



Neutral Citation Number: [2022] EWHC 2578 (Ch)

Case No: CR-2021-000940

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
IN THE MATTER OF BITUMINA INDUSTRIES LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF INSOLVENCY ACT 1986

7 Rolls Buildings
Fetter Lane, London
EC4A 1NL

Date: 12 October 2022

Before :

MR SIMON GLEESON
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

(1) LEE MANNING
(2) CAMERON FRAZER GUNN
(Joint Administrators of Bitumina Industries
Limited)

Applicants

- and -

(1) NESTE AB
(2) RAMI FARAH

Respondents

Mr. Olivier Kalfon and Mr. Joseph Bunting (instructed by **Locke Lord (UK) LLP**) for the
Applicants

Mr. Daniel Petrides (instructed by **McCarthy Denning**) for the **First Respondent**
Mr. Christopher Brockman (instructed by **Keystone Law**) for the **Second Respondent**

Hearing dates: 14 July 2022

APPROVED JUDGMENT

This judgment was handed down remotely by circulation to the parties' representatives by email and release to the National Archives. The date and time for hand-down is deemed to be 12 October 2022 at 10.30 am.

Mr Simon Gleeson :

1. This is an application made by the joint administrators of Bitumina Industries Limited (**“the Company”**) for directions as to the validity and enforceability of a charge given to the Second Respondent by the Company in January 2020 (**“the Charge”**).
2. The Charge constituted a grant of a floating charge to a connected person at a relevant time, and is therefore prima facie invalidated by s.245 of the Insolvency Act 1986 (**“The Act”**). However, that section provides that such a charge is not invalidated if consideration is given for it at the time of or after its creation.
3. The Second Respondent argues that he did give such consideration both at the time when the charge was created and thereafter. There is no dispute about the facts in this regard – the issue is simply whether, as a matter of law, his interactions with the Company constituted the giving of good consideration at the same time as or after the creation of the Charge so as to validate it.
4. The First Respondent (who is the largest unsecured creditor of the Company) argues that the Charge, although validly created, was invalid under s.245 at its moment of creation, and that it is not validated by any of the subsequent actions of the Second Respondent.

Introduction

5. Bitumina International DMCC (**“DMCC”**) was a company established in Dubai on 10 April 2019. It was owned by the Second Respondent, Mr Farah. Its main (and apparently only) asset appears to have been a cash balance of \$2,350,000. On 22 November 2019, Mr Farah entered into a sale and purchase agreement (the **“SPA”**) to sell DMCC to the Company in consideration of the issue by the company to him of

2,332,750 convertible secured loan notes of \$1 each (the “**Notes**”). The security for the Notes was to be constituted through a separately executed debenture granting a floating charge over the assets of the Company. The terms of the Notes were recorded in a document called the Convertible Loan Note Instrument (“**CLNI**”).

6. At the time of the sale of DMCC to the Company, and for some time thereafter, Mr Farah was a director of the Company.
7. The SPA was executed on the 22 November 2019. It provided that completion should take place “immediately after the signing of this agreement”, at which point the shares in DMCC should be transferred and the Notes issued.
8. The issue of the Notes was approved by a board resolution of the Company, on the same day as the execution of the SPA, and certificates evidencing the issue of the Notes were issued under the Company’s seal on that date (the “**Certificates**”).
9. A debenture securing the Notes was also executed on that day (the “**First Debenture**”). It appears that this debenture was validly executed. However, it was not registered within the prescribed period, and therefore became ineffective against the Joint Administrators at the expiry of that period.
10. The completion process of the SPA was protracted, since the UAE company law formalities relating to the transfer of the shares in DMCC took time to complete. Since the SPA had provided for completion to take place “immediately”, both parties were now in breach – the Company because it had not granted a valid Debenture, and Mr Farah because he had not transferred the shares. During this period, the parties to the SPA clearly agreed to vary its terms to require the creation of another Debenture. A

second debenture was created (the “**Second Debenture**”), which was invalid on its face. However, nothing turns on that document.

11. It was therefore agreed between the parties that another Debenture (the “**Third Debenture**”) should be executed on the same day that the share transfer was to be completed. This was 22 January 2020.
12. The Third Debenture was formally invalid for two reasons. First, Mr Farah was both a party to it and witnessed the signatures of Mr Schmidt and Mr Hamoud (*Seal v Claridge* (1881) 7 QBD 516 at 519); and second, that the execution pages were not in fact executed, but the execution page of the Second Debenture was attached to it (*R (On the application of Mercury Tax Group) & Another v HMRC* [2008] EWHC 2721 (Admin)). It therefore never took effect as a deed. It was, however, registered with the registrar of companies as a charge.
13. It is not legally necessary for a floating charge to be granted in the form of a deed. Where parties bind themselves to create a charge, purport to do it by deed, and the deed itself fails, the question becomes simply one of whether the steps taken by the parties, disregarding the deed, were sufficient to create a legally enforceable obligation on the chargor to apply the charged property in discharge of the secured obligation. It is common ground between the parties that that was the case here. A valid equitable charge (the “**Charge**”) therefore came into existence at this time.
14. Shortly after the completion of the SPA, the terms of the agreement between the parties were significantly renegotiated. This renegotiation involved amendments to the terms of the Notes recorded in the CLNI, and these amendments were effected by the execution of a deed of amendment dated 23 April 2020 (the “**Deed of Amendment**”). The question of whether the effect of the Deed of Amendment was in fact to cancel the

existing Notes and replace them with new instruments is a significant point in this application.

15. It should be noted that the Charge was in the form of an “all monies” debenture – thus the amendments effected by the Deed of Amendment did not require any amendment to the Charge, and would not have done so even if they had constituted the extinction of the existing Notes and the creation of new instruments.
16. Mr Brockman, for Mr Farah, says that the restructuring of arrangements between the parties went some way beyond the specific measures recorded in the Deed of Amendment, and that in analysing the position I should look at the entire agreement between the parties, and not merely the terms of the Deed of Amendment. I accept that submission. I will therefore refer to the entirety of the restructuring of the arrangements between the parties as the “**Renegotiation**”.
17. The joint administrators of the Company were appointed pursuant to an Order of ICC Judge Prentis on 30 June 2021.

The Law

18. S.245(2) of the Act so far as relevant to this application provides:

“(2) [Invalidity of floating charge] Subject as follows, a floating charge on the company’s undertaking or property created at a relevant time is invalid except to the extent of the aggregate of–

- (a) the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge,

(b) the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company, and

(c) the amount of such interest (if any) as is payable on the amount falling within paragraph (a) or (b) in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.”

19. S.235(3) provides:

“the time at which a floating charge is created by a company is a relevant time for the purposes of this section if the charge is created – in the case of a charge which is created in favour of a person who is connected with the company, at a time in the period of 2 years ending with the onset of insolvency”

20. S.245(5) (a) provides that the onset of insolvency in cases where an administrator is appointed by the court is the date of the administration application.

21. S.249 provides that a person is “connected” with a company if they are a director of that company. It is accepted that for the purposes of s.245 Mr Farah is connected to the Company and that the relevant period is two years.

22. Section 245 is not based on any requirement for, or implication of, a desire to prefer a particular creditor - there is no “mental element”. Questions as to the intention of the company, the connected person or indeed anyone else are not relevant – if a charge is granted within the relevant time, it is prima facie invalidated.

23. The section does, however, save certain charges. Where a charge is granted “for consideration”, it is valid to the extent of the value of that consideration, provided that the consideration is given at the same time as, or after, the granting of the charge. However, words of limitation are included in the section in order to make clear that only certain types of assets can constitute consideration for this purpose. Thus in order

to show that he has given consideration, the beneficiary of the charge must show that he has either provided “money paid, or goods or services supplied” to the company granting the charge, or has procured a discharge or reduction of a debt of the company.

