(2021) 33 SAcLJ 625
(Published on e-First 1 December 2020

Case Note

THE INHERENT WEAKNESS OF FLOATING CHARGES

Malayan Banking Bhd v Bakri Navigation Co Ltd
[2020] 2 SLR 167

This case note discusses the recent Singapore Court of Appeal's decision in *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167, which made important points on the legal position of a floating chargor's dealings with charged assets outside the chargor's ordinary course of business. In particular, the decision clarifies the relative priorities of the chargor and the third party as well as whether such dealings would crystallise the charge by operation of law. In so doing, the decision also confirms that the floating charge's flexibility, its greatest strength, might just be its inherent weakness, first conceptually, and then in its effectiveness.

Daniel **ANG** Wei En
LLM Candidate (University of Melbourne);
LLB (Hons) Candidate (National University of Singapore).

Hans **TJIO**
LLM (Harvard), MA (Cambridge);
Advocate and Solicitor (Singapore), Barrister (Middle Temple);
Professor, Faculty of Law, National University of Singapore.

I. Introduction

1 In *Malayan Banking Bhd v Bakri Navigation Co Ltd*[1] ("*Bakri*"), the Court of Appeal made important points on the legal position of a floating chargor dealing with charged assets outside the chargor's ordinary course of business. In particular, it clarified the relative priorities of the chargee and a third-party purchaser, as well as whether such dealings would crystallise the floating charge by operation of law. Also, at first instance in *Malayan Banking Bhd v ASL Shipyard Pte Ltd*[2] ("*Bakri (HC)*"), the High Court made interesting observations on the meaning of "encumbrance" at general law and for the purposes of the automatic crystallisation clause

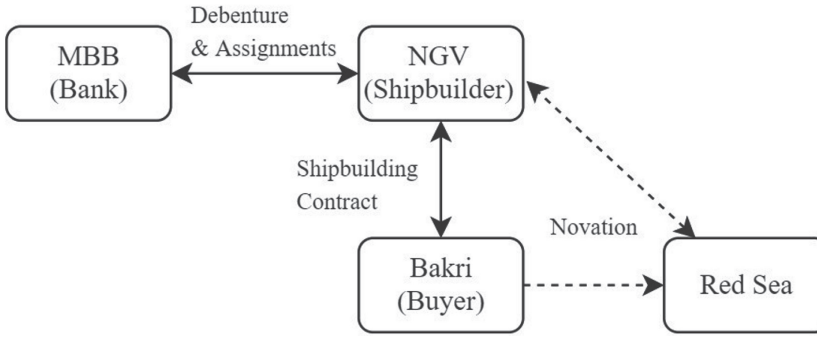
1 [2020] 2 SLR 167.
2 [2019] SGHC 61.

in that case, as well as on negative pledges in the context of dealings within the chargor's ordinary course of business.

II. Facts

A. The debentures

2 Malayan Banking Berhad ("MBB"), a Malaysia-incorporated bank, financed the construction of ship vessels by NGV Tech Sdn Bhd ("NGV"), a Malaysian shipbuilder. The debentures ("the Debentures") had identical terms and were governed by Malaysian law.[3] The parties' relationships are depicted in the diagram below.[4]



3 Under the Debentures, NGV created the following charges in favour of MBB:[5]

(a) a *fixed* charge over, *inter alia*, NGV's "securities of any kind whatsoever whether marketable or otherwise and all other interests …" (cl 3.1(a)); and

(b) a *floating* charge over all of NGV's assets (cl 3.1(b)).

4 The Debentures also provided that the floating charge could be crystallised: (a) by written notice (cl 4.2); or (b) pursuant to the automatic

3 In the proceedings, the parties agreed that Singapore and other Commonwealth cases could be referred to determine any question of Malaysian law arising in connection with the Debenture. In this respect, the courts in *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 and *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 disagreed with the Malaysian court's decision in *NGV Tech Sdn Bhd v Ramsstech Ltd* [2015] 1 LNS 1017, which dealt with the same bank and debentures.

4 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [5].

5 NGV assigned the proceeds of all its shipbuilding contracts to MBB. The Debenture and the assignments were duly registered at the Malaysian Registry of Companies.

crystallisation clause (cl 4.3). The Debentures also contained a negative pledge by NGV (cl 8.1).

B. The Vessels

5 NGV agreed to construct four vessels for Bakri Navigation Company Ltd ("Bakri"). The shipbuilding contracts for Hulls 1117 and 1118 ("the Vessels") were subsequently novated to Red Sea Marine Services Ltd ("Red Sea"), a company in the same group as Bakri.

