EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

SAINT LUCIA
COMMERCIAL DIVISION

CLAIM NO. SLUHCV2016/0696

BETWEEN:

KCL CAPITAL MARKET BROKERS LIMITED

Claimant/ Applicant

And

THE ATTORNEY GENERAL

Defendant/ Respondent

Appearances:

Mr. Leslie Prospere with Mr. Vilan Edward, for the Claimant/Applicant
Mr. Rene Williams, Senior Crown Counsel, for the Defendant/ Respondent

---

2017: June 8
September 12

Factoring Agreement – Ownership of Accounts Receivables – Prior Assignment of Debt -- Article 1479 of the Civil Code – Attachment Order Pursuant to Rule 59.7 of CPR2000 – Judgment in Rem – Fustration – Validity of Assignment

DECISION IN CHAMBERS

[1] **ST ROSE-ALBERTINI, J. [Ag]:** The claimant/ applicant KCL Capital Markets Brokers Limited (KCL) has filed a claim against the Attorney General of Saint Lucia, the party in whose name proceedings against the Crown must be instituted[1], to recover special damages in the sum of $1,338,570.28, interest and costs. The claim alleges breach of contract occasioned by failure of the Government of Saint Lucia (GOSL) to remit to KCL certain receivables payable on the authority of two Notices of Direction to Pay dated 20th February 2012 and 6th March 2013 respectively (the Notices), issued pursuant to a Factoring Agreement and assignment of the receivables.

[2] The Attorney General asserts that the Crown is not liable for the sums claimed because an attachment order made on 18th August, 2014 (the Order) directed the Crown to pay the sum of $1,335,562.83 to a judgment creditor of the seller and assignor of the recievables.

[3] KCL has asked this court to determine certain preliminary issues which it believes will result in complete disposal of the claim. The facts of the case are not in dispute. The fight between the parties concern differences on issues of laws relating to ownership of the factored receivables, the effect of the Order if any on GOSL's obligations to KCL under the Notices and liability for the remaining payments due to KCL, under the Notices.

THE ISSUES

[4] The central issue for this Court is to determination whether the Order impeded the contractual obligation of GOSL to KCL and in that regard the following questions must be answered:-

1. Who is the lawful owner of the receivables payable under the Notices?

2. Did the Order vitiate the Notices?

3. Is the Crown liable for remitting to KCL the remaining payments arising from the Notices?

---

[1] Section 13(2) of the Crown Proceedings Act - Cap 2.05 of the Revised Edition of the Laws of Saint Lucia

BACKGROUND

[5] KCL is a securities company registered under the Companies Act of Trinidad and Tobago. It is licensed and regulated by the Trinidad and Tobago Securities and Exchange Commission and provides financial advisory, arrangement and underwriting services for securities offered for sale in that country. Its registered office is at No. 25 Western Main Road in Trinidad. The company previously operated as AIC Capital Market Brokers Limited.

[6] On 15th September 2011 KCL executed a Factoring Agreement for the Purchase and Sale of Accounts Receivable[2], a Purchase Confirmation[3] and Assignment Agreement with Asphalt & Mining (St Lucia) Company Limited (AMSL), a company incorporated under the Companies Act of Saint Lucia. The arrangement was for the sale and purchase, with full recourse, of all the accounts receivable of AMSL, under a road construction and rehabilitation project in Saint Lucia, with absolute assignment to KCL, of all receivables payable under that project. The effective date of the purchase was 21st September 2011. The genesis of the project lies in an agreement dated 24th March, 2010 between the Ministry of Communications Works Transport and Public Utilities in Saint Lucia and AMSL for the Anse Ger to Deruisseaux Road Rehabilitation Project (the Project).

[7] In clause 1 of the Factoring Agreement the purchase of the accounts receivable was to be evidenced by:-

> *"…..the execution of an Assignment Agreement or acceptance of a Bill of Exchange (the "Acceptance") in the form set out in Exhibit B….."*

[8] In clause 3 AMSL agreed to endorse on the original and every copy of each invoice a notice in the following form-:

> "*The debt arising under this subject invoice has been assigned to and is payable to KCL…..whose receipt is the only valid discharge of the debt……"*

---

[2] Exhibit A on pages 15 – 21 of Application Bundle
[3] Exhibit B on page 23 of Application Bundle

[9] In the same clause AMSL also agreed to execute a "Notice, Acknowledgment and Direction to Pay" in relation to the assigned receivables.

[10] In clause 18 (x) AMSL agreed that it would not, without KCL's prior written consent, attempt or purport to sell, assign, transfer or encumber any purchased debt other than to or in favour of KCL.

[11] On 20th February, 2012 AMSL issued the first Notice And Direction to Pay to GOSL expressly directing that an initial payment of US$185,958.65 followed by 16 equal quarterly payments of US$226,242.88 be remitted directly to First Citizens Investment Services Limited as agent for AIC Capital Market Brokers Limited (subsequently re-named KCL).

[12] The second Notice And Direction to Pay was issued on 6th March, 2013 expressly directing GOSL to remit directly to First Citizens Investment Services Limited as agent for KCL, 12 equal quarterly payments of US$235,550.91.

[13] It is worth noting that each of the Notices contained a Schedule "C" comprising a total of 20 equal payments commencing from 1st July, 2013 and ending on 1st April, 2016. The Notices identified the Project as the "*Anse Ger to Desruisseaux (AGD) Road Rehabilitation Works*" and contained the following statements:-

> "*TAKE NOTICE that for valuable consideration, we, Asphalt and Mining (St Lucia) Company Limited have assigned all receivables owing pursuant to the Contract/ Invoice to KCL Capital Market Brokers Limited,……..*
>
> *You are authorized and directed to pay directly to FIRST CITIZENS INVESTMENT SERVICES LIMITED as agent for KCL Capital Market Brokers Limited all monies which are now payable to us under this Agreement…….*
>
> *Payment to FIRST CITIZENS INVESTMENT SERVICES LIMITED of amounts due under the Contract shall be, and be deemed to be payments to us and shall satisfy in whole or in part, as the case may be, your indebtedness under the contract.*

This direction is irrevocable except with the written consent of First Citizens Investment Services Limited or KCL Capital Market Brokers Limited.