24. It is also important to bear in mind the legal nature of a charge. In Bridge et al, *The Law of Personal Property* (3rd ed. 2022), the following summary is given at para 16-068:-

“When a charge is created, the debtor (the “chargor”) simply agrees with the creditor (the “chargee”) that certain assets (the “charged assets”) are to be appropriated to the discharge of a debt or other obligation. It is in the nature of a charge that it be made for consideration. If the security agreement is between debtor and creditor, there is inevitably consideration, but charges are not limited to agreements between these parties. What is critical is the existence of a specifically enforceable agreement creating the charge. This is because the existence of the equitable proprietary right relies on the chargee having a specifically enforceable right to have the charged property appropriated to the payment of the relevant debt or discharge of some other obligation. As Briggs J put it in *Re Lehman Bros International (Europe) Ltd*: “It is that right of specific enforcement which transforms what might have otherwise been a purely personal right into a species of proprietary interest in the charged property” ([2012] EWHC 2997)”.

25. Because a charge arises out of an enforceable personal obligation, “an unconditional promise to create a charge in the future in equity creates a charge immediately since equity looks on as done that which ought to be done. This again is subject to the proviso that valuable consideration has been given in return for the promise”; *Levy v Abercorris Slate & Slab Co* (1887) 37 Ch D 260, at 265. It is therefore clear that any enforceable

agreement (generally, an agreement for good consideration to grant a charge) is effective to create that charge in equity.

26. However, not all agreements to grant a charge bring a charge into existence. In *Re Jackson and Bassford* [1906] 2 Ch 467, Buckley LJ said

“An agreement to give security may be either one of two things. It may be so expressed as to create a present equitable right to a security. If it does that, then it would seem to me that it must be registered under s. 14 of the Act of 1900, otherwise it is void as against the liquidator and any creditor of the company. Or it may be so expressed as to be merely an agreement that in some future circumstances a security shall in the future be created. In that latter case, the agreement not creating a present security will not require registration.”

27. Where any such charge is brought into existence, it must be registered in the same way as any other charge, and that registration must be within the statutory period beginning with the date of its creation. As Sir Christopher Slade said in *Power v Sharp* [1993] BCC 609

"In a case where the promise to execute a debenture creates a present and equitable right to a security, and moneys are advanced in reliance on it, the delay between the advances and the execution of the formal instrument of charge is immaterial; the charge has already been created and is immediately registerable, so that other creditors of the company will have an opportunity to learn of its existence; the temporal requirements contained in s.212 of the 1908 Act and s.245 of the 1986 Act will be satisfied."

The DMCC Transaction

28. The DMCC transaction was not a conventional corporate sale and purchase, and it is important to understand its economic reality. The sole asset of DMCC was its cash balance – in effect the Company was buying a box containing \$2.3m in exchange for the issue of \$2.3m of Notes. However, by buying the box, the Company did not obtain unrestricted access to its contents. Mr Farah controlled the bank account within which the \$2.3m was held, and the Company could only access that money with Mr Farah’s active co-operation. Mr Farah allowed the use of the money to finance bitumen trading transactions, but for no other purpose.
29. Mr Farah’s evidence is that the intention at this stage was that the Company would shortly raise new finance from external finance providers. At that point the Notes would be paid off and the Company would gain unrestricted access to DMCC’s cash balances. The transaction was therefore intended to be in the nature of a bridging loan.
30. The management of the Company, personified by Mr. Berndt Schmidt, seems to have been considerably more interested in the acquisition of more bitumen companies than in raising new finance. In particular, he was seeking to acquire Stratura Asfaltos (a Brazilian Asphalt company) (“**Stratura**”) and Nynas NB, a Swedish refinery company (“**Nynas**”) from Neste. This caused the Noteholders a great degree of concern, to the extent that they almost called in the Notes. As a result, negotiations took place to reach a new agreement. The changes to the terms of the Notes were effected by the Deed of Amendment.
31. The drafting of the Deed of Amendment and accompanying resolutions was carried out by Curtis, a firm of lawyers based in London. A key point here is that the form which the Notes took was that of registered notes whose existence is evidenced by certificates

issued under seal by the Company. Curtis are said to have been concerned that the changes to the CSNI being made by the Deed of Amendment were so fundamental that they amounted to the cancellation of the existing Notes and the issue of new Notes. That led to the inclusion in the Deed of Amendment of provisions requiring that the original Certificates dated 22 November 2019 be delivered up to the Company, and that they be replaced by new Certificates with new numbers issued on 23 April 2020 (the “**Note Exchange**”). The old Certificates were to be destroyed by the Company, and the replacement Certificates were to be reflected and recorded in the register of the Notes.

32. The benefit to the Company of the Renegotiation was twofold. By extending the maturity of the Notes from one year to two, it gained more time to raise external capital. Also, and importantly, Mr Farah agreed that the cash held in DMCC could be deployed elsewhere within the group. This was a somewhat limited concession, since the cash remained subject to the control of Mr Farah and could only be deployed with the consent of Noteholders. However, USD \$1,726,849.80 of DMCC’s cash was deployed after 23 April 2020.
33. There was a second round of amendments to the terms of the Notes in October 2020, but this does not seem to have been substantive.

The Issues

34. The joint administrator’s application before this court is set out at para 6.1 of the application notice

“Giving directions (pursuant to paragraph 63 of Schedule B1 of the Insolvency Act 1986) in relation to the following matters arising in the administration of the Company, namely: the validity and enforceability of a debenture dated 22 January 2020 (“the 2020 Debenture”), created between the Company (as chargor) and the second respondent, Nader Hamoud and Jonathan Woods (as chargees); specifically whether, and

if so the extent to which, Section 245 of the Insolvency Act 1986 applies to the second respondent so as to invalidate his security under any floating charge created by the 2020 Debenture”

35. It should be noted that this is not a request to validate the Third Debenture as actually executed, since it is common ground that that that document is ineffective. However, it is common ground that the Charge was brought into existence by the attempts to create that debenture. It is that Charge in respect of which the Joint Administrators seek directions.
36. The Joint Administrators have provided a series of helpful submissions as to this point. They have not taken a position on the issues, but have made a series of submissions intended to assist the court. They have succeeded in that aim.
37. Mr Farah’s case in broad terms is:
 - i) The Charge was valid as originally created;
 - ii) The use of the word “consideration” in s.245 IA 1986 now extends to include contractual consideration, which can include both the shares in DMCC, and also his subsequent conduct;
 - iii) The process adopted with the surrender of the old Notes was the discharge of a debt of the Company equivalent to the value of the Notes. The consideration received by the Company at that time was therefore the full nominal value of the Notes;
 - iv) Simultaneously and in consideration for this the Company issued new Notes. These new Notes were secured by the existing charge (the “**Note Exchange**”). For the purposes of s.245, this transaction should be regarded as a separate transaction for value.

38. Neste's position is that not only does the Note Exchange not constitute the giving of consideration under s.245, but that s.245 invalidated the debenture at the time when it was originally created. They argue this on two grounds, one being that the shares in DMCC did not constitute eligible consideration for the purposes of s.245 in any event, and the other being that, even if they did, the charge was in fact created after those shares were transferred to the Company.

39. The questions which require to be answered are therefore four;-

(1) Was the Charge invalid under s.245 by reason of having been granted after the relevant consideration had been received by the Company?

(2) Did the Renegotiation constitute the giving of new consideration in accordance with s.245(2)(a)?

(3) Did the Note Exchange result in a discharge of a debt of the Company within the meaning of s.245(2)(b)?

(4) Did the release of funds from DMCC pursuant to the Renegotiation constitute money paid to the Company within the meaning of s.245(2)(a)?

1. The Validity of the Charge

40. Section 245(2)(a) of the Act provides that a charge will be valid to the extent of the value of so much of the consideration for its creation as consists of "money paid, goods or services" which are "supplied to the company at the same time as, or after, the creation of the charge". In order to apply this rule to these facts, we need to know the date of the Charge's creation, the date of the provision of any consideration to the

Company, whether that consideration falls within the limited range of consideration which can be recognised as such by the section, and what the value of that consideration should be taken to have been.