6 NGV appointed a subcontractor to take over the construction of the Vessels. Later on, Red Sea paid NGV's subcontractors directly to complete the Vessels' construction. These moneys were set off against their purchase price, which NGV and Red Sea had agreed to reduce, entitling Red Sea to take delivery without payment. Thereafter, NGV and Red Sea contracted to transfer the title to, and possession of, the Vessels to Red Sea.

7 Subsequently, NGV informed Red Sea that it was unable to complete the Vessels within the stipulated time, and transferred the partially completed Vessels to shipyards in Singapore and Batam to be completed, without MBB's knowledge. The seeming complexity of the purchase led MBB to argue that it was not made in the ordinary course of business, but the courts disagreed.

C. Default and court proceedings

8 Subsequently, NGV defaulted on the loans granted by MBB, and MBB served notice on NGV crystallising the floating charge. On the application of an unrelated creditor, NGV was wound up in Malaysia.

9 MBB commenced court proceedings in Singapore against Bakri and Red Sea, and obtained an injunction preventing dealings with Hull 1118.[6] MBB argued that it had an interest in Hull 1118 by virtue of the fixed charge or the floating charge, and that its interest was superior to Red Sea's interest. Red Sea argued that it was a *bona fide* purchaser of the legal title for value without notice ("Equity's Darling"), and that it did not bear the burden of proof to show that it did not have notice.[7]

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6 MBB did not pursue its claims in respect of Hull 1117, which could not be traced.

7 This point as to where the burden of proof lay was left open by the Singapore courts. The area is not settled but there are instances where an Equity's Darling defence required the third party to show that it was without notice. See *Credit Agricole Corp and Investment Bank v Papadimitriou* [2015] 1 WLR 4265 and *Kay Hian & Co (Pte) v Phua Ooi Yong Jon* [1988] 2 SLR(R) 439.

10 In the alternative, MBB also claimed under the tort of conspiracy, which deprived MBB of its interest in Hull 1118. Bakri and Red Sea counterclaimed in the tort of malicious prosecution and for losses suffered due to the injunction.

III. The court's holding

A. The decision

11 The main issues before the courts related to the nature of MBB's interest in Hull 1118, and whether it was superior to Red Sea's title.

12 At the first instance, Vinodh Coomaraswamy J held that:

(a) The Debentures did not create a fixed charge over Hull 1118.

(b) The Debentures created a floating charge over Hull 1118.

(c) NGV's dealings with Red Sea were not outside the ordinary course of business.

(d) The floating charge was not automatically crystallised by NGV's dealings with Red Sea.

(e) The floating charge was crystallised by written notice, after the dealings.

(f) The conspiracy claim was not made out.

13 On appeal, the Court of Appeal, with Judith Prakash JA delivering its grounds of judgment, dismissed MBB's appeal and held additionally that:

(a) While NGV's dealings may have been unusual, they were not outside the ordinary course of business.

(b) In any case, dealings outside the ordinary course of a chargor's business did not necessarily crystallise a floating charge.

B. Fixed charge

14 Coomaraswamy J held that the fixed charge created by the Debenture did not cover Hull 1118. The fixed charge was created over

"securities … and all other interests",[8] which referred to interests in the debt or equity of other companies,[9] thus not encompassing Hull 1118.[10] Rather, Hull 1118 could have been considered "stock in trade", which was expressly excluded from the fixed charge.[11] Further, the fixed charge could not have been intended to cover NGV's vessels, because that would have inhibited NGV's ability to trade by preventing any vessel sale without MBB's concurrence.[12]

15 The latter point reinforces the requirement of fixed charges that the chargee must have sufficient *actual* control over the charged assets. This dates back to *Re Lin Securities (Pte) Ltd*,[13] where Chao Hick Tin JC (as he then was) opined that the chargor's freedom (or lack thereof) to deal with the charged assets evinced the true nature of the charge.[14] In this regard, the Singapore courts have been relatively consistent compared to the English courts in requiring control, especially with respect to charges over book debts.[15] As such, in Singapore, comparatively more charges will likely end up characterised as floating charges and take on their inherent weaknesses.

