

**Conference: Secured Transaction Law Reform in other jurisdictions
18th and 20th June 2014, London and Durham**

**Comments on papers of Professor Tony Duggan and Professor Peter Winship
by Dr Magda Raczynska**

Charges in licences in English law

No statutory definition of “property” for the purposes of security interests (charges/mortgages created by a company)

Re Celtic Extraction Ltd [2000] 2 WLR 991 (CA) – waste management licence as property

Insolvency Act 1986, s 436:

“property” includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property”.

“It is hard to think of a wider definition of property” (*Bristol Airport plc v Powdrill* [1990] Ch 744 (CA) 795 (Browne-Wilkinson V-C))

Property outside the Insolvency Act 1986

- Traditionally only tangibles and intangibles but see *Re Huggins* (1882) 21 Ch D 85 (CA) 90 (Jessel MR): “The mere fact that you cannot sue for the thing does not make it not ‘property’” (still intangibles?)
- Theft Act 1968 s4(1): “‘Property’ includes money and all other property, real or personal, including things in action and other intangible property”; Fraud Act 2006 ss5(2): “‘property’ means any property whether real or personal (including things in action and other intangible property)”
- Examples:
 - Carbon trading allowances (*Armstrong DLW GmbH v Winnington Networks Ltd* [2012] EWHC 10 (Ch), [2013] Ch 156)
 - Export quota of textiles (*AG of Hong Kong v Nai-Keung* [1987] 1 WLR 1339 (PC))

Characteristics of property

National Provincial Bank Ltd v Ainsworth [1965] AC 1175, 1247–1248 (Wilberforce LJ): “definable, identifiable by third parties, capable in its nature of assumption by third parties, and [has] some degree of permanence or stability”

Re Celtic Extraction Ltd [2000] 2 WLR 991 (CA) para 33 (Morritt LJ)

1. There must be a statutory framework conferring an entitlement on a person, who satisfies certain conditions even though there is an element of discretion exercisable within that framework
 - Example of entitlement: entitlement in the previous owner of a fishing licence to be considered for the grant of fresh licences, *In re Rae* [1995] BCC 102; see also *AG of Hong Kong v Nai-Keung* [1987] 1 WLR 1339 (PC)
 - Discretion not preclusive: historical example: annuities granted “out of the voluntary bounty of the Crown” charged on the tonnage and poundage dues always treated as property

2. The entitlement must be transferable
 - Restrictions on the person of the transferee not preclusive (*Re Celtic* – “fit and proper person”)
 - Restrictions on transferability preclusive: contractual or statutory ban on transfer (e.g. social security benefits, Social Security Administration Act 1992, s187)
 - Personal licences not transferrable (obligation to undertake work personally)
3. The entitlement must have value

Examples of licences capable of being subject to a charge

Fishing licences

- fishing vessel fully registered under Part II of the UK Ship Register can be subject to a mortgage, Merchant Shipping Act 1995 and the Merchant Shipping (Registration of Ships) Regulations 1993
- standard form of mortgage– bare mortgage – registrable at the UK Ship register and Companies House if granted by a company
- additional charging clauses over fishing licences - a deed of covenant registrable at the Companies House if granted by a company

Licences under Licensing Act 2003 – licences concerning the following activities:

- the sale by retail of alcohol,
- the supply of alcohol by or on behalf of a club to, or to the order of, a member of the club,
- the provision of regulated entertainment, and
- the provision of late night refreshment.
- Charges possible despite the licence not being “property” for the purposes of the Insolvency Act 1986, s436
 - Licensing Act 2003, s27: “...licence lapses if the holder of the licence... becomes insolvent”;
 - Old rule: *Re Britnor* (1876) 56 LJ Bankr 85;
 - Is the appointment of a fixed charge receiver under the statutory power in the Law of Property Act 1925 an insolvency event under the Licensing Act 2003?
 - Licensing Act 2003, s 50(3): “Notwithstanding the lapsing of the licence, a person mentioned in section 16(1) (who, in the case of an individual, is aged 18 or over) may apply under section 42 for the transfer of the licence...”

Security in traceable proceeds in English law

Comments on Example 4 in the paper of Prof. Tony Duggan

Can the secured creditor assert security in both the original asset and the traceable proceeds of misappropriated collateral?

1. Exchange product theory

- an immediate (automatic) proprietary interest in traceable proceeds from the moment of substitution, *Cave v Cave* (1880) 15 Ch D 639.
- “if the property in its original state and form was covered with a trust (...) no change of that state and form can divest it of such trust” (*Taylor v Plumer* (1815) 3 M&S 562, 574 (Ellenborough LJ))
- Objections:
 - geometric multiplication (valid in the context of security?)