The Date of creation of the Charge.

41. The SPA imposed an unconditional contractual obligation on the Company to create a charge. It is very common for a contract to impose an unconditional obligation to create a charge by deed, but for the deed itself to be executed some time after the contract is entered into. The legal position where this is done is relatively well understood – the execution of the valid deed of charge vacates the obligations created by the original contractual charge. Gough on Company Charges (2nd ed) suggests that this is because the contractual charge is extinguished through merger (pp 711-2) (see *Re Tyrrels Ltd* [1929] SASR 450), and I agree.
42. However, it should be emphasised that the result of this process is not the creation of two co-existent charges. In *Re Gregory Love & Co* [1916] 1 Ch. 203, there was an agreement to charge, which was registered, and a subsequent deed, which was also registered. The latter was given within the vulnerable period. Sargant J held that the prior agreement, although duly registered, could not save the subsequent security, as the subsequent formal charge was to complete an execution or performance of the prior agreement as to leave no right or obligation still subsisting under it (at p.211). The effect of the instrument, as Cozens-Hardy M.R. said in *Re Columbian Fireproofing* [1910] 2 Ch. 120 at 123, is that "the formal instrument necessarily supersedes and gives the go-by to the prior agreement".
43. That, however, did not happen in this case, because the deed was not registered in time. As a result, I think it is correct to say that the initial contractual charge continued in

existence. However, since it was not registered, it was void against a liquidator, administrator or creditor, and was therefore useless for all practical purposes.

44. I do not think that anything turns on the failed attempt to create the Second Deed.
45. After the failure of the First Deed to create a valid charge, the position was that the Company was subject to an unperformed contractual obligation to create a valid floating charge. I think it is clear that the failed creation of the first deed did not discharge that obligation - where a person contracts to do something, and attempts unsuccessfully to do it, it is clearly not the case that the failed attempt at performance discharges the contractual obligation to perform. The Company here, having contracted to give a valid floating charge and failed to do so, was under a continuing obligation to perform that obligation. That obligation did not itself create a charge, since it was “merely an agreement that in some future circumstances a security shall in the future be created” (*Jackson & Bassford Ltd* [1906] 2 Ch 467). However, the only way in which the parties could perform their contractual obligations was to agree a new date on which to grant a new charge, since there was nothing that the parties could do to validate the original charge (the date for registration having passed).
46. It seems to me to be clear from the facts that at some point the Company and Mr Farah must have agreed that the new charge was to be created on a specified date, and that date was to be 22 January 2020. On that date a new charge was to be granted, a new deed was to be executed, the new charge was to merge into that new deed, and that new deed was to take effect as from that agreed date. I also think that it is clear that to the extent that the agreement to do this constituted a mutually agreed variation of the terms of the SPA, acts done in performance of it were enforceable contractual obligations. Consequently the agreement by the Company to grant a new charge on the specified

date gave rise to a new contractually enforceable charge, which took effect on that specified date.

47. The intention of the parties was that, as is normal, the contractual charge thus created should merge into the deed of charge. However, that deed was never created.
48. The Joint Administrators suggest that the legal basis for the Charge is not in fact the contract to grant the charge, but the failed charge itself. In this regard they rely on *Re Fireproof Doors Ltd* [1916] 2 Ch 142, at pp.150-151, per Astbury J (followed in *Rushingdale Ltd SA v Byblos Bank SAL* (1986) 2 BCC 99509, at 99516-99518) as authority for the proposition that where, as here, a company purports to execute a charge as a deed, but that deed is defective in its execution, then the failed deed may itself take effect as a present agreement to grant an equitable charge. I think they are correct to the extent that, if there were no prior contract, a case for the existence of the charge could be founded on the failed deed, and if it were, it would necessarily follow that such a charge was created at the time when the deed was purportedly delivered. However, I perceive this line of argument as additional to, rather than exclusive of, the argument that the charge arose out of the contractual agreement to grant it. I think that if the Second Respondent wishes to argue, as he does, that the Charge was granted on the day on which the contract concerned provided that it should be granted, the fact that he could alternatively rely on the failed deed as giving rise to the charge does not defeat his argument. Another way of putting this point is to say that although the failed attempt to create a debenture clearly evidences the Charge, the Charge itself arose from the contractual obligation to create it.
49. The ordinary problem with such a charge continuing in existence would be that it would require registration. In this case particulars of registration were provided to the registrar,

but in respect of the ineffective Third Debenture, not the Charge. This potentially raises the question of whether the submission of a registration in respect of the failed deed could constitute a registration of the contractual charge so as to render it valid.

50. One way to argue this would be to say that because the registrar's certificate has been granted, the Charge can no longer be questioned, as laid down in s. 859I(6) of the Companies Act 2006, (see *In Re C. L. Nye Ltd*, [1971] 1 Ch. 442 (CA) – a case decided under the old law but, it seems, still generally regarded as valid). However, there are limits to the unchallengeability of a certificate, and in particular a registration could not render valid an invalidly created charge, even under the old law - as Dillon J said in *R v Registrar of Companies, Ex Parte Central Bank Of India* [1986] 1 Q.B. 1114, the granting of a registrar's certificate in respect of a charge "has no effect on the true construction of the charge, and does not preclude it being challenged on any other ground e.g. fraud or duress" (at 1183). It is therefore clear that the registration of the Third Deed was not effective to validate it as such.
51. The remaining question is as to whether the purported registration of the deed could have had the effect of validating the Charge. Since the Charge was intended to be identical to that to be created by the Third Deed, the majority of the registration statement would have been identical, and the substantive material required by s.859D would have been present.
52. The registration of one charge cannot validate an entirely different charge. As was correctly stated in the Australian case of *JJ Leonard Properties Pty Ltd v Leonard (WA) Pty Ltd (n Liquidation)* (1987) 13 ACLR 77, a registrar's certificate is not any evidence that the requirements as to the registration of an equitable charge to which the notice of charge did not relate had been complied with. However, the Charge and the Third Deed

were not entirely different – indeed, they were intended to be created as part of a single design, and to merge into each other. In this circumstance I think that the registration statement submitted to the registrar correctly described the legal effect and consequence of the Charge, and the registrar’s certificate should be held to cover the Charge. I think that this is equally true whether the Charge is taken to have arisen from the contractual obligation or from the failed attempt to embody it in a deed – in both cases, the result was the creation of a charge which was different in some respects from that described in the particulars of registration, but in both cases the description of the charge filed with the registrar was an exact description of the charge which the chargor had granted, except for its legal form.

53. Consequently I find that a valid, registered contractual charge came into effect as from the date on which the parties had agreed that it should do so – the 22nd January. I do not think that the fact that the invalid deed was not effected until some days after this date has any relevance to that finding.

54. This takes us to four further issues

Did the transfer constitute “consideration” specifically for the grant of the charge?

55. The term “consideration” in s.245 seems to bear a different meaning from that which it bears in contract law. That was the position under the predecessor to section 245; *Re Yeovil Glove Co Ltd* [1965] Ch. 148, at 171, per Harman LJ, and at 178, per Russell LJ. The learned editors of *Palmer’s Company Law* (Volume 4) explain, at 13.199.35, that given the similarity between both provisions, and that both refer to “consideration”, “consideration” should be given the same meaning in both provisions. In *In Re Peak Hotels and Resorts Limited (In Liquidation)* [2019] EWCA Civ 345 at [16], Henderson LJ concluded that he “provisionally incline[d] to the view that the word “consideration”

is still being used in a non-technical sense” and that *Re Yeovil Glove Co Ltd* still applied. However, he expressly declined to determine the issue finally as it was not necessary so to do.