C. Floating charge

(1) Meaning of "encumbrance" in automatic crystallisation clauses

16 As for the floating charge created by the Debenture, it was clear that Hull 1118 was within its scope.[16] NGV's transfer of title of Hull 1118 to Red Sea would trigger the automatic crystallisation clause if such transfer was an "encumbrance", which Coomaraswamy J held was not.[17]

17 Coomaraswamy J rejected the interpretation that "encumbrance" should include any transaction which has the legal or economic effect of depriving the creditor of its security interests.[18] That interpretation, as with the commercial implications of NGV's vessels being subject to

8 See para 3(a) above.
9 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [77].
10 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [73]–[74]. As to the difference between security interests and securities, see *Fons Hf v Corporal Ltd* [2015] 1 BCLC 320 at [24].
11 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [78].
12 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [80].
13 [1988] 1 SLR(R) 220.
14 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [53].
15 *In re Spectrum Plus* [2005] 2 AC 680; *cf Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142.
16 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [84].
17 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [89].
18 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [90].

a fixed charge described above,[19] would require MBB's consent for every vessel NGV sold, inhibiting NGV's commercial objectives of selling vessels.[20] This would thereby contradict the floating charge's purpose of allowing the chargor to deal with the charged assets.[21] Vessel sales without MBB's consent would crystallise the floating charge not just over Hull 1118, but also over NGV's *entire* undertaking.[22] This would paralyse NGV's business, until MBB subsequently decrystallised the charge.[23] Coomaraswamy J's rejection of this interpretation was affirmed on appeal, although the Court of Appeal did not comment on his views that the broad interpretation above could not be reached simply because any unintended effects could be mitigated by the express decrystallisation clause, due to the "commercial impracticality" of doing so.[24]

18 Rather, Coomaraswamy J held that at general law[25] and within the meaning of cl 1.2 of the Debenture, the term "encumbrance" meant "a transaction which creates a right in favour of a creditor in the property of a debtor which facilitates the satisfaction of some other right vested in right vested in the creditor".[26] *Goode and Gullifer* describes a security interest similarly,[27] and the Debenture's listed examples of "encumbrances" included mortgages, buttressing the definition above.[28] In Coomaraswamy J's view, the transfer of possession of and title to Hull 1118 was not an "encumbrance", because it was a transfer of ownership instead.[29]

(2) Dealings in breach of restrictions in the debenture

19 Coomaraswamy J observed that where the chargor's dealing was in breach of the debenture's restrictions, the chargee would take priority over the third party if the latter had the requisite notice.[30] However, he

19 See para 14 above.
20 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [95].
21 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [97].
22 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [96]–[97].
23 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [99].
24 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [65]. Compare *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [99]. See further paras 50–52 below.
25 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [91].
26 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [94].
27 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 1-36.
28 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [92]–[93].
29 In contrast, a moratorium on a sale of shares post-initial public offering was seen not to include the creation of security over those shares: *Pacrim Investments v Tan Mui Keow Claire* [2008] 2 SLR(R) 898.
30 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [132].

did not make a holding on this issue, because it was argued too late in the proceedings.[31] This was affirmed on appeal.[32]

20 Coomaraswamy J held that even if NGV breached the debenture's restrictions, Red Sea did not have constructive notice of the floating charge's terms, as the particulars of the Debenture that were registered did not mention the specific restrictions found in the Debenture.[33] He also found that the Red Sea did not have constructive notice of the negative pledges, relying on *Wilson v Kelland*[34] rather than *Kay Hian & Co (Pte) v Phua Ooi Yong Jon*,[35] where the third party in the latter case was found to have had actual knowledge. The Court of Appeal agreed.[36]

(3) What are dealings outside the "ordinary course of business"?

21 Coomaraswamy J noted that whether the dealings were in the "ordinary course of business" or not could affect the chargee's and third party's relative priority. If they were, the third party would have priority over the charge (and on *Bakri*'s facts, the automatic crystallisation clause was not triggered);[37] if they were not, the chargee would have priority unless the third party was Equity's Darling.[38]

22 In interpreting the meaning of "ordinary course of business", the Court of Appeal noted that it invariably constitutes "carrying on business as a going concern", but the converse was not necessarily true.[39] In any case, the Court of Appeal considered that even if NGV's transactions with Red Sea were exceptional, liable to be a wrongful preference or unnecessarily made, that would be insufficient to bring it outside the "ordinary course of business".[40] In the event, both Coomaraswamy J and the Court of Appeal held that NGV's dealings with Red Sea were *not* outside the "ordinary course of business",[41] with Coomaraswamy J adding that the dealings actually furthered NGV's business.[42]

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31 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [138].
32 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [96].
33 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [139].
34 [1910] 2 Ch 306.
35 [1988] 2 SLR(R) 439.
36 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [96].
37 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [132].
38 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [133].
39 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [82].
40 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [89].
41 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [93]; *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [135].
42 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [135].