- involuntary ownership problem (valid in the context of security?)
 - economic inefficiency – oversecritisation, possible deadweight loss
2. Assert new interest - a power *in rem* (Prof. Peter Birks)
 - No interest until the power to vest the interest exercised
 - Objection: a third party acquiring an interest in the traceable proceeds prior to the exercise of the power might defeat the secured creditor's interest
 3. Immediate property right in traceable proceeds subject to election (Prof. Lionel Smith)
 - satisfaction of the proprietary claim to proceeds would retroactively divest the claimant from the interest in the original asset.
 - Some support in *Foskett v McKeown* [2001] 1 AC 102 (HL) 127 (Millet LJ)
 - Simultaneous claims to proceeds and the original asset may not be precluded
 - Objection: the mechanism of claiming may be based on adoption of the unauthorised disposition
 - Adoption: in the context of trusts and in *Buhr v Barclays Bank* [2001] EWCA Civ 1223, [2002] BPIR 25 para 49 (Arden LJ)
 - “[Once the unauthorised sale took place] Barclays (if indeed it has already done so by commencing these proceedings) could adopt this transaction and thus retrospectively make the Buhrs its agent. In the context of this transaction, the Buhrs would... then be bound to keep the proceeds of sale separate from their other assets and would hold them (subject to prior charges) on trust for Barclays and so would be bound to account to Barclays for the amount secured by its charge”.
 - Objection: adoption as forgiveness and approval of the unauthorised act – no logical link between forgiveness and choosing between proceeds and original asset
 - Avoidance of excessive security as a better explanation?
 - Problems still: timing of assessment of excessiveness

Comments on the Example 5 in the paper of Prof. Tony Duggan

Assumptions: type of debtor (unincorporated, corporate) and type of interest (fixed charge, floating charge).

Price not identifiable traceable proceeds

- Not possible to trace into an overdrawn account, *Bishopsgate Investment Ltd v Homan* [1995] Ch 211 (CA), applying *James Roscoe (Bolton) Ltd. v Winder* [1915] 1 Ch 62 (the lowest intermediate balance rule); *Shalson v Russo* [2003] EWHC 1637 para 140 (Rimer J):
 - “it is not possible to trace into and through an overdrawn account, because such an account is not an asset at all: it is a liability. The consequence is that the claimant cannot show that his money has become represented by an asset into which it is possible to trace: all his money has done is to reduce a liability, and so has ceased to exist.”
- Backwards tracing into what the overdraft spent on
 - Possible but controversial: *Bishopsgate Investment Ltd v Homan* [1995] Ch 211 (CA) 216-217 (Dillon LJ) but contra *Bishopsgate Investment Ltd v Homan* [1995] Ch 211 (CA) 222 (Leggatt LJ).
 - Need to show an intention to pay for the property purchased with the purchase? *Foskett v McKeown* [1997] 3 All ER 392 (CA) 408-409 (Sir Richard Scott V-C)

Proceeds at the Factor's bank

- Traceable if the original asset subject to fixed charge and disposed without Bank's consent (unauthorised disposition); if original asset subject to floating charge claims to traceable proceeds (of sale outside ordinary course of business) doubted.
- Equitable tracing rules.
- Traditionally need to establish fiduciary relationship:

- doubted by Lord Millett in *Foskett v McKeown* [2001] 1 AC 102 (HL) 127 (Millett LJ) but see *Bank of America v Arnell* [1999] Lloyd's Rep Banking 399 and *Shalson v Russo* [2003] EWHC 1637, paras 103-104 (Rimer J).
- randomly established? See *Chase Manhattan Bank v Israel-British Bank (London) Ltd* [1981] 1 Ch 105
- Defence of bona fide purchaser for value without notice: does Factor have notice?
- Change of position defence may depend on the basis for the claim
- Basis for the proprietary claim to traceable proceeds:
 - unjust enrichment: enrichment at the expense of the claimant that is unjust
 - meaning of “unjust”: absence of basis or unjust factors (Ignorance? Powerlessness? Lack of authority?)
 - vindication of property right: the claimant has a proprietary interest in an asset in the property received by the defendant, whether the interest is existing (retained or revested by rescission) or created by operation of law;
 - *Foskett v McKeown* [2001] 1 AC 102
 - support unpronounced in relation to security interests
 - if change of position = disenrichment – not available on vindication view
 - if change of position = protection of reasonable reliance – may be available on both views
 - is change of position available if defendant merely “blameworthy” (just falls short of bad faith)? (notice to the Factor?)

Comments on the Example 6 in the paper of Prof. Tony Duggan

The proprietary claims based on tracing but now also possible to trace into the price

Personal claims against the third party – possible extended conversion claim?

- contemplated in *OBG v Allen* [2007] UKHL 21
- controversial (conversion applies only to tangible property) – is there scope to extend to intangible property?
- Basic elements: “First, the defendant’s conduct was inconsistent with the rights of the owner (or other person entitled to possession). Second, the conduct was deliberate, not accidental. Third, the conduct was so extensive an encroachment on the rights of the owner as to exclude him from use and possession of the goods. The contrast is with lesser acts of interference.” *Kuwait Airways Corp v Iraqi Airways Co Ltd* [2002] UKHL 19; [2002] 2 AC 883, [39] (Nicholls LJ)
- Objection: does factor commit any deliberate act?

Personal claims against the third party – possible unjust enrichment (UE) claim?

- If knowing receipt (KR): receipt and knowledge? KR might be based on unjust enrichment or liability for wrongs
- Strict liability based on unjust enrichment:
 - “Liability for ‘knowing receipt’ is receipt-based. It does not depend on fault. The cause of action is restitutionary... There is no basis for requiring actual knowledge of the breach of trust.” *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (HL) para 104 (Millett LJ)
 - *Lipkin Gorman (a firm) v Karpnale* [1991] 2 AC 548 – a personal restitutionary claim based on unjust enrichment
- Liability for wrongs:
 - real complaint not that defendant received money but that they used up the money
 - *Lipkin Gorman v Karpnale* is a common law proprietary restitutionary claim
- Problem: if KR – requirement of breach of trust or fiduciary relationship. The chargor not a fiduciary or trustee for the Bank.

Other personal (possibly wrong-based) claims?