56. In this case it is necessary to determine the point, but I do not think that is its one of very great difficulty. If a company were to agree to grant a charge in exchange for funding, the contractual consideration would be the exchange of contractual promises. The performance of that obligation by the payment of money would not constitute “consideration” in the contractual sense, since the mere performance of an existing contractual obligation cannot itself constitute consideration in the contractual sense. However, it seems clear from the existing cases on s.245 that they regard “consideration” as meaning the actual lending of money, not the mere promise to do so. It is equally clear that if a financing proceeds in three stages; first the making of an agreement to provide finance and to grant a charge, second the granting of the charge, and third the payment over of the promised financing, the requirements of s.245 would be satisfied even though neither the making of the payment nor the granting of the charge would, in contractual terms, constitute “consideration”.
57. This logic applies equally to the transfer of shares here. In contractual terms that transfer did not constitute “consideration”, since it was simply the performance of a pre-existing contractual obligation. The requirement here must therefore be to look at the point at which valuable property or services were in fact transferred. That was clearly the date of completion of the transfer of the shares – that is, the 22 January.
58. The transfer of property therefore did not itself constitute “consideration” under any existing contract. However, it does constitute consideration for the purposes of s.245, since the section uses the term “consideration” to mean actual value transferred.

59. I think that this conclusion is also inherent in the conclusions actually reached in *In Re Peak Hotels and Resorts Limited (In Liquidation)* [2019] EWCA Civ 345. In that case the chargee, Candey, had contracted to supply services. Henderson LJ said (at [36])

“Those services were supplied pursuant to the Fixed Fee Agreement, but for the purposes of section 245 the question is not what sum was contractually due from PHRL to Candey in return for those services. ... The relevant issue is the extent to which Candey is entitled to enforce its charge, and for that purpose what has to be ascertained is the value, calculated in accordance with section 245(6), of the services actually supplied by Candey to PHRL during the relevant period.”

60. This seems to me to support the argument that for the purposes of this section “consideration” means value actually supplied, regardless of the contractual position.

Was the value that was given, given “by reason of” the charge?

61. Even if the charge was validly created, it is only valid under s.245 to the extent that value was given specifically in respect of the grant of that charge. This follows from the decision of the Court of Appeal in *Re Shoe Lace Ltd* (sub. nom. *Power v Sharp*, [1993] BCC 609). In that case the Court held that the decisions in a series of previous cases were wrong, in that they had been based on the incorrect proposition that payment made on account of the consideration for a charge, in anticipation of its creation and in reliance on a promise to execute it, would satisfy the requirements of the section. This was held to be incorrect on the basis that the requirements of consideration and contemporaneity were in fact separate. Thus a charge can be struck down under s.245 on two entirely separate grounds; one being that value is transferred to the grantor prior to the creation of the charge, and the other being that the value transferred was not transferred in consideration for the grant of the charge.

62. The Joint Administrators submit that, even if the shares transferred constitute value, they were not transferred in consideration of the grant of the charge. Their argument is that the shares were transferred pursuant to the SPA in exchange for the issue of the loan notes, and that the obligation to transfer the shares was entered into when the SPA was entered into. They therefore say that the shares cannot have been transferred “by reason of” the creation of a debenture created some time after the assumption of that obligation
63. I do not think that this is right. The SPA imposed an obligation on Mr Farah to transfer the shares to the Company, and an obligation on the Company to (inter alia) grant the charge. That agreement provided for both of those acts to be done on the date on which the agreement was signed. Neither of those things were in fact done on that date. Consequently both parties found themselves, some time later, in a position where neither had performed their contractual obligations as set out in the SPA. I think it is clear that they dealt with this by entering into another agreement by which both of these obligations were to be discharged on the 22 January. I think it is this agreement which supports the argument that the transfer was by reason of the charge.
64. It is entirely true that at any time after the failure of the First Debenture Mr Farah was contractually bound to transfer the shares, and could in equity have been compelled to do so. However, at the same time the Company was obliged to create a charge, had not done so, and could in equity have been compelled to do so. It is highly implausible that any order could have been secured to mandate one without mandating the other. To my mind this emphasises the fact that the performance of each obligation was in fact dependent on the performance of the other.

Were the shares capable of constituting “consideration”?

65. The section provides that consideration should only be recognised for this purpose to the extent that it constitutes “money paid, or goods or services supplied”. It could be argued that technically shares are neither money, nor goods, nor services, and therefore fall outside the scope of “consideration” for this purpose. If this construction were to be adopted, then the form of the transaction – the giving of a floating charge to support the payment obligations incurred in the purchase of shares - would always be vulnerable under s.245.
66. As noted above, the purpose of the transaction was the provision of financing to the Company. However, for various reasons the transaction was structured as a sale of 100% of the shares in a cash-box company. The effect of the transaction was therefore clearly the provision of finance to the Company, but it cannot be described as “money paid” to the Company.
67. The Joint Administrators point out that the question of what the phrase “goods and services” is intended to mean in this context is unclear. Sealy & Milman: Annotated Guide to the Insolvency Legislation (25th Ed. – 2022), Volume 1: observe that “Whether paras (a) and (b) will themselves be open to a restrictive interpretation is unclear: it is hard to see why other forms of valuable consideration (e.g. the transfer of land or shares) were not included within the reform that was made”. However, the plain language of the provision refers only to “money” “goods” and “services”. Shares are not naturally described as “goods”. This is the point made by Armour and Bennett, *Vulnerable Transactions in Corporate Insolvency* (2003), at 5.5913:

“The use of the verb ‘supply’ and the choice of the terms ‘goods’ and ‘services’ rather than broader terms such as ‘property’ indicate that many assets with considerable value are excluded from the permissible forms of value under Section

245. Thus, consideration for a floating charge in the form of rights over, for example, land, intellectual property or choses in action would be regarded as of no value under the legislation. While it is hard to justify this discrimination, it appears unavoidable as a matter of statutory interpretation.”

68. The Insolvency Act 1986 does not define “goods”. It does, however, contain a definition of “property”, which embraces property of every description, and includes “goods”. I think it is therefore clear that the draftsman cannot have intended the term “goods” to include all property, otherwise he would have used the defined term “property”. “Goods” in this context must therefore mean something less than “property”.

69. The answer to this may be found in *In Re Peak Hotels and Resorts Ltd (In Liquidation)* [2019] EWCA Civ 345; [2019] Bus. L.R. 1758. In that case, at [17], Henderson LJ quoted (with apparent approval) the following passage from Goode, *Principles of Corporate Insolvency* (5th Edition, 2018)¹⁴ at para 13-111:

“The effect of s. 245 is that the most common forms of new value – money, goods, services, payment of debt – now suffice to preserve the validity of the floating charge. This extension in the concept of new value represents a compromise between the views of the hardliners who considered that the old restriction to cash should be retained and the proponents of the opposing view that any form of money’s worth should suffice. The Cork committee rather cautiously recommended the addition of goods to cash but the exclusion of services [Insolvency Law and Practice, Report of the Review Committee, Cmnd. 8558, para 1564]. In the end, services were added to the list. The result in broad terms is that admissible new value is restricted to those forms of benefit to the company which

arise from day-to-day trading and finance and have a readily ascertainable value. Excluded are a wide range of other assets, both tangible and intangible, including land and buildings, intellectual property rights, debts and other receivables and rights under contracts.”

70. The Second Respondent argues that this passage contains the true meaning of the term “goods” in this context, which should be understood to mean “forms of benefit to the company which arise from day-to-day trading and finance and have a readily ascertainable value”. Personally I find this construction appealing.
71. Although I accept that the term “goods” has an ordinary legal meaning (generally accepted to be that given in s. 61(1) of the Sale of Goods Act 1979 as “all personal chattels other than things in action and money”), this definition excludes a large number of types of property which are everyday use in trade and financing, ranging from bills of exchange and cheques to cryptocurrency, patents, real estate and software.
72. A good part of the reason that I find the Second Respondent’s proposed meaning attractive is that the application of the Sale of Goods Act meaning in this context seems to me to produce outcomes so bizarre that I find myself very unwilling to believe that they can possibly represent the intention of the legislator. In a case such as this, where property has been sold to a company, the Company has agreed to pay a price for that property, the seller has agreed to the Company deferring its obligation to pay the price, and the resulting debt is secured by a floating charge, it is in my view impossible to produce any rational justification for saying that this rule should apply to the sale of some types of property but not others. There is of course a concern about the value of the property concerned, but this is fully addressed by s.245(6), which requires any such property to be valued on an arms-length basis.