(4) Crystallisation by operation of law by dealings outside the ordinary course of business

23 Though *obiter dicta*, in considered judgments, Coomaraswamy J and the Court of Appeal held that dealings with charged assets outside the ordinary course of a company's business would *not* crystallise a floating charge by operation of law.[43] Crystallisation by operation of law could occur independently of crystallisation pursuant to an automatic crystallisation clause.[44]

24 Coomaraswamy J held that the *only* dealings that would crystallise the floating charge by operation of law are those without a view to "carrying on the company's business".[45] In such circumstances, the commercial rationale for floating charges of not inhibiting the chargor's business is extinguished.[46] The Court of Appeal agreed,[47] adding that it was an implied term in law that a floating charge would crystallise on events denoting the chargor's cessation of trading as a going concern.[48]

25 As for "fraudulent transactions", that is, those not conducted in good faith, they would clearly be outside the ordinary course of business but again not crystallise the floating charge, as the chargor's business did not cease. The Court of Appeal did not find this result absurd, given that the chargee would still have priority over the third party (provided the third party was not Equity's Darling).[49]

IV. Comment

26 The High Court's and Court of Appeal's decisions in *Bakri* are welcomed, as they make important clarifications about the floating chargor's dealings with the charged assets. They also confirm the inherent weakness of the floating charge's constraints on the chargor's dealings.

27 The observations in *Bakri* are of broad application, since most forms of charges that do not fit the archetypal fixed charge may

43 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [78]; *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [113]. Both courts saw *Fire Nymph Products Ltd v The Heating Centre Pty Ltd* (1992) 7 ACSR 365 as a case involving an automatic crystallisation clause that expressly provided for crystallisation upon dealings "outside the ordinary course of business".

44 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [84].

45 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [124].

46 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [119].

47 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [74].

48 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [73].

49 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [90].

be considered floating charges by default. This would include most agreements to grant charges or even floating charges, as was most recently held in *Aavanti Offshore Pte Ltd v Bab Al Khail General Trading*.[50] There, the High Court relied on the definition of a "charge" in s 4 of the Companies Act,[51] which includes "any agreement to give or execute a charge", as well as the earlier Court of Appeal decision in *Diablo Fortune Inc v Duncan, Cameron Lindsay*[52] ("*Diablo Fortune*"), which had characterised liens given to shipowners by charterers over sub-freights which may be due to them as floating charges.[53]

28 In addition to the *Bakri* observations, the doctrine of apparent authority continues to operate in the background.[54] After crystallisation, if the third party acquires the charged assets without notice of crystallisation,[55] or the chargor's actual authority to deal has been otherwise withdrawn,[56] the chargor's apparent authority may continue; thus, the third party could still take priority.[57] But even without crystallisation, whether the dealing was in the "ordinary course of business" still remains relevant – if it were not, apparent authority may not apply,[58] and the chargor would take priority as discussed above.[59]

50 [2020] SGHC 50 at [63].
51 Cap 50, 2006 Rev Ed.
52 [2018] 2 SLR 129 at [35] and [58].
53 See Ian Teo, "Registrability of Liens on Sub-freights: The Last Word or Not" [2018] LMCLQ 490.
54 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 5-02.
55 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 5-53. This may be the position even if the third party had dealt with the chargor prior to crystallisation or was aware of the existence of the floating charge.
56 Where the floating charge crystallised pursuant to an automatic crystallisation clause, as with crystallisation in general, the third party would take priority if it did not have notice of crystallisation: Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 4-55. Even where crystallisation has not occurred, if the third party has actual knowledge that the dealing is breach of the clause, there may not be apparent authority: United Kingdom, Law Commission, *Registration of Security Interests: Company Charges and Property Other Than Land* (CP No 164, 2002) at para 2.44; citing Roy Goode, *Commercial Law* (Penguin, 2nd Ed, 1995) at pp 743–744.
57 Eilís Ferran & Look Chan Ho, *Principles of Corporate Finance Law* (Oxford University Press, 2nd Ed, 2014) at pp 336–337.
58 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 5-44. The chargor would not have actual authority either.
59 See para 21 above.