Please sign and return the attached copy of this notice as acknowledgment of the irrevocable Direction To Pay."

[14] The first Notice was signed by Isaac Anthony Permanent Secretary in the Ministry of Finance, Economic Affairs, Planning and Social Security and stamped 23rd February, 2012. The second Notice was signed by Reginald Darius Permanent Secretary in the Ministry of Finance, Economic Affairs and Social Security and stamped 29th May, 2013.

[15] Payments commenced as agreed with GOSL remitting the funds to KCL, in the manner directed in the Notices.

[16] On 28th May 2014 LCaribbean Construction Inc, a subcontractor of AMSL filed a claim against AMSL and Globetec Construction LLC (GCL) for breach of contract and recovery of $1,093,280.24 in damages[4]. The claim was undefended and default judgment was entered in favour of LCaribbean on 18th June, 2014.

[17] On 7th August, 2014 LCaribbean filed an application for attachment of sums payable under the Project, in satisfaction of the judgment debt owed by AMSL. It was made pursuant to section 22 of the Crown Proceedings Act and Rule 59.7 (3) and (4) of the Civil Procedure Rules 2000 (CPR), as a form of garnishment against the Crown.

[18] The ensuing Order was made on 18th August, 2014 in the following terms:-

"1. The Defendants/respondents[5], either jointly or severally be restrained from receiving any and all monies due from the Government of Saint Lucia up to the amounts owed by the Defendants/Respondents in the sum of $1,093,280.24 together with interest at the rate of 6% per anum from 31st October, 2011 to the

---

[4] SLUHCV2014/0383 between Lcaribbean Construction Inc v (1) Asphalt & Mining (St Lucia) Company Limited and (2) Globetec Construction LLC

[5] *AMSL and GCL*

date of payment and costs in the sum of $3,110.50 pursuant to the judgment in default of acknowledgment of service dated 18th June, 2014.

2. The Government of Saint Lucia is directed to make payment to the Claimant/Applicant[6] in the sum of $1,093,280.24 together with interest at the rate of 6% per anum from 31st October, 2011 to the date of payment and costs in the sum of $3,110.50 pursuant to the judgment in default of acknowledgment of service dated 18th June, 2014, being monies which are owed to the Defendants/Respondents by the Government of Saint Lucia.

3. The claimant is awarded costs of $750.00 on their application."

[19] On 23rd September 2014 GOSL filed an application in the LCaribbean claim, seeking to vary or discharge the Order. The basis of the application was that the sums attached by the Order had been irrevocably assigned to KCL and the Crown was legally obligated to pay KCL. That application was struck out on 4th May 2015.

[20] On 8th May, 5th June and 26th August, 2015 KCL wrote to GOSL stating its position with respect to the Order and demanded that GOSL meet its contractual obligations by remitting the receivables due and payable under the Notices[7].

[21] Despite these demands GOSL proceeded to comply with the Order and on 26th June 2015 paid the sum of $1,335,562.83 to LCaribbean, who in turn executed a release of any claims against the Crown[8]

[22] On 17th August 2015 KCL filed a petition pursuant to Article 381 of the Code of Civil Procedure[9] (the CCP) seeking to be joined in the LCaribbean claim for the purpose of discharging of the Order or obtaining alternative redress[10]. Upon making inquiries at the High Court Registry a Notice of Hearing was issued some 12 months later, on 8th August,

---

[6] *LCaribbean*

[7] See Exhibits JD1, JD2 & JD3 on pages 91 - 93 of Application Bundle

[8] See Exhibit JD4 and JD5 on pages 95 – 97 of Application Bundle

[9] Chapter 243

[10] See Exhibit SC8 on page 73 of Application Bundle

2016 scheduling the hearing of the petition for 1st March, 2017[11]. By this time GOSL had paid the sums directed under the Order to LCaribbean and reneged on the remaining payments to KCL. A further demand for payment was made on 5th November, 2015 to no avail.

[23] KCL discontinued the petition on 15th August 2016 and filed the instant claim on 3rd November 2016. Acknowledgement of service and defence were duly filed and the application currently before this court was filed on 3rd March 2017. The matter was subsequently transferred to the Commercial Division.

The Crown's Evidence

[24] The Crown's evidence was contained in a single affidavit deposed by Ms Jan Drysdale, Senior Crown Counsel in the Attorney General's Chambers (Chambers). In the main she asserts that when the Order was made Chambers was unaware of the Notices which assigned all the receivables payable under the Project, to KCL. Immediately upon receiving this information from the Ministry of Infrastructure, Port Services and Transport Chambers proceeded to file an application to discharge or vary the Order. The Notices were exhibited in the application.

[25] She deposed further that KCL was entitled to intervene in the proceedings to protect its rights as the factor of the receivables affected under the Order. Despite being made aware of the Order, KCL took no steps to intervene and was not represented at the hearing, albeit that Chambers had requested its attendance. Instead KCL proceeded to write several letters to GOSL demanding payment of the receivables. The Crown's application was struck out, the Order remained binding and GOSL had no choice but to comply with it.

[26] The Court was asked to take judicial notice of the petition which was subsequently filed and discontinued by KCL, coupled with its the conduct in not facilitating a determination on the issues relating to the effect of the Order within the realm of the LCaribbean claim. The

[11] See Exhibit SC9 on page 79 and Exhibit JD5 on page 98 of Application Bundle

Court was asked to find this claim was tantamount to abuse of the court's process on the basis that the proceedings were res judicata.

[27] I deduced from the Order that KCL and the Crown were not present when the Order was made and were never joined as parties in the LCaribbean claim, albeit that the Crown was heard on an application and KCL had filed a petition, in that claim. It is not disputed that the Factoring Agreement, Purchase Confirmation and Assignment Agreement were not adduced in evidence in the LCaribbean proceedings so as to elicit a conclusive determination on the contractual obligation of GOSL to KCL under the Notices. Consequently by order dated 18th May, 2017 this Court ruled that the plea of res judicata and abuse of process were not applicable in the circumstances of this case because the issues for consideration had not been canvassed or finally determined in any court proceedings to which KCL and GOSL were parties[12].

