chief source of guidance upon the subject. In a later passage he says: "Long before Holroyd v. Marshall 2 [1862] 10 H.L.C. 191; 11 E.R. 999 was determined it was well settled that an assignment of future property for value operates in equity by way of agreement, binding the conscience of the assignor, and so binding the property from the moment when the contract becomes capable of being performed, on the principle that equity considers as done that which ought to be done, and in accordance with the maxim which Lord Thurlow said he took to be universal, that whenever persons agree concerning any particular subject, that, in a court of equity, as against the party himself, and any claiming under him, voluntary or with notice, raises a trust: Legard v. Hodges3 [1792] 1 Ves. Jun. 478; 30 E.R. 447."[30]. Again:—"The truth is that cases of equitable assignment or specific lien, where the consideration has passed, depend on the real meaning of the agreement between the parties. The difficulty, generally speaking, is to ascertain the true scope and effect of the agreement. When that is ascertained you have only to apply the principle that equity considers that done which*

ought to be done if that principle is applicable under the circumstances of the case" [31].

For the purpose of deciding in the present case whether the respondents' title to the book debts depends upon what amounts to an assignment, it is important to notice the essential elements upon which Lord Macnaghten dwells. As the subject to be made over does not exist, the matter primarily rests in contract. Because value has been given on the one side, the conscience of the other party is bound when the subject comes into existence, that is, when, as is generally the case, the legal property vests in him. Because his conscience is bound in respect of a subject of property, equity fastens upon the property itself and makes him a trustee of the legal rights or ownership for the assignee. But, although the matter rests primarily in contract, the prospective right in property which the assignee obtains "is a higher right than the right to have specific performance of a contract," and it may survive the assignor's bankruptcy because it attaches without more eo instanti when the property arises and gives the assignee an equitable interest therein (*In re Lind; Industrials Finance Syndicate Ltd. v. Lind*[32]). *In that case* Swinfen Eady *L.J. describes the effect of the decisions thus:—"It is clear from these authorities that an assignment for value of future property actually binds the property itself directly it is acquired—automatically on the happening of the event, and without any further act on the part of the assignor—and does not merely rest in, and amount to, a right in contract, giving rise to an action. The assignor, having received the consideration, becomes in equity, on the happening of the event, trustee for the assignee of the property devolving upon or acquired by him, and which he had previously sold and been paid for"[33]."*

In the present case the assignment agreement was in terms of a present assignment ("the Assignor as beneficial owner assigns to the Assignee"); it was made for consideration (making finance available to the Assignor); that consideration passed from the respondent ("the receipt whereof the Assignor acknowledges"); and the property the subject of the assignment was capable of identification and ascertainment (by reference to the construction contracts). It follows that, upon any sum by way of payment under either construction contract coming into existence, it became, immediately, the property of the respondent.

Against this prima facie conclusion, Mr Sawan, for the appellant, makes the following submissions.

First he refers to the fact that the payment of the sum of $406,899.70 into the account of the appellant was approved by the Attorney General. That is true. Indeed the appellant wrote to the Attorney General on 20 June 2005 saying that he would not adopt the construction contracts for completion of these projects unless assured that payment under them would be made to his account; and the Attorney General agreed to an amendment of the adoption agreement to reflect that. Unfortunately for the appellant, nothing which the Attorney General did or said could alter the effect of the assignments and the Attorney General was wrong to agree to this amendment.

Secondly Mr Sawan relies on the fact that the sum of $406,899.70 was "properly utilised" for the completion of the two construction contracts. It may be accepted that this sum was used for that purpose. But that cannot affect the fact that it was the respondent's money which was so appropriated and used for this purpose without its consent.

Thirdly he refers to the provisions of the *Emergency (Companies Act) (Amendment) order* 1998 as providing a defence by the appellant to the orders made by the learned judge or possibly as providing a right to him to be indemnified by the company against liability under those orders. We should say at once that the second of these questions was not before us and could not have been. The appellant is no longer the Judicial Manager of the company and the company is not a party to this appeal. With that in mind we turn to the specific provisions.

Under section 149M (3) it is provided that:

> *"(3) In exercising his powers and discharging his duties the Judicial Manager:*
>
> *(a) is deemed to act as the agent of the company;*
>
> *…………………………….*
>
> *(c) shall not incur personal liability on any contract entered by him or which he causes the company to enter into (except insofar as the contract otherwise provides)."*

Mr Sawan relies on subsection (3)(a). However the appellant could not have been exercising his powers or discharging his duties as Judicial Manager in dealing with the respondent's property without its consent and contrary to its interests. His powers were limited to dealing with the company's property and enforcing its rights.

We have included reference to subsection (3)(c) because of Mr Sawan's submission that the appellant should not incur personal liability and that is the only provision which, in terms, exempts a judicial manager from personal liability. Plainly it has no application here.

Section 149M (4) then provides:

> *"Any sums payable in respect of debts or liabilities of the company incurred while the Judicial Manager was in office, under…….contracts…….adopted by him shall be charged on and paid out of any property of the company which was in his custody or under his control at that time, in priority to all other liabilities of the company……."*

It is true that the moneys paid by the appellant to complete the construction contracts, to the extent that they came out of the above sum of $406,899.70, were paid under contracts adopted by him, namely the construction contracts. But what that subsection provides is that a judicial manager's liabilities under adopted contracts, which would include any liabilities of the appellant to the government under those construction contracts, were to be charged on and paid out of the property of the

company. It says nothing about his liability to the respondent in respect of his wrongful conversion of the respondent’s property.
Under section 149O the Judicial Manager has power to dispose of property of the company. But the subject sum was not property of the company; it was property of the respondent.

Section 149L was also referred to by Mr Sawan. The respondent was not attempting to enforce a security over property of the company (subsection (2)(b)); it was seeking to recover its own property. Subsection (2)(c) is arguably more relevant, at least to the question of the proceeding against the company. It provides that, during the period for which a Judicial Manager is in office:

> *“(c) No other legal proceedings and no execution or other legal process may be commenced or continued, and no distress may be levied, against the company or its property except with the consent of the Judicial Manager.”*

However, whatever effect this provision may have had in respect of the proceeding against the company, it had none in respect of this proceeding against the appellant.

Mr Sawan's final submission concerns conditions 4 and 5 of the respondent’s facility letters of 12 August 2002 and 3 October 2003. Whatever may have been the effect of these conditions, they lasted only during the terms of the loans offered in those letters which expired, respectively, on 31 October 2002 and 30 April 2004. The sums totalling $406,899 70 comprised progress payments made under the construction contracts on 27 June 2005 and 26 July 2005. The conditions could have had no relevance to those payments. In any event, any arrangements between an assignor and an assignee, subsequent to the assignment, as to disposal of part of the property assigned, can have no effect as against the debtor, in the present case the respondent.

Accordingly, nothing which Mr Sawan has said can affect the prima facie conclusion referred to earlier. It follows that the learned judge was correct in his conclusion and this appeal must be dismissed.

ORDERS

1. Appeal dismissed.
2. Order nisi that the appellant pay the respondent’s costs to be taxed if not agreed.
3. If either party wishes to be heard on costs that party must notify the Registrar by 6th December 2007.

Power, P.

Mortimer, J.A. **Davies, J.A.4**