A. Dealing outside the ordinary course of business

29 It should be recalled that Coomaraswamy J's and the Court of Appeal's *dicta* with respect to dealings outside of the ordinary course of business were, strictly speaking, *obiter*, as the court held that NGV's dealings were *not* outside the ordinary course of business.[60]

(1) Property versus *priority rules*

30 In *Bakri*, the Court of Appeal used the language of "priority rules" to describe the chargee's and third party's competing interests in charged assets acquired outside the ordinary course of the chargor's business.[61] It is not clear whether the court applied a *priority* rule as opposed to a *property* rule involving Equity's Darling, though they often lead to similar results.

31 "Priority" and "property" rules sometimes, however, differ in their scope of application. As Iwan Davies points out, *priority* disputes concern competing security interests in the same asset. On the other hand, *extinguishment* disputes go to the rights of ownership,[62] involving issues relating to conveyance of good title. On this view, *Bakri* could arguably be an extinguishment dispute. The situation involving a third-party buyer is also seen by *Goode and Gullifer* as a question of "priority".[63]

32 Also, the concept of "priority" should be approached with some circumspection, as buyers do not have to search a charge register and this may be overlooked if elided with other encumbrancers. In this regard, the Singapore courts might have used the language of "priority" in order to restrict the imprecise use of "property" language. For instance, in *Jurong Aromatics Corp Pte Ltd v BP Singapore Pte Ltd*,[64] the High Court rejected the description of a charge using the language of "assignment", because it involved some transfer of ownership that a charge did not presuppose.

(2) Crystallisation by operation of law

33 For crystallisation by operation of law, the *Bakri* courts' holding, that it is not triggered by dealings outside the ordinary course of the

60 See para 22 above.

61 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [132]; *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [37].

62 Iwan Davies, "Reform of English Personal Property Security Law: Functionalism and Article 9 of the Uniform Commercial Code" (2004) 24 Legal Stud 295 at 321.

63 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 5-43.

64 [2018] SGHC 215 at [45]–[47].

chargor's business unless it ceased the business, is in line with the position before automatic crystallisation clauses were used. In older cases, *dicta* suggested that crystallisation required the chargee's positive intervention, unless the chargor's business ceased.[65]

34 In reaching this holding, the Court of Appeal in *Bakri* analogised crystallisation by operation of law to the chargee's right to intervene where the chargor's business ceased.[66] The court relied on *Hubbuck v Helms*[67] ("*Hubbuck*") to support this analogy and for their observation that "the threshold for crystallisation as a matter of law is a high one".[68]

35 However, it is submitted that *Hubbuck*'s support for the analogy might be limited. As the Court of Appeal also noted, the term "crystallisation" (and not just in the automatic sense) was not used expressly in *Hubbuck* or generally during the late 19th century. Moreover, *Hubbuck* itself dealt with the appointment of receivers rather than crystallisation, and these have different thresholds. As Coomaraswamy J in *Bakri* recognised, the former's test of whether the security is in jeopardy[69] may be satisfied by dealings in the ordinary course of business or that do not cease the chargor's business. Although he also held that the appointment of receivers also crystallises the charge,[70] the Court of Appeal in *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd*[71] ("*Jurong Aromatics (CA)*") has noted the two differ in that the chargor's business continues in the ordinary course even after the appointment of receivers. Further, a receiver can be appointed even if the charge has not crystallised and even without the chargor's default.[72] Also, the threshold for injunctive relief merely requires the dealings to be outside the ordinary course of business.[73]

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65 In particular: *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979 at 986–987, *per* Vaughan Williams LJ and at 992–993, *per* Fletcher Moulton LJ; *Reg in right of British Columbia v Consolidated Churchill Copper Corp Ltd* [1978] 5 WWR 652.

66 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [77]. The Court of Appeal adopted the views of William Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) at pp 144–145.

67 (1887) 56 LJ Ch 536.

68 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [77].

69 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [121]. See also *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [46]; Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at p 132, para 4-05. Examples include the potential execution of a judgment debt by a third party: see, *eg*, *Re London Pressed Hinge Co Ltd* [1905] 1 Ch 576.

70 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [128].

71 [2020] 1 SLR 627 at [29].

72 As was the case in *Re London Pressed Hinge Co Ltd* [1905] 1 Ch 576 at 580, *per* Buckley J.

73 *Re Woodroffes (Musical Instruments) Ltd* [1986] Ch 366 at 378A, *per* Nourse J.