KCL's Evidence

[28] KCL's evidence was contained in two affidavits deposed by Mr Shannon Chitolie as Attorney appointed under a Deed of Deposit of Power of Attorney duly registered at the Office of Deeds and Mortgages[13]. In summary he outlined the chronology of events leading up to this application and tendered the exhibits relied on by KCL.

[29] It is KCL's contention that in complying with the Order GOSL caused the accounts receivables which belonged to it to be redirected to the payment of the judgment debt owed by AMSL to LCaribbean and that it was erroneous for GOSL to interpret the Order as intercepting the contractual obligation to KCL, as enshrined in the Notices.

[30] KCL claims to have relied on representations from the Crown of its intention to apply to discharge or vary the Order on the basis that it had been wrongly obtained and that its application was highly meritorious. On that basis KCL anticipated that the success of the

---

[12] Prospere v Prospere (2007) 69 WIR 278 applied
[13] In Vol. 168A No. 213050

application was a mere formality and considered the Crown's application as constituting recognition and acceptance of the continuing contractual relation between GOSL and KCL and the corresponding obligation to remit invoices payable from the Project directly to KCL. Mr Chitolie deposed that representatives of KCL travelled to Saint Lucia for the hearing of that application, however due to a miscommunication the incorrect date was conveyed by Chambers and the Crown's application was disposed of ahead of their arrival.

[31] KCL accepts that it was entitled by law to apply to be joined as a party in the LCaribbean claim and took steps to this end by filing a petition pursuant to Article 318 of the CCP. This effort was stalled by prolonged delay in obtaining a hearing date from Court Registry, which led to a decision by KCL to discontinue the petition. The demand letters written to GOSL served to bolster the assertion that GOSL was in breach of the Notices by failing to remit the balance of the receivables due under the Project.

LAW AND ANALYSIS

Submissions of the Crown/ GOSL

[32] Learned Senior Crown Counsel Mr Rene William addressed the Crown's submissions along the following lines:- (i) that the Order operated in rem in respect of the receivables payable under the Project; (ii) that the Notices were frustrated by a supervening illegality thereby discharging GOSL from making further payments to KCL and (iii) when the Order was made there was no evidence that a valid assignment existed in accordance with Article 1479 of the Civil Code[14] (the Code). In the circumstances the Order had the effect of vitiating the Notices but only to the extent of the sums specified therein, thus preventing AMSL from receiving the sums directed to be paid to LCaribbean. He agrees that GOSL remained contractually bound to pay KCL any sums left over after payment to LCaribbean.

[14] Cap 4.02 of the Revised Edition of the Laws of Saint Lucia

[33] Mr Williams contends that in considering the effect of the Order on the Notices it must be noted that the affidavit deposed on behalf of LCaribbean in support of the attachment application[15], refers to and exhibits the documents relating to the contract between GOSL and AMSL for the Anse Ger to Deruisseaux road works namely; the Contract Agreement, Finance Agreement and Letter of Acceptance[16]. That application culminated in the Order being granted in circumstances where these were the only documentary before the court. At the hearing the judgment debtor AMSL and GOSL were absent and unrepresented and KCL was not a party. Consequently the order could only refer to sums payable under the respective contract and in the absence of any other evidence it must be seen as vitiating the Notices.

[34] Judgment in rem: On this issue Mr Williams submits that the effect of the order depends on whether it is classified as being in rem or in personam. The distinction is set out in the judgment of Lord Mance in the Privy Council decision of **Pattni v Ali and another[17]** in those words:-

> ***"……..****For present purposes, a judgment in rem in the sense of rule 40 is thus a judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world (and not merely as between parties or their privies in the litigation before it). The distinction is shortly and accurately put in Stroud's Judicial Dictionary, 7th ed (2006), p 2029, cited (in an earlier edition) by Deemster Kerruish: "A judgment in personam binds only the parties to the proceedings, as distinguished from one in rem which fixes the status of the matter in litigation once for all, and concludes all persons....."*

[35] He referred the court to a similar definition contained in Halsbury's Laws of England[18] which further explains the principle as follows:-

> *"….the judgment of a court of competent jurisdiction is as regards persons domiciled and property situated within the jurisdiction of the court pronouncing the judgment, conclusive against all the world in whatever it settles as to the status of*

---

[15] See para 3 of Affidavit Of Alana Eugene filed on 7th August, 2014 on pages 109 – 113 of Application Bundle
[16] See pages 122 – 124 of Application Bundle
[17] [2007] 2 WLR 102 at page 112, para 21
[18] (2015) Vol. 12 at para 1596

the persons or property, or as to the right or title to the property itself, or of the proceeds of its sale."

[36] He argues that although CPR Part 50 concerns Attachment of Debts does not apply to the Crown, an order made pursuant to CPR 59.7 (3) and (4) or section 22 of the Crown Proceedings Act has similar effect to an absolute order made under CPR Part 50. He relies on **Société Eram Shipping Co Ltd and others**[19] in which the House of Lords described an order made in similar proceedings (third party debt orders under the UK CPR 1998) as being in rem. Lord Hoffman in that decision stated:-

> "*The essence of such an order is that* ***it is execution in rem against the property of the judgment debtor, against a res or chose in action which belongs to him*** *and which is within the jurisdiction of the court making the order." (Emphasis added)*

[37] Mr Williams further says that an attachment order made under CPR59.7 takes effect immediately as an absolute order and binds the Crown and unlike the CPR Part 50 it does not encompass a two stage process where an order nisi is first made to attach the monies in the hands of a granishee, followed by a second stage during which the garnishee may object, stating reasons why the debts should not be garnished.

