

THE HIGH COURT

IN THE MATTER OF A.H. MASSER LIMITED (IN RECEIVERSHIP)  
 WILLIAM MARY McCANN AND MICHAEL JOSEPH LONG

PLAINTIFFS

AND

THE REVENUE COMMISSIONERS

DEFENDANTS

Judgment of Mr. Justice Barron delivered the 6<sup>th</sup> day of October  
1986.

The sole question raised in this case is whether or not on the true construction of an indenture dated the 30th March, 1981 made between several borrowers of which the company was one and a consortium of banks the charge on book debts which it creates is a fixed charge or a floating charge.

The essential distinction between such charges as indicated by McCarthy J. in Keenan Brothers Limited 1985 I.L.R.M. 641 is that in the former type the charge is immediately effected upon the execution of the instrument of charge, whereas in the latter type the charge may never be effected. Since the purpose of a floating charge is to enable the borrower to use its property unrestricted by the existence of the charge so long as the charge remains floating, a test to ascertain the true nature of the charge is to determine whether the instrument of charge does or does not permit such unrestricted use of the property charged. A fixed charge

creates an immediate assignment in equity of the property charged, whereas such equitable assignment in the case of a floating charge is not effected until the charge crystallises. A further test to determine the nature of the charge therefore would be to ascertain when such assignment takes place.

Clause 3.02 (f) of the Deed provides that the company "charges by way of first fixed charge all book debts and other debts now and from time to time due or owing to such company but so that such company shall nevertheless be entitled to make a bona fide transfer free of such charge of any book debt against payment therefore by an insurer".

This clause shows that the parties sought to create a fixed charge. Nevertheless, if the provisions of the deed contradict this expression of intention, it is such provisions which must prevail.

The Plaintiffs rely on Clause 7.02 of the Deed. It is as follows:

"Debts. During the continuance of this security each company shall pay into an account or accounts of such company with the banks or any of them all monies which it may receive in respect of the book debts and other debts hereby charged and shall not without the prior consent in writing of the trustee purport to charge, assign or otherwise dispose of the same in favour of any other person but so that such company shall nevertheless be entitled to make a bona fide transfer free of such charge of any book debt against payment therefor by an insurer."

The use of the word trustee in the clause is a reference to the trustee appointed by the deed to act on behalf of the consortium of lenders. This clause clearly restricts the manner in which the company can deal with the proceeds of its book debts. It

also restricts the company from purporting to charge, assign or otherwise dispose of its book debts and other debts. This is a recognition that the company would not be entitled to do so. If so, then it is a recognition that the book debts and other debts are assigned in equity at the date of execution of the deed or at the date of the creation of such debt if this occurs subsequently. The Defendants argue that the saver in favour of the insurers alters this construction. I cannot see how it does. The proviso merely enables the company when it has received the amount of a debt from an insurer to assign the right to claim the debt from the debtor.

The Defendants rely upon the provisions of Clause 3.04 and Clause 4.01. Clause 3.04 is as follows:

"Permitted user of property. Notwithstanding the charges created by the companies and subject as herein provided the trustee shall permit the companies until the security hereby constituted shall become enforceable as hereinafter provided to hold and enjoy the charge property and subject as herein provided to receive and apply all income arising therefrom and to carry on therein and therewith the business authorised by the respective memoranda and articles of association."

Clause 4.01 is as follows:

"Events of default. The security hereby constituted shall immediately become enforceable and all rights of the companies to deal for any purpose whatsoever with the charge property or any part thereof shall cease forthwith if the trustee shall demand payment of the whole or any part of any monies for the time being secured by this debenture in accordance with the terms of repayment thereof."

The Defendants submit that these clauses allow the company

unrestricted use of his assets, while the Plaintiff submits that such use is subject to such restrictions as may appear elsewhere in the Deed. Clearly, this latter submission is correct and these clauses do not assist in resolving the issue.

Reference should also be made to Clause 7.15. This clause obliges the borrowers on demand inter alia to give to the Mortgagee "a valid and effectual legal or equitable assignment of its book and other debts." It would seem unnecessary to include reference to an equitable assignment if such had already been effected by reason of the charge on book debts and other debts being a specific rather than a floating charge.

In Barclays Bank .v. Siebe Gorman 1979 2 Lloyds Rep 142 the charge on book debts and other debts was expressed as here to be a specific charge. The debenture also contained a clause requiring the borrower to pay the proceeds of book debts into its account in terms similar to those of Clause 7.02 in the present case. Clause 5 (c) of that debenture was as follows:

"The company during the continuance of the security shall pay into the companies account with the bank all monies which it may receive in respect of the book debts and other debts hereby charged and shall not without the prior consent of the bank in writing purport to charge or assign the same in favour of any other person and shall if called upon to do so by the bank execute a legal assignment of such book debts and other debts to the bank."

It can be seen that the provision also required the borrower on demand to effect a legal assignment of the book debt and other debts to the bank. The absence of reference to an equitable assignment seems a clear acknowledgement that such had already been effected by the execution of the Deed. Slade J. indicated that he would have held the charge to be floating had the borrower

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been free to deal with the proceeds so long as the account was in credit. The basis of his decision lay in the restriction imposed on the borrower in relation to its dealing with the monies:

In Keenan Brothers Limited 1985 I.L.R.M. 641 the Deed contains a clause requiring the borrower to pay all monies received in respect of its book debts and other debts into a special account. The clause was as follows:

"The company shall pay into an account with the bank designated for that purpose all monies which it may receive in respect of the book debts and other debts hereby charged and shall not, without the prior consent of the bank in writing make any withdrawals or direct any payment from the said account. The company shall not, without the prior consent in writing of the bank, purport to charge, waive, assign or otherwise deal with its book debts or other debts in favour of any other person."

It can be seen that although this clause was similar to clause 7.02 in the present case, it restricted withdrawals from the account unlike the present clause. As Henchy J. said at page 645, these particular assets "were unusable in the ordinary course of business save at the discretion of the bank."

The restrictions imposed upon the borrower in Keenan Brothers Limited were clearly more extensive than those imposed here. Nevertheless it seems to me that the essential provision is the restriction on the mortgagor which prevents it from purporting to charge, assign or otherwise dispose of its book debts and other debts. I regard this provision as acknowledging that the debts are in equity the property of the mortgagee and so not available to the mortgagor in the ordinary course of its business. Undoubtedly Clause 7.15 suggests that the execution of the Deed did not effect an equitable assignment of the book debts and

other debts. Since a conflict accordingly exists I take the view that it must be resolved in favour of Clause 7.02 since the fundamental provisions in relation to book debts and other debts are contained in that clause. In addition the parties themselves by Clause 3.02 (f) indicated their intention to create a specific charge. Accordingly I take the view that the Deed created a specific charge over the book debts and other debts of the company;

*Henry Barron*  
*6/10/86*