36 In contrast to *Bakri*, in *Hamilton v Hunter*[74] ("*Hamilton*"), the New South Wales Court of Appeal held that the chargor's power to deal was limited not *only* by the cessation of his business, but also by the purpose for which the power was implied, that is, the ordinary course of business.[75]

37 Even then, it might still be ambiguous whether that limitation operates through the priority rules or through crystallisation. *Hamilton* can be understood as being decided based on the former rather than the latter, which Ferran argues resulted from the cessation of the chargor's business.[76] The application of priority rules might be suggested by Kevin Holland J limiting his *dicta* to third parties with notice of the terms of the charge (as was the case in *Hamilton* itself).[77] Further, Holland J did not expressly hold that the charge had crystallised, despite recognising that it was argued by the plaintiff. In light of *Bakri*, perhaps *Hamilton* should be seen as a dealing by the floating chargor outside the ordinary course of business which the third-party assignee knew about.

38 Separately, while cessation of the chargor's business would certainly be outside the ordinary course of business (and also crystallise the floating charge), it does not necessarily mean that dealings that are *outside* the ordinary course of business but *not* in cessation of the chargor's business should not crystallise the charge. Such dealings may include "fraudulent dealings",[78] which MBB argued in *Bakri* was outside the implied licence of a floating charge. Adopting Gough's views, the Court of Appeal in *Bakri* held that such dealings *per se* would not crystallise the charge.[79] While the chargee arguably might not have wanted the chargor to continue "trading" in such a manner, it must be remembered that apparent authority still operates in the background[80] and so provides a counterbalance.

74 (1982) 7 ACLR 295 at 307.

75 *Hamilton v Hunter* (1982) 7 ACLR 295 at 305.

76 Eilís Ferran, "Floating Charges – The Nature of the Security" (1988) 47(2) Camb LJ 213 at 231–232.

77 *Hamilton v Hunter* (1982) 7 ACLR 295 at 307. Holland J made expressly clear that he was not referring to cases where the third party had no notice.

78 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [85]. This refers to dealings that are not in good faith for the purposes of the chargor's business.

79 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [85]–[86]; citing William Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) at pp 209–214.

80 See para 28 above. It has been argued that this is still to be preferred to the use of vicarious liability in analysing misstatements by agents: Peter Watts, "Principals' Tortious Liability for Agents' Negligent Statements – Is 'Authority' Necessary?" (2012) 128 LQR 260. But see *Frederick v Positive Solutions (Financial Services) Ltd* [2018] EWCA Civ 431.

39 The above position on crystallisation by operation of law manifests the "fairly weak"[81] constraints of floating charges on chargors' dealing powers. The Court of Appeal in *Bakri* thought that chargees dissatisfied with this position can seek additional protection.[82] Many might do so to avoid MBB's fate, possibly leading to increasingly detailed, specific and lengthy drafting of floating charge documents – a regression in the development of floating charge drafting. Early on, in 1877, floating charge documents were commonly drafted with lengthy explanations of the operation of the floating charge.[83] The words "floating security" were used for the first time around 1881.[84] By 1884, the term "floating security" became well recognised by the courts and replaced those lengthy explanations.[85] In recent Singapore cases, it has also been observed how courts may see most novel forms of security, however drafted, as floating charges in substance.[86]

40 But a reversion to those days might have already begun as early as the time of *Hamilton*, around the 1980s, when automatic crystallisation clauses became increasingly accepted.[87] Against this backdrop, it might appear strange that the automatic crystallisation clause in *Bakri* carried little detail other than with respect to where the chargor "charges pledges or otherwise encumbers in favour of any third party" the charged assets. It remains to be seen how floating charge documents, especially its negative pledges, automatic crystallisation and de-crystallisation clauses, will be drafted going forward. It is likely that it will include at the least, as a crystallising event, any disposition of property "outside the ordinary course of business".

81 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [90]; *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [121], following *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [46].

82 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [90].

83 Richard Nolan, "Property in a Fund" (2004) 120 LQR 108 at 121. For instance, Palmer's precedent charge stated that "the company shall be at liberty, in the course of its business … [to] deal with … the [charged assets]": Francis Palmer, *Company Precedents* (Stevens, 1st Ed, 1877) at pp 435–436.

84 Francis Palmer, *Company Precedents* (Stevens, 2nd Ed, 1881) at p 231.

85 Francis Palmer, *Company Precedents* (Stevens, 3rd Ed, 1884) at pp 265–266.

86 See, for example, *