[38] He argued that **Crantrave Ltd v Lloyds Bank plc**[20] cited by KCL as authority for restitution of the monies paid under the Order should be distinguished because it deals with an order nisi where the court clearly says that such orders only has the effect of freezing the funds of a judgment debtor. The parties must then be given an opportunity to be heard following which the court makes a decision to discharge the order or make it absolute. It is only if the order is made absolute that the funds are paid over to the judgment creditor.

---

[19] [2003] 3 All ER 465 at page 487
[20] 2000] 4 All ER 473, 479 to 480

[39] The Order was therefore absolute and determined title to the sums payable under the Project. As a result the obligations to KCL under the Notices were vitiated, to the extent of the sums directed to be paid to LCaribbean.

[40] The Doctrine of Frustration: On this point Mr Williams submits that:- (i) the effect of the Order was to frustrate the Notices which though not illegal or unenforceable when executed became illegal to perform once the Order was made, to the extent required to be paid to LCaribbean; (ii) if GOSL went ahead and paid KCL that would amount to breach or contempt of the Order; (iii) contracts are deemed to be obligations and Article 994 of the Code requires that the subject of an obligation must be something possible and not forbidden by law or good morals; (iv) a supervening illegality occurred after the obligation under the Notices was contracted and the effect of this was to frustrate performance of the obligations and discharge GOSL from further performance under the Notices. He supports this argument with Article 1132 of the Code which states:-

> *"When the performance of an obligation to do has become impossible through no fault of the debtor and before he or she is in default, the obligation is extinguished and both parties are liberated; but if the obligation be performed in part, the creditor is bound to the extent of the benefit actually received."*

[41] He relied on **Denny Mott and Dickenson Ltd v James B. Fraser & Company Limited**[21] as the leading authority on the doctrine of frustration. In that case a contract for the sale of timber was rendered illegal by wartime trading restrictions and House of Lords held that the restrictions had the effect of discharging both parties from further performance of the contract. Lord Macmillian said

> *"It is plain that a contract to do what it has become illegal to do cannot be legally enforceable. There cannot be default in not doing what the law forbids to be done".*

[21] [1944] A.C. 265

[42] He submits that similarly in **Devcon Ltd v Cap Juluca Properties Ltd**[22] Blenman J (as she then was) in ruling that a commercial contract was frustrated after the contractor's equipment was seized by Customs authorities and damaged opined that:-

> "*The type of frustration which applies to the case at bar is frustration of the adventure which occurs where the commercial venture envisaged by the parties is no longer capable of performance. The essential conduit to determining whether the contract is frustrated is to ascertain whether the contract made is, on its true construction, wide enough to apply to the new situation created by the supervening event. If it is not, then the original commercial adventure envisaged by the parties is considered frustrated and thereby incapable of performance*."

[43] Mr Wiiliams also says, that a court order is capable of producing a supervening illegality, resulting in frustration of performance of an existing obligation. He cites **Z Ltd v A-Z AND AA-LL**[23] in which the English Court of Appeal examined the effect of a mareva injunction (freezing orders) on the owner of a bank account and Lord Denning expressed that:-

> *"Alternatively it can be said that the customer has only authorized the bank to do what is lawful for the bank to do -- and not that which is unlawful -- so that any prior mandate from the customer is automatically annulled when the bank receives notice of the Mareva injunction…*"

[44] Mr Williams adds that the effect is comparable to what obtains when an attachment order is absolute, as in the instant case. To act contrary to the Order would be no less than an attempt to render it ineffectual, which amounts to contempt of court. Although GOSL made an application to discharge or vary the Order and the court was notified of the payments being made to KCL pursuant to the Notices the application was struck out, leaving the GOSL with no alternative but to pay the sums to LCaribbean, as ordered.

[45] Assignment of the accounts receivable from the Project : The Crown asserts that on the date the Order was made and the date on which its own application was struck out, there was no evidence of a valid assignment, because there was no indication that the Notices

---

[22] AXAHCV2009/0014, delivered on 1st March, 2012, para 107
[23] [1982] 2 WLR 288

were accepted by KCL and the Notices by themselves were not sufficient to satisfy Article 1479 of the Code, which provided that:-

> "A*ny absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to rights having priority over the right of the assignee) to pass and transfer from the date of such notice—*
>
> *(a) the right to such debt or thing in action;*
>
> *(b) all remedies for the same; and*
>
> *(c) the power to give a good discharge for the same without the concurrence of the assignor…."*

[46] The Crown further says that the Article corresponds to section 136 (1) of the Law of Property Act 1925 in the UK (LPA), the requirements of which were examined in **Curran v Newpark Cinemas Ltd and others**[24]. That case concerned a direction to pay, similar to the Notices in the instant claim and the court ruled that in order to constitute a valid assignment the document must (i) be in writing, (ii) signed by the assignor, and (iii) communicated to and accepted by the assignee. Jenkins LJ in delivering the decision of the Court made the following observation:-

> *"The document here relied on is the direction and authority, which in point of form is not an assignment to the bank of the debt in question but merely a direction to the garnishees to pay the debt in question to the bank. On the footing that there had, in fact, been no prior agreement with the bank to give such a direction, and that the bank had not been notified of the fact that such a direction had been given, we think the result would follow that the direction and authority, though expressed to be irrevocable except with the consent of the bank, could in fact have been revoked by the judgment debtors at any time as amounting to no more than an arrangement between the judgment debtors and the garnishees in which they*

[24] [1951] 1 All ER 295, 299-301

alone were concerned and which, in the absence of any such agreement or notification, conferred no interest in the debt on the bank."

[47] Mr Williams contends that whereas the Notices were signed and stamped by AMSL and also by a Permanent Secretary in the Ministry of Finance, there is nothing to indicate that it was accepted by KCL, and that is essential to complete notice of the assignment. He says that KCL admits to having become aware of these proceedings around 30th January, 2015. No further order was made until four months later on 4th May, 2015 when the Crown's application was struck out. Yet the relevant documents confirming assignment of the accounts receivable were never placed before the court. All that was available were two incomplete Notices and the Crown only became aware of the other supporting agreements after the Order was made. For these reasons the court is urged to find that the Order vitiated the Notices

[48] In **Curran** the court indicated what should happened in such circumstances, stating:-

"(1) If in garnishee proceedings it is suggested that the debt belongs to or is claimed by some third person, or that any third person has or claims to have a lien or charge upon it, the judge may order the third person to appear and state the nature and particulars of his claim to the debt. (2) After hearing the third person if he appears, the judge may bar the claim of the third person or may order an issue to be tried between the third person and the judgment creditor, or make such other order (including an order as to costs) as may be just."