73. I am therefore prepared to hold that the term “goods” in this context should encompass not only goods in the Sale of Goods sense, but also things in action (such as money receivables) and intangibles (such as intellectual property) which are of a kind which (a) are received by the Company pursuant to its ordinary trading activity and (b) have a clear value, such that transfer of their ownership to the Company necessarily swells the assets of the company.
74. In this context, it seems to me that in the circumstances the shares in DMCC satisfy that criterion. The Second Respondent also points out that since the Company was a holding company, its stock in trade was shares of other companies, and it seems extremely strange to argue that the acquisition of shares in a subsidiary by a holding company does not constitute the conduct of its day-to-day activities.

What was the value of the consideration given?

75. Section 245(6) provides as follows

For the purposes of subsection (2)(a) the value of any goods or services supplied by way of consideration for a floating charge is the amount in money which at the time they were supplied could reasonably have been expected to be obtained for supplying the goods or services in the ordinary course of business and on the same terms (apart from the consideration) as those on which they were supplied to the company

The question here is as to the application of this provision to the shares in DMCC.

76. The Joint Administrators and the First Respondent have both referred me to *In Re Peak Hotels and Resorts Limited (In Liquidation)* [2019] EWCA Civ 345, which is clear authority for the proposition that the price paid by the chargor for the consideration

received is not determinative of its value, and that value can only be determined by an arms-length valuation. My starting-point here is that the facts in *Peak Hotels* involved a situation where experts were wildly at variance with each other as to the value of the services delivered. The challenge here, by contrast, seems to be to ascertain whether the correct valuation of a company whose asset is a cash balance of USD \$2.3m is in fact \$2.3m. However, the Joint Administrators point out that the position is not quite this straightforward. One of the reasons for structuring the transaction in the way in which it was in fact structured was to enable Mr Farah to maintain a degree of control over the cash balance of DMCC. The Joint Administrators point out – fairly – that the value of a limited right to control a cash balance may well be considerably less than the value of that cash balance.

77. I therefore think that, if a valuation cannot be agreed between the parties, it is a matter which should be determined at a further hearing.

The Administrator's Second and Third Questions

78. If I am right as to the validity of the Charge for the purposes of s.245(2), and that substantial value was given at the time of the creation of that charge through the transfer of the shares in DMCC to the chargor, then the other issues before me largely fall away. However, if I am wrong, then it becomes necessary to deal with them, and I do so below.
79. If the Charge was invalidated by s.245(2)(a), either because no valid consideration was provided or because any such consideration was provided prior to the date of creation of the Charge, Mr Farah maintains that some or all of his claim is validated through his subsequent interactions with the Company through s.245(4)(b). His arguments are that

- i) He gave consideration to the full value of the secured amount by consenting to a restructuring of the secured obligations (the “**Restructuring**”); and/or
- ii) The Note Exchange transaction constituted a new transaction for full consideration; and/or
- iii) He gave consideration value equal to a substantial part of the secured amount by consenting to the release of funds from DMCC to the acquiring company (the “**Release**”).

2. Did The Renegotiation Constitute New Consideration?

80. It is undisputed that there was a comprehensive renegotiation of the arrangements between the original parties to the SPA, and that this was given effect in part by the Deed of Amendment. The following major changes were made to the original CLNI by the Deed of Amendment:

52.1 Revisions or additions to the definitions section including to “Effective Date”, “Assets”, “Instrument”, “Last Valuation of the Company”;

52.2 Provisions (Clauses 4.9 to 4.11) explicitly giving the Noteholders sole control of the DMCC bank account to ensure the proper application of the funds by the Company;

52.3 New applicable formulas/procedures covering the conversion of the Notes into shares (clause 5), the amounts to be paid on a sale (clause 7), where a Call Note was issued by the Company (clause 8) and extending the maturity date;

52.4A new clause 9.6 limits the amount that can be redeemed on 3 months notice.

Previously the entire amount of any Loan Note could be redeemed (see CLNI clause 9.1), that was now limited to 15% of the outstanding amount every quarter;

52.5 Increase in the interest rate from 10% to 15% (clause 10.1);

52.6 Increasing the Maturity Date of the Notes from the first anniversary of the date on which the Notes are issued to the second anniversary of the date on which the Notes were issued;

52.7 Adding DMCC as a party to the agreement for the purposes of entering into separate security arrangements.

81. The power granted to the Noteholders to control the DMCC bank account was accompanied by detailed discussion as to how that power would be exercised - for example an email dated 11 April 2020 sets out the bondholders' indicative agreement to consent to payments of

USD \$50,000 per month to pay operating expenses;

USD \$200,000 to pay legal fees incurred on the acquisition of Stratura;

BRL 4 million to purchase Stratura.

82. Mr. Brockman submits, and I accept, that the written terms of the Deed of Amendment do not actually capture all of the elements of the Renegotiation. As far as the documentation was concerned, there were no limits on the Company's ability to use the funds held by DMCC prior to the Deed of Amendment, and it was that deed which imposed such restrictions. However, the true position was that Mr Farah, who had de facto control of the DMCC bank account, declined to allow the funds therein to be used

for anything other than trading transactions. The substance of the agreement which constituted the Renegotiation was that Mr Farah would release that constraint, and allow the funds held by DMCC to be applied for other group purposes, in exchange for (inter alia) the imposition of formal bondholder control over the expenditure of cash by the Company. Mr Farah, in effect, gave up his block on the DMCC account in exchange for control over the Company's use of cash.

83. It is also clear that the alternative to the new arrangement was not a continuation of the status quo as Mr Farah said in his email dated 14 April 2020:-

“Again, if you want to have a call we can. But be clear: the company cannot and will not be allowed to operate as what you think is ‘normal’ when our bridge money is still stuck in there with no prospect of redeeming it short of a liquidation – which is in no-one’s interest.”

84. Mr Farah argues that simply by consenting to the Renegotiation he gave value to the Company, and that value should be counted as “consideration” for the purposes of s. 245.

Can conduct constitute consideration for s.245?

85. S. 245(2)(a) refers to “the consideration for the creation of the charge”, and s. 245(2)(b) refers to “that consideration”. It seems clear that the term “consideration” in s.245(2)(b) should be given the same meaning as in s.245(2)(a).

86. As discussed in paragraph [] above, the meaning of the term consideration in the section is not entirely free from doubt. However, the section is limited to consideration which takes the form of “money paid, or goods or services supplied”. The issue here is

as to whether Mr Farah's conduct in agreeing the Renegotiation could be construed as the provision of a service to the Company.

87. I do not believe that a noteholder of a company who agrees to a renegotiation of the terms of the note which he holds is supplying services to the Company for this purpose. The key to this is the test articulated by Parker J in *Re Orleans Motor Company* – is the result of the arrangements an increase in the amount of assets available for creditors? It is clear that the provision of intangible services can have this effect. However, where the “service” provided is no more than a renegotiation of an existing arrangement, and there is no immediate material benefit to the Company from the renegotiation, then there is no “consideration”. I note that this is the case even though the actions of the creditor unquestionably would constitute consideration in a contractual sense, but I think that is the intended and deliberate effect of the words of limitation used in the section.
88. I also note Mr Brockman's point that, as set out in paragraph [55] above, the consequence of a failure of the Renegotiation would potentially have been the liquidation of the Company. This demonstrates the significance and importance of the agreement eventually reached to the Company. However, it does not mean that entry into that agreement is capable of constituting consideration here. The point is not that the concessions made by Mr Farah in the Renegotiation were not valuable- they clearly were. The point is that they did not have the effect of swelling the assets of the company available to creditors by any measurable amount, and therefore cannot constitute consideration for the purposes of s.245.