[49] In that case it was incumbent on the assignee bank to put in evidence confirmation that there was a valid assignment. Mr Williams says that a parallel can be drawn here because that court the court ordered that the third party bank be served and said:-

"*If the bank fails to appear, or fails to establish its claim as assignee, a fresh garnishee order binding the bank and protecting the garnishees in their compliance with it can be made*".

[50] Similarly he says, it was incumbent on KCL to adduce evidence of a valid assignment and in the absence of this the court had no alternative but to make the Order and GOSL had no

choice but to comply with it. GOSL is not at fault as it did not take a unilateral decision to pay the receivables to LCaribbean and applied to have the order discharged but was unsuccessful.

[51] Ultimately, Mr Williams accepts that the agreements executed by KCL and AMSL would have sufficed as evidence of the absolute assignment required under Art 1497 had they been before the court when the Order was made or when the Crown's application was considered. To which KCL says that the Notices contained express notification of the fact of assignment, which is all that was required to confirm the existence of the assignment. GOSL had already accepted the Notices and performed under them, when it commenced direct payments to KCL.

Submissions of KCL

[52] Learned Counsel Mr Leslie Prospere drew the court's attention to the requirements for obtaining an attachment order of sums standing in the name of a judgment debtor, pursuant CPR 50.2(4) and by extension CPR 59.7(4). The Rule states:-

> "*4) A debt may be attached if it –*
> *(a) is due or accruing to the judgment debtor from the garnishee on the date that the provisional order under rule 50.3 is served on the garnishee; or*
> *(b) becomes due or accrues due to the judgment debtor at any time between the service of the provisional order under rule 50.3 and the date of the hearing."*

[53] He submits that the rule codifies the common law equivalent of garnishment proceedings and **Dunlop & Ranken Ltd v Hendall Steel Structures Ltd et al**[25] is authority for the proposition that a debt must be due or accruing to a judgment debtor to initiate this process. The case concerned a dispute arising from an architect certificate and the stage at which it crystalized into a debt capable of being attached. Lord Goddard CJ said*:*

[25] [1957] 1 WLR 1102

"It is well known that garnishee proceedings, that is to say, execution by way of attachment for debts, only applies where there is a debt which is due or which is accruing due, though it may not be immediately payable"

[54] The point, he says, was also emphasized in the earlier case of **Isrealson v Dawson**[26] which concerned whether an insurance company's liability to pay a claim under an insurance policy can become an attachable debt. Scrutton LJ said:

"*Now he (meaning the Judge at first instance) could not make an order in that form* ***unless there was a debt due to the judgment debtor****…….It follows that there was no ground on which the learned judge, who was not referred to the cases which have been cited to us, could make the order." (Emphasis added)*

[55] In the same case Greer LJ endorsed the position of Scrutton LJ stating:-

"…… in order to found jurisdiction *to make any order for attachment or for the trial of an issue,* ***the applicant must establish that there is in law a debt due from the garnishee to the judgment debtor."*** (Emphasis added)

[56] Similarly in **Société Eram Shipping Co Ltd and others v Compagnie Internationale de Navigation**[27] Lord Bingham in considering the extra jurisdictional effect of an attachment of debt order explained the evolution of the attachment of debts in these words:-

"*Lindley MR defined the effect of the order absolute very succinctly in Pritchett v English and Colonial Syndicate [1899] 2 QB 428 at 433: "…… the order is, in substance, not an order to pay a debt,* ***but an order on the garnishees,*** *the syndicate****, to hand over something in their hands belonging to [the judgment debtor] to [the judgment creditor]."***

[57] Mr Prospers contends that the receivables payable under the Project had been previously assigned to KCL with the knowledge of the GOSL and the Notices were merely a fortification of KCL's ownership of the receivables which previously belonged to AMSL. That is so because ownership of these receivables changed by virtue of the Factoring Agreement which was fortified and reinforced by the Purchase Confirmation and

[26] [1933] 1 K.B. 301, 304-305
[27] [2003] 3 All ER 465,

Assignment Agreement, followed by the Notices to GOSL. There was from September 2011 an outright purchase of the receivables and GOSL was put on notice of the assignment. As a result the receivables could not be considered a debt due to AMSL capable of attachment under section 22 of the Crown Proceedings Act or CPR 59.7(4).

[58] He further says that Mr Williams arguments on this point would have been justified only if the receivables in the hands of GOSL were still the direct assets and property of AMSL; biut when the Order was made the receivables had long been factored and assigned to KCL, who became the rightful owner. GOSL's attempt to interpret the Order in a manner which vitiates the Notices is flawed because the language of the Order is clear and unambiguous and only restrains GOSL from remitting sums to be paid to AMSL and directs that same be paid instead to LCaribbean.

[59] The Order does not in any way (expressed or otherwise) mention or interferes with the contractual rights existing between GOSL and KCL and could not have affected the Notices, as it did not speak to these rights at all.

[60] Having established from these principles that the receivables were incapable of being classified as a debt due to AMSL, if GOSL erroneously made the payment to LCaribbean in compliance with the Order, it would be faced with the inherent risk of having to pay the amount twice, because a third party cannot pay a debt to the wrong party without incurring the concomitant risk of having to pay it again to the rightful party. Mr Williams relied on **Crantrave Ltd v Lloyds Bank plc**[28] as authority for this proposition. That case concerned garnishment of a bank account in circumstances where a bank failed to obtain the prior consent of the judgment debtor to pay out monies to a judgment creditor. The court determined that the bank had improperly debited the balance standing in the account of the judgment debtor and was required to repay the sum. May LJ in evaluating the bank's conduct said:

> "*……it is my in view obvious that the bank cannot <u>without the customer's authority or unless there is an obligation imposed by due process of law</u>, unilaterally choose to pay money to a creditor of the customer and reduce the balance in the*

[28] Supra note 20

customer's account by debiting the amount of the payment……If the bank would do so the customer would remain entitled to require payment of the full unreduced credit balance…… It was a gratuitous payment and the bank had no defence to the claim unless they established additional facts. No equity arises from the circumstances of the payment itself. ***The bank simply made a mistake."*** (Emphasis added)

[61] On that note Mr Prospere says the Crown was well of aware of the absolute nature of the assignment of the receivables and the contractual obligation to pay same to KCL, at the time the Order was made and could also have utilize Article 381 of the CCP to be joined as a party to the LCaribbean proceedings to appeal against the order and secure a stay. Having failed to take these steps, he submits, GOSL is precluded from approaching the court for relief, having regard to its full knowledge of the assignment of the debt to KCL. Thus the effect of GOSL's conduct was to wrongly pay to LCaribbean funds to which AMSL was no longer entitled, perhaps genuinely believing that it was compelled to honour the terms of the Order. However the fact is that GOSL at the time of payment knew that it was indebted to KCL and not AMSL and it is still open to GOSL to pursue legal proceedings against LCaribbean as constructive trustee, to recover the wrongful payment.

[62] He agreed on the authorities cited, that an attachment order operates as a judgment in rem, but it is only in circumstances where it binds the property that belongs of the judgment debtor. In **Société Eram Shipping Co Ltd and others** Lord Hoffman specifically stated that the order must concern the property of the judgment debtor. Thus the principle of a judgment in rem cannot assist to the Crown, as there were no longer any receivables due to AMSL, under the Project, on the date that the Order was made.

[63] Concerning **Z Ltd** on which the Crown relied to say that the Order was absolute and GOSL was under an obligation to abide by its terms, KCL submits that GOSL was fully aware that the receivables no longer belonged to AMSL, to the extent that it filed an application to have the order discharged.

[64] Mr Prospere says further that the instant case is more consistent with **Crantrave**, as it was unreasonable for GOSL to pay the monies to LCaribbean having regard to its own knowledge of the assignment and the legal options available to challenge the Order. To compound things this was not an arrangement between GOSL and KCL which would start at a future date. GOSL had already commenced and made several payments to KCL and here can be no stronger evidence of the existence of the contractual relations between the parties. Contrary to the Crowns assertion, there was full acknowledgment by GOSL that payments were made to KCL and estoppel must arise to prevent GOSL from seeking to evade completion of the contract. To now suggest that an illegality arose, which would cause a contempt had it not complied with the order, is erroneous because there were other legal options that it failed to pursue. This is simply is a case where one party is fully aware of its contractual obligations, has partially performed and is now seeking to evade full performance without having any basis in law for the assertions being made.

[65] KCL further contends that in the **Devcon** case Blenman J outlined 5 propositions which describe the essence of the doctrine of frustration which are instructive. The 4th proposition is that frustration should not be due to the act or election of the party seeking to rely on it and must be some outside event or extraneous change of situation and the 5th is that a frustrating event must take place without blame or fault on the party seeking to rely on it.

[66] GOSL took a conscious decision not to avail itself of all available legal remedies and cannot now seek to rely on its own omission as a basis for invoking the principle of frustration. The obligations under the Notices were never impossible or illegal to perform and GOSL could have continued to meet its obligation. The decision to pay LCaribbean does not discharge GOSL of its responsibility to meet its obligations. While GOSL still has a remedy by way of an action to declare LCaribbean the constructive trustee of the monies paid pursuant to the Order, KCL on the other hand has no legal remedy open to it, save these proceedings. It cannot approach AMSL to say that arrangement has been breached. AMSL is entitled to fully rely on the assignment of its rights in the receivables and the ability of KCL to bring an action against the Crown as debtor, to recover the monies wrongly paid.

[67] In response to the Crown's reliance on Article 994 of the Code which provides that the subject matter of an obligation must be something possible and not forbidden by law or good morals. KCL submits that the subject matter of the Notices was a valid commercial transaction contemplated by the parties and was not tainted by any form of illegality, impropriety or immorality. In the circumstances Article 994 cannot assist.

[68] On the issue of the validity of the assignment Mr Prosper submits that Article 1479 is satisfied if 3 requirements are met:- (i) the assignment must be in writing; (ii) it must be under the hand of the assignor (in this case AMSL) and (iii) express notice in writing must be given to the debtor (in this case GOSL). The Notices fully complied with these requirements. They were in writing, prepared and signed by AMSL, duly acknowledged by the signature of a Permanent Secretary in the Ministry of Finance (having authority under the Finance Act to bind the Crown) and the stamp of the Ministry is affixed to each. Both Notices expressly stated that for valuable consideration AMSL has assigned all receivables owing under the Project to KCL. He says Article 1479 differs from section 136 (1) LPA because the latter may require acknowledgment by the assignee, for an assignment to be effective; but that is not a requirement of Article 1479.

Who is the rightful owner of the receivables payable from the Project

[69] As I understand it factoring is a form of debt financing arrangement in which a business enterprise called a seller, sells its receivable assets for valuable consideration, at a discount to a third party, usually a financial institution called the factor, in order to raise cash to meet immediate needs. The receivables are usually premised on invoices generated for work performed or goods sold to a third party, who in turn becomes financially liable for payment of these invoices. In the instant case the receivables were for construction and rehabilitation works performed by AMSL under the Project. AMSL was the seller of its receivable assets to KCL as the factor and the Crown was the third party debtor responsible for payment of the receivables.

[70] Factoring requires that sale of receivables carry a transfer of ownership of the receivables to the factor in a manner that conveys all of the rights associated with the receivables, including the right to receive payment directly from the debtor, such that the receivables become the asset of the factor. The debtor must be notified of the sale of the receivables and the factor's entitlement to make all collections on these receivables. The transfer of rights in receivables is done by legal assignment of the debts (usually called a chose or thing in action)[29].