3. Did the Note Exchange Result in a Discharge of Debts of the Company?

89. Mr Farah can only succeed on this ground if the Restructuring can be analysed as a cancellation of the existing debt due from the Company, and the creation of an entirely new obligation in exchange for entirely new consideration.
90. There are two questions here; one being as to whether the Note Exchange did constitute an entirely new transaction, and the other being as to whether, even if it did, that transaction would satisfy the requirements of s.245.

Did the Note Exchange Constitute a New Transaction?

91. The documentation of the Note Exchange is, surprisingly, profoundly ambiguous on this point.
92. The form of the Notes is set out in the CLNI. That document recites that the directors have resolved to create up to \$3,318,517 of secured convertible loan notes, and have agreed to constitute them in accordance with the terms set out in it. It provides that each noteholder shall receive a certificate executed as a deed by the Company specifying the amount of Notes which he holds. It is important that there is no provision of the CLNI which requires (or even contemplates) the issue of physical notes. The Notes are to have registered form, and the certificates are evidence of the fact that the relevant entries have been made on the register. Thus, for example, the definition of “Noteholder” in the CLNI is “the person for the time being entered in the Company’s register as holders or joint holders of the notes”. The Notes therefore exist in the same way that a share in a company exists – its existence can be proven, but it has no physical existence.
93. The form of the original certificates recites the board resolution of the 22 November 2019 creating the Notes, identifies the CLNI as “constituting” the Notes, and certifies

that the named holder of the certificate is the registered holder of the specified nominal amount of the Notes.

94. When the Restructuring was undertaken, new Certificates were issued. The form of these new Certificates was only very slightly different from that of the old Certificates. The new Certificates also recite the board resolution of the 22 November 2019, but go on to describe the holder as “the registered holder of the nominal amount stated above of the Notes constituted by a loan note instrument dated 22 November 2019 and made by the Company as amended by a deed of amendment and undertakings by Bitumina Industries Limited and Bitumina International DMCC to the Noteholders dated 23 April 2020 between the Company, Rama Farah, Nader Hamoud, Jonathan Woods and Bitumina International DMCC (the “Instrument”).”
95. To my mind, the form of the new Certificates is consistent with the transaction being an amendment of the terms of the existing Notes, and is entirely inconsistent with the transaction being an issue of entirely new instruments. In particular, the fact that the new Certificates describe the Notes as being those Notes whose issuance was approved by the original board resolution in relation of 22 November 2019 suggests very strongly that the transaction was simply an amendment of those Notes. The position might have been different if there had been a new board resolution authorising the issue of new notes on new terms, but there was not.
96. If the transaction was simply a restructuring of the terms of the existing Notes, then I think it is clear that, for the reasons given above, merely consenting to such a restructuring would not constitute good consideration for the purposes of s.245.

Would the transaction constitute good consideration even if the Note Exchange were a new transaction?

97. On a plain reading of s.245, this would clearly be the case. Section 245(2)(b) is unconditional in its form – any discharge of any debt of the company constitutes consideration. However s. 245 and its predecessors have in this regard been given a heavily purposive interpretation by the courts. The problem is stated in Sealy & Millman (25th Ed. in the general notes to s.245 IA 1986)

“Difficulties may also occur where the indebtedness discharged is that of the creditor to whom the floating charge is granted. An existing creditor would be able to avoid the consequences of s.245 by the simple expedient of requiring a notional repayment of the existing debt in return for a new advance of the same amount. To avoid this conclusion either the reference to discharge or reduction of debt must be construed as meaning debt owed to a person other than the creditor making the new advance, or the courts would need to regard the “repayment” and “new advance” as in substance effecting no change at all and therefore being outside the ambit of category (b).”

98. In this regard, therefore, the courts have applied to s.245 and its predecessors a heavily purposive construction, based on the view that the abuse which s.245 and its predecessors were established to prevent was the situation where a person, finding himself a creditor of a failing company, sought to improve his position by obtaining security from the company in respect of that pre-existing debt. Parker J. in *In re Orleans Motor Co. Ltd* [1911] 2 Ch 41, speaking of a statutory predecessor of s.245, s.212 of the Companies (Consolidation) Act, 1908, explained that "The section was designed apparently to prevent companies on their last legs from creating floating charges to secure past debts or for moneys which do not go to swell their assets and become available for creditors.". That remains a valid expression of the purpose of s.245.

99. *In Re Peak Hotels and Resorts Ltd (In Liquidation)* [2019] EWCA Civ 345; [2019] Bus. L.R. 1758, the Court of Appeal had to consider the operation of section 245(2), IA 1986, and specifically the issue of the valuation of the provision of services for the purposes of section 245(2)(a). At [31], Henderson LJ explained that “it is important to begin by placing section 245 in its statutory context in the law of insolvency and examining how the section operates”. At [32], he explained that “section 245 is one of a group of sections which enable transactions entered into during a specified period before the onset of insolvency to be set aside or adjusted. Parliament has decided that these powers are needed in order to strike a fair balance between the creditors of a company which enters liquidation or administration”. At [33], he then expanded on this.

“The critical distinction between fixed and floating charges, at least in the present context, is that a fixed charge necessarily attaches from its inception to existing property of the company, whereas a floating charge remains in suspense until the happening of a crystallising event, whereupon it will attach to the company’s assets of the types specified in the charge as at the date of crystallisation, whether or not they were in existence when the floating charge was created. This has the potential to cause unfairness between the holder of a floating charge and the company’s unsecured creditors if the charge is created at a time when the company is of doubtful solvency and it later goes into liquidation or administration. In particular, the secured creditor would be likely to gain an unfair advantage if it were thus able to obtain priority for any part of the company’s indebtedness to it which in substance preceded the date of the charge, or which post-dated the charge but exceeded the further value actually provided by the creditor to the company before the charge crystallised. In general terms, that is the mischief which section 245 seeks to combat. It does so, like its predecessors in the Companies Acts of 1908 and 1948, by providing that a floating charge over the company’s property or undertaking, created during the specified “relevant period”, is invalid except to the extent specified in the section. [...]

100. These authorities clearly identify the purpose of s. 245 and indicate how it is to be interpreted. The purposive construction which is applied to the section is that it should invalidate any charge which operates to secure “indebtedness to [the Company] which in substance preceded the date of the charge, or which post-dated the charge but

exceeded the further value actually provided by the creditor to the company before the charge crystallised”; *Re Peak Hotels and Resorts Ltd (In Liquidation)*, at [33], per Henderson LJ.

101. In *Re GT Whyte & Co* [1983] BCLC 311 the facts, in outline, were these:

(1) Lloyds through its alter ego, Labco (which the court considered was in substance Lloyds (see 317f)) advanced loans to Whyte.

(2) There was a defect or concern about the strength of the security (see 314g) of Labco.

(3) Labco called in the loans, and Lloyds and Whyte agreed that Lloyds would open a new loan facility for Whyte to discharge the demand by Labco for repayment, and at the same time (in effect) Whyte would grant Lloyds a floating charge. Whyte then went insolvent (or for the purposes of the application was assumed to have done (see p.312(h)) within the relevant period. It is not clear how the original debt was actually repaid to Labco. The evidence suggested that the matter was dealt with by book entries as between Labco and Lloyds, but the statement of account showed a debit entry against a cheque number and Nourse J inferred that Whyte did draw a cheque on the new Lloyds account in favour of Labco (see 315f-g).

(4) In short, therefore, Lloyds procured the discharge of a loan to itself and its replacement with a new loan to itself post-dating the floating charge.