[71] Martin Hughs writing in the Journal of International Banking and Financial Law on the subject of assignment of choses in actions made the following observations in relation to legal assignments, based on the position in English law:-

> "……*The effect of a legal assignment is that the assignee becomes the owner of the debt in place of the assignor, which no longer has any right to sue for the debt and cannot give a good discharge for it.* ***If the debtor were to pay the assignor after receiving notice of the assignment, it could be required to pay again by the assignee****.* ***Thus a lender who takes a legal assignment of a chose in action becomes the owner of the chose****…….The giving of notice freezes the position, so it is in an assignee's interest to give notice as soon as the assignment is effected…….What matters is that the debtor is made aware of the assignment……The assignee under a legal assignment has the legal right to the debt or thing in action and all legal and other remedies for the same…..****The assignee can sue the debtor to the exclusion of the assignor*** *but the generally accepted position is that all necessary parties should participate in proceedings, so in a case where an assignee needs the participation of its assignor, it can join the assignor as a defendant if the latter will not join in bringing the action[30]." (Emphasis added).*

---

[29] 22 Halsbury's Laws (5th edn) para 333.

[30] *Martin Hughes, Assignment of Choses In Action, (2001) 3 JIBFL 103*

[72] In **First Vancouver Finance v. M.N.R.**[31] the Supreme Court of Canada in considering the issue of ownership of factored receivables adopted dicta from the court at first instance, where the trial judge said the following:-

> *"On the preliminary issue of the ownership of the factored accounts, Wimmer J. relied upon the definition of a factoring agreement from Alberta (Treasury Branches) v. M.N.R., [1996] 1 S.C.R. 963, at paras. 30-31. In that case, Cory J. stated at para. 31 that, "**A factoring of accounts receivable is based upon an absolute assignment of them.** It is in effect a sale by a company of its accounts receivable at a discounted value to the factoring company for immediate consideration. Wimmer J. observed that, according to Alberta (Treasury Branches), **an absolute and unconditional assignment of book debts is beyond the reach of the Minister under garnishment provisions**. He held further that the **assignments from Great West to First Vancouver were absolute and unconditional because, upon completion of the assignments, Great West had no residual rights in the property and could not redeem or recover the accounts** and, in that circumstance, Canada Safeway had no liability to Great West after there was a completed transfer of accounts. Although the Minister argued that the assignments were not absolute because under the factoring agreement First Vancouver had recourse to Great West if a customer disputed or failed to pay an account, Wimmer J. noted that **the definition of factoring approved by Cory J. contemplated that a factor may acquire an absolute interest in book debts with or without recourse** (p. 718)." (Emphasis added).*

[73] The receivables from the Project were factored to KCL from September 2011 and the Notices were issued in 2012 and 2013 which brought about completion of the absolute assignment several months prior to the Order in the LCaribbean claim. GOSL commenced payments in compliance with the Notices and several payments were remitted to KCL before the Order was made. It can hardly be said on these facts that KCL had not received no communication of, or accepted the Notices.

---

[31] [2002] SCC 49

[74] Applying the foregoing legal principles to the facts, I formed the view that once the receivables were sold and the fact of assignment was stipulated in the Notices, they became instruments of absolute assignment, complete and perfect in themselves without any residual right remaining with AMSL to redeem or recover the receivables. I am also satisfied on perusal of the documents adduced by KCL that the parties intended that the assignment of the receivables to KCL was absolute and unconditional such that the receivables irrevocably became the property of the KCL, once the Notices were concluded. I do not agree that these rights could have been extinguished, simply because the relevant document were not before the court when the Order was made.

[75] I have considered the submissions of the Crown in relation to the **Curran** case and I am not persuaded that the circumstances mirror that of the instant case. In **Curran** the court was particular to say that a direction to pay given after garnishment summons had been issued, in circumstances where there was no proof of prior agreement for assignment and the assignee bank had been informed of the assignment, could not amount to an absolute assignment. The court viewed the arrangement as strictly one between the garnishee and the judgment debtor, to the exclusion of the lender bank and would not be considered it a valid assignment albeit that it was stated to be irrevocable. Whereas this outcome is understandable in the circumstance of that case, in the instant case I would venture to say that the facts are the inverse. Here AMSL and KCL had first executed a factoring agreement which made provision for execution of an assignment agreement, followed by Notices to be served on the account debtor GOSL in the form and substance stated in clause 3 of the Factoring Agreement. On the evidence the Notices were concluded and remittance of the receivables to KCL as assignee commenced several months prior to the attachment proceedings. When GOSL reneged on payments KCL made written demands based on the authority of the agreements and Notices, and sought to pursued its interest on the authority of the same Notices in the petition filed in the LCaribbean claim and these instant claim. The Notices and supporting agreements were provided as exhibits in both proceedings.. I do not think it can be said with any measure of reasonableness mind would that the Notices were not communicated to or accepted by KCL at the time they were affected.

[76] It is my considered opinion that the circumstances of the instant case was such that the assignment was given in writing under the hand of the assignor AMSL, who transferred all its right to and remedies for the receivables to KCL. AMSL also expressly relinquished its right of redemption by stipulating in the Notices that the direction was irrevocable except with the consent of KCL or its local agent and no one else. Payments to KCL were also deemed to be sufficient discharge GOSL's indebtedness under the Project and the Notices did not reserved any residuary rights on behalf of AMSL as assignor.

[77] It has long been established that the characteristics which confirm that an absolute assignment has been effected for the purposes of section 136 of the LPA (the equivalent of Article 1479) are (i) whether notice has been given to the debtor (in this case GOSL) and (ii) whether the assignor (in this case AMSL) has retained any rights in relation to the debts or the interest has passed in its entirety. Once these conditions are complied with the whole of the interest passes unconditionally to the assignee (in this case KCL) and the debtor is not left in a state of uncertainty as to whom to pay[32]. The factoring Agreement expressly stated that only payment to KCL would amount to satisfaction of GOSL's indebtedness under the Project, thus payment to a party other than KCL could not amount to satisfactory discharge this obligation.