102. Nourse J considered the law, as it then applied, under Section 322(1) of the Companies Act 1948. Given its materiality, it is worth quoting in full, beginning at p.316g. He explained that:

“I was referred to five earlier authorities in which the meaning of the expression 'cash paid to the company' was considered. They were *Re Orleans Motor Co Ltd* [1911] 2 Ch 41; *Re Hayman, Christy & Lilly Ltd* [1917] 1 Ch 283; *Re Matthew Ellis Ltd* [1933] Ch 458, CA; *Re Destone Fabrics Ltd* [1941] Ch 319; and *Re Ambassadors (Bournemouth) Ltd* (1961) 105 Sol Jo 969. In some of those cases learned judges expressed general views as to the transactions which the section was intended to defeat. Thus, in *Re Orleans Motor Co Ltd* [1911] 2 Ch 41 at 45, Parker J said that one of the apparent objects of the provision was to prevent companies on their last legs from creating floating charges for moneys which do not go to swell their assets and become available for creditors. In *Re Hayman, Christy & Lilly Ltd* [1917] 1 Ch 283 at 285, Astbury J thought that the expression meant 'except the amount of any cash absolutely and unconditionally paid to the company'. In *Re Matthew Ellis Ltd* [1933] Ch 458 at 464–5, Eve J at first instance disapproved the view of Astbury J, but then excluded from the expression any payments of cash made upon the condition that the cash should be applied in discharge of an existing, as opposed to a future, liability of the company. The Court of Appeal disapproved all the views above mentioned and held that a floating charge will not be invalidated merely by reason of the imposition of a condition that the money advanced is to be applied by the company in discharge of an existing liability, provided that the transaction is in substance for the benefit of the company and not merely the substitution of a secured for an unsecured debt and thus of benefit to one creditor at the expense of others. The question was expressed in much the same way by Simonds J in *Re Destone Fabrics Ltd* [1941] Ch 319 at 324. He said that the ultimate test might well be whether the transaction is to be regarded as one intended bona fide for the benefit of the company, or whether it is intended merely to provide certain moneys for the benefit of certain of the company's creditors to the prejudice of others. Finally, I should record that in *Re Orleans Motor Co Ltd* [1911] 2 Ch 41 at 45, Parker J had said that another of the apparent objects of the section was to prevent companies on their last legs from creating floating charges to secure past debts. There has never, I think, been any doubt about that. Indeed, that part of Parker J's views was expressly approved by the Court of Appeal in *Re Matthew Ellis Ltd* [1933] Ch 458 which remains the most authoritative decision on the subject. Accordingly, the primary question in each case is whether the transaction is in substance for the benefit of the company and not merely the substitution of a secured for an unsecured debt.

In *Re Matthew Ellis Ltd* [1933] Ch 458 it was held that the charge was valid. In each of the other four cases it was held that the charge was invalid. And each of them appears to me to have been a case where it could be said that there had been a blatant attempt to obtain a benefit for one creditor at the expense of others. In other words, there had been underhand conduct of one kind or another. In my judgment, however, conduct of that kind is not a pre-requisite to the operation of the section. In the present case it is not suggested that there was any such conduct on the part of Lloyds in procuring the execution by Whyte of the floating

charge of 2 April 1974. For myself, I would like to say that any such suggestion would have been manifestly unsustainable. Nevertheless, the primary submission made by counsel for the liquidator (Mr Scott) was that, to the extent of the first £12.75m, the floating charge was in substance created to secure Whyte's past indebtedness to Lloyds. On that simple ground, submitted counsel for the liquidator (Mr Scott), the charge was to that extent invalid.”

103. Nourse J, at pp.317d – 318c, then considered the substance of the transaction, and found that there was no new value moving to the company: “The transaction was not in substance for the benefit of Whyte. Its effect was merely to substitute for one security a better security to which s 322 applied.” Importantly, Nourse J did not look at mala fides or questions of intention or state of mind. The question he asked was objective: what, in substance, was the effect of the transaction.
104. *Re Fairway Magazines Ltd* [1992] BCC 924 was a case about section 245(2)(a). Here, within the relevant time period, the director had, in anticipation of being granted a floating charge over the company, advanced £10,000 to the company. Under the law at the time, this was held to be a payment at the time of the floating charge (pp.930H-932B). After the floating charge was executed, the director then advanced two further payments of £10,00 each. These were paid directly into the Company’s overdrawn bank account; the director was a guarantor of the company’s indebtedness to the bank, and so the payments pro tanto reduced the director’s liability to the bank.
105. The essence of the relevant parts of the decision in *Re Fairway Magazines* for this purpose is the finding as to the two payments of £10,000. It was held by Mummery J. that these payments “were not paid to the company within sec. 245(2)(a) because they never became available to the company to use as it liked” (933 C). The reason for this was that the payments were in fact made by the director to the company’s bank on terms

that his liability under his guarantee of the company's indebtedness to that bank would be reduced pro tanto. At no point did the company ever have any control over the funds, or any say in their use. He distinguished the case of *In Re Matthew Ellis*, whose facts were very similar, on the basis that in that case the payment was for the benefit of a supplier, and was "a business transaction which secured [for the company] the goodwill of a firm which was willing to continue to supply goods to the company on credit and so keep the business of the company going" (at p.993).

106. It seems to me that where a creditor of a company agrees to reduce or extinguish a money claim on that company as part of a transaction whose consequences are that it will acquire a new claim on that company of roughly equal value, that reduction or extinguishment will not constitute consideration for the purposes of s.245. I agree with Mummery J that in such a transaction, no new resources ever become available to the company. I therefore think that, on the authorities as they stand, any exchange transaction where a company's liabilities on existing debt are extinguished, but only on condition that the company becomes liable for a new debt to the same creditor will fail this test. It should be noted here that the problem is not the exchange, it is the automaticity. If a noteholder sold debt instruments issued by a company back to that company, and then reinvested the proceed of sale in new notes issued by the same company, this problem would not arise. The issue arises where the terms of the transaction place the company in a position where incurring the new debt is the necessary price of being released from the old debt. That is exactly the position in this case.
107. It was suggested in argument that any transaction which substitutes one debt obligation for another is "a transparent subterfuge", and therefore cannot constitute the provision

of consideration under s.245. In this context, reliance was placed on two cases. In *Re Matthew Ellis, Ltd* [1933] Ch. 458, at 477, Romer LJ said that:

“There are, of course, certain considerations for the issue of a debenture which plainly do not amount to payments in cash. Where, for instance, an existing creditor of a company takes a debenture from the company to secure the amount of his debt on the terms that he shall not immediately press for payment of his debt, or where he takes a debenture for the amount of his debt on the terms that the debt itself is to be extinguished, obviously no cash passes from the debenture holder to the company. If in such a case he goes through the form of drawing a cheque in favour of the company for the amount of his debt on the terms that the company shall forthwith itself hand to him in exchange a cheque for the same amount, there has in form been a payment in cash. But in such a case there has not been a payment in cash if one looks at the substance and not at the form, and in considering whether there has been a payment of cash within the meaning of s. 266 it is always the question of substance that must be regarded and not the question of form.”

108. In *Re Destone Fabrics Ltd* [1941] Ch. 319, at 324, Simonds J reviewed *Re Matthew Ellis Ltd*, and then said:

“I think that I too am entitled to say that in this case the Court will not be misled by a transparent subterfuge. I find it impossible to believe that the purpose of this transaction was anything else but, by the issue of this security, to procure the payment to certain directors of the sums due to them in preference to other creditors of the company, and payment also to Davis who was himself advancing the money on the security of the debenture. The ultimate test in such cases may well be whether the transaction is to be regarded as one intended bona fide for the benefit of the company, or whether it is intended merely to provide certain moneys for the benefit of certain creditors of the company to the prejudice of other creditors of the company.”

109. I do not agree with this submission. The present case is an example of the position where there is no subterfuge, no dishonesty, and where it seems to me that all parties acted honestly and with probity. The striking down of a floating charge under this section does not carry any implication of wrongfulness - as Nourse J said in the case of *Re Whyte* (at p. 317b), the presence of such conduct is not a statutory prerequisite for the operation of those provisions. Equally, I strongly disagree that a debt restructuring transaction of the kind before me is anything other than a perfectly normal commercial

transaction. One of the distinguishing features of s.245 is that it can operate in situations where all those concerned were acting in a way which they believed to be transparent and honest, and that appears to be exactly the case here.