[78] I found merit in KCL's submissions that once AMSL sold the receivables and executed the relevant agreements, ownership of the receivables from the Project transferred to KCL and based on the documentation all that was required to give effect to an absolute and unconditional assignment pursuant to Article 1479 had been done. I have no doubt that KCL would have been privy to the Notices, they having been a necessary step for securing payment of the receivables from GOSL.

[79] In the circumstances I conclude that the receivables from the project were the property of KCL.

---

[32] Rhiannon Singleton, Statutory assignments by way of security: a paradox? (2016) 1 JIBFL 12

Did the Order vitiate GOSL's obligations under the Notices

[80] The Crown's position on this issue is that the Order was absolute and determined title to the sums payable under the Project. As a result it vitiated the obligation to KCL under the Notices, to the extent of the sums directed to be paid to LCaribbean.

[81] KCL's argument is that on the authority of the rulings in **Dunlop & Ranken Ltd v Hendall Steel Structures Ltd et al** and **Isrealson v Dawson** it is settled law that a debt capable of attachment in the hands of a garnishee must be one which is due or accruing due to the judgment debtor because an attachment order is execution in rem against the property of the judgment debtor, against a res or chose in action which belongs to him and which is within the jurisdiction of the court making the order.

[82] Having established that KCL lawfully owned the receivables payable by GOSL under the Project at the date that the Order was made, I accept KCL's qualification that if the order operated as a judgment in rem, it could only apply to sums proven to be that of the judgment debtor AMSL. The Order did not speak to or interfere with the contractual rights of KCL under the Notices and it would be incorrect to interpret the Order as having made a pronouncement on title to the receivables which were factored and had become the property of KCL, prior to the attachment proceedings.

[83] It is the law that if one party wrongly hands over the property of another to a third party in satisfaction of another's debts, the available remedy is restitution by the party at fault. If the words of May LJ in **Crantrave** may be echoed here, GOSL simply made a mistake, when it paid receivables assigned to KCL to LCaribbean, in satisfaction of the debts of AMSL.

[84] In **Crantrave** though the outcome turned on an order nisi which merely freezes funds of a judgment debtor in the hands of a garnishee, which can only be been paid after the order was made absolute, the point is well taken there must be a debt due to the judgment debtor capable of being attached and only then can an absolute order operate as a judgment in rem. There is a common thread in the cases cited by the Crown which is that

the courts were dealing with property belonging to the judgment debtor, in the hands of a garnishee. There is no parallel to the instant claim and the insurmountable hurdle for the Crown, as I see it, is that the law establishes that property rights in factored receivables is transferred to factor as assignee, once the assignment is absolute.

[85] On the issue of frustration raised by the Crown, I found no illegality of the kind required to give rise to frustration of the performance of GOSL's contractual obligations under the Notices, for the simple reason that the direction in the Order to pay monies to LCaribbean could only have been with respect to sums which belonging to AMSL, if any existed under the Project to the value contained in the Order; but separate and apart from the receivables which were factored to KCL. It is settled law that a debt owed by one person cannot be collected from property belonging to another. In that sense the receivables which belonged to KCL could not have been considered a debt due to AMSL, for the purpose of satisfying its debts to a third party when the terms of the Order spoke specifically to payment by the Crown to AMSL. At that time GOSL's was making no payments to AMSL and its obligation for remittances was strictly to KCL.

[86] In the circumstances I conclude that the Order did not vitiate GOSL's obligations to KCL, under the Notices.

Is the Crown still liable for the remaining payments to KCL

[87] Having determined that the receivables from the Project belonged to KCL and could not have been the used to settle unrelated debts of AMSL the legal authorities establish that if factored accounts are paid to a party other that the assignee, then debtor remains liable to the assignee to pay the debt over again.

[88] On this issue I found dicta of Jenkins LJ in **Curran** to be instructive when he said:-

> *"It must be remembered that a garnishee is in a difficult position.* ***He has to obey any order made against him, yet, if he has had notice of a prior assignment, the order is no protection to him, and, if he pays in compliance with the***

order, he nevertheless remains liable to the assignee to pay the debt over again: *see Yates v Terry. This being so, we think it is clearly wrong, where the garnishee shows that he has notice of a prior assignment, to make an order against him unless he is able to prove strictly and conclusively that the assignment of which he has notice is a valid assignment." (Emphasis added).*

[89] It is evident that at the time payment was made to LCaribbean GOSL was fully seized of the assignment of the receivables payable from the Project and such these receivables could only have been categorized as a payable to KCL.

[90] In **First Vancouver Finance v. M.N.R** the question for the court was whether a factor was entitled to recover monies paid to the Minister of National Revenue from receivables which were purchased prior to the Minister issuing a request for statutory garnishment, in connection with these receivables. The court ruled that monies owing on accounts factored prior to the date of the request for garnishment were not subject to the garnishment, however accounts factored after that date were effectively intercepted by it. In other words once the receivables were factored before the Minister issued a request to garnish, the National Revenue was prevented from asserting an interest in these invoices. Consequently, a declaration was made confirming the factor's entitlement to the funds already paid to the Minister.

[91] On this point I conclude that the funds paid to LCaribbean were indeed the property of KCL, which ought not to have been utilized as if it were the property of AMSL. Therefore GOSL is liable to pay to KCL the remaining sums under the Notices.

CONCLUSION

[92] For the reasons outlined above I declare and order as follows:-

1.The Order of the Court dated 18th August, 2014 did not vitiate the Notices of Direction to Pay dated 20th February, 2012 and 6th March, 2013.

2.The defendant/respondent continues to remain contractually liable to remit to the claimant/applicant the remaining payments due under the Notices.

3. Judgment is given for the claimant/ applicant in the sum of $1,335,892.78 together with interest on the said sum at the rate of 6% per annum from 5th November, 2015 until payment in full.

4. The claimant/applicant is awarded the costs of this application in the sum of $7,000.00.

Cadie St Rose-Albertini
High Court Judge

By the Court

[SEAL]

Registrar