110. Finally, it was suggested by the Joint Administrators, in their position as neutral assistants of the court, that *Re Fairway Magazines Ltd* and the authorities cited therein addressed the position under s.245(2)(a), and that these authorities might not be applicable to s.245(2)(b). I am grateful to them for raising the point – which would not otherwise have occurred to me – but I cannot think that it is correct. Leaving aside the basic point that there is no imaginable reason why the approach under section 245(2)(a) and 245(2)(b) should differ, the applicability of this line of authorities to section 245(2)(b) was considered (albeit briefly and apparently obiter) in *Re Comet Group Ltd (In Liquidation)* [2018] EWHC 1378 (Ch), at [142] and [167]. At [142], Sir Nicholas Warren explained that:

“Ms Hilliard addressed section 245 in paragraphs 5 to 7 of the Hilliard Opinion. I do not set out or even summarise what she says. But, in response to any suggestion that the sentiment behind what Mummery J said in *Re Fairway Magazines Ltd* [1992] BCC 924 at 932 (“If the effect of a payment, which in form made to the company, is merely to substitute secured debt for unsecured debt, then the payment is not in substance a payment to the company”) is not applicable where the relevant consideration falls within section 245(2)(b), she expressed the view that such a suggestion would be wrong. As to that, like her, I do not understand that section 245(2)(b) has altered the general purposes of section 245, which is to prevent a company that is on its last legs from creating a floating charge to secure past debts or to secure moneys which do not go to swell its assets and become available for creditors.”

4. Did the Release of DMCC Funds after the Renegotiation Constitute Consideration?

111. Mr Farah raises a further point in respect of s.245(2)(b). This is based on the fact that one of the significant terms of the renegotiation was that Mr Farah would consent to

the release for group purposes of some of the funds held by DMCC. Pursuant to this agreement, DMCC paid out USD \$1,726,849.80 as set out at paras 61 to 65 of Mr Farah's witness statement. That included USD \$760,000 on 13 August 2020 on behalf of the Company to acquire shares in Stratura, USD \$119,000 on 14 September 2020 on behalf of the Company to acquire shares in Nynas; and USD \$187,548.77 and AED 94,864 was paid between June and October 2020 to pay professional fees incurred by the Company, including those in connection with the acquisition of the Stratura and Nynas shares.

112. In principle this money was owned by the Company from the date of the SPV onwards - it was owned by a subsidiary entity of which it had complete voting control. However, voting control of an entity and actual control of its assets may not be synonymous. The Company may have owned these balances, but it did not control them. For these purposes, I do not think it is relevant whether Mr Farah's de facto veto on their deployment was valid as a matter of law – it was clearly a very real fact on the ground.
113. It is therefore clear that Mr Farah's agreement to a partial removal of this veto as part of the Renegotiation was of considerable value to the Company, in that it enabled it to deploy its assets in accordance with its strategy.
114. The issue before me is therefore as to whether the removal of that veto constituted the giving of consideration within the meaning of s.245(2).
115. In my view, it did not. The starting point is to return – once again – to the idea that consideration in this regard is that which swells the assets of the company concerned and becomes available for creditors. On an insolvency of the Company, it seems likely that Mr Farah's power to restrict the utilisation of the account would in effect have terminated – if DMCC were placed in the local equivalent of a members voluntary

liquidation, it is difficult to see how the relevant cash balances would not have been made available to the local liquidator, and then to the creditors of the Company. Consequently I think that at all material times after the Company acquired DMCC, the assets of DMCC would have been available to creditors of the Company in a winding-up. Consequently, I do not believe that Mr Farah's agreement to partially remove his veto over their deployment had the effect of increasing the assets of the Company, and for that reason I do not believe that it constituted consideration under s.245.

Directions

116. I would therefore direct the Joint Administrators as follows
- a. The Charge was a validly created security, and is effective against the Joint Administrators.
 - b. The Charge was not invalidated by s.245(2)(a) at the date of its creation, and is valid to the extent of the value derived by the Company from its acquisition of the shares of DMCC.

If it had been necessary to give further directions they would have been

- c. There was no discharge or reduction of existing debts of the Company by Mr Farah within the meaning of 245(2)(b) as a result of any of the interactions with the company considered in this Judgment.

Procedural History

117. Finally, I should say a word about the process by which this judgment came to be delivered. I am asked by the Joint Administrators to give directions on three points. The answers to the second and third points depend to some extent on the direction given in

respect of the first. In the oral hearing before me, the focus of the submissions of the parties was almost exclusively on the second and third points. In considering the matter further in the course of writing my first draft judgment, I concluded that the first point was more difficult than I had thought. I set out in the draft judgment that I circulated my preliminary conclusions on it. However, the parties, upon receipt of that draft, represented (correctly) that if the point was as important as I considered it to be, they should be able to make further representations in respect of it. I decided that the appropriate course would be to permit further submissions to be made, and have now received those submissions from all parties. This judgment is therefore substantially different from the draft originally circulated.

118. The fact that my judgment was circulated as a draft judgment means that, as a procedural matter, I have a discretion whether or not to receive further submissions and to reconsider it. However that discretion cannot be, and should not be, exercised capriciously. More importantly, if a Judge has simply got things wrong, it is not for him to conduct an appeal against his own judgment (*In re St Nazaire Company* (1879) 12 Ch D 88). I have therefore considered carefully the extent to which it is permissible for me to substantially revise my initial draft in the light of the further submissions received.

119. I have been referred to the notes in the White Book following CPR 40.2 and in particular to the cases of *Re Barrell Enterprises* [1971] 1 WLR 19, CA and *Re L (Children) (Preliminary Finding: Power to Reverse)* [2013] UKSC 8. In the latter case, Baroness Hale of Richmond JSC stated:

“[The] overriding objective must be to deal with the case justly. A relevant factor must be whether any party has acted upon the decision to his detriment, especially

in a case where it is expected that they may do so before the order is formally drawn up. On the other hand, in *re Blenheim Leisure (Restaurants) Ltd*, Neuberger J gave some examples of cases where it might be just to revisit the earlier decision. But these are only examples. A carefully considered change of mind can be sufficient. Every case is going to depend upon its particular circumstances.”

120. My attention was also drawn to *Egan Motor Services (Bath)* [2008] 1 WLR 1589 at paragraphs 50 and 51 where Smith LJ stated that it is only in the most exceptional circumstances that it is appropriate to ask the judge to reconsider a point of substance in a draft judgment. He gave as examples the situations where the judge had not given adequate reasons for some aspect of the judgment, or where the judge had decided the case on a point that was not properly argued, or relied on an authority which was not considered.
121. Counsel for the Applicant and the First Respondent have submitted that my draft judgment fell within the second of these. In particular, they argue that the points raised by the Second Respondent as regards the validity of the charge were raised for the first time at the hearing, so that counsel for the Applicants and the First Respondent were not able to respond properly and fully to them. Counsel for the Second Respondent argues that these points were not new, were acknowledged in the other parties submissions, and were in any event covered by his skeleton argument, which was circulated a week before trial. Consequently, he says, if those points were not addressed by the other parties in their submissions, that is their funeral, and they should not now be permitted to come back for another bite at the cherry.
122. I have some sympathy with this position, but I do not think it applies in this particular case. The issue before the court is, in my view, a matter of some general importance,

and I think it is only appropriate to ensure that it has been fully and properly argued before giving judgment. It is not suggested that these issues were fully argued before me, and the further submissions from counsel for the Joint Administrators consist of 21 pages of closely-reasoned analysis. I have derived a great deal of benefit from them, as well as from the further submissions of all the other parties

123. I accept that this is not an ideal way to have proceeded, and I am aware that, as Peter Gibson LJ pointed out in *Robinson v Fernsby* [2004] WTLR 257, para 120, judicial tergiversation is not to be encouraged. However, it seems to me that since the outcome will be a judgment which has had the benefit of full submissions on all of the material points, it is the approach which best serves the interests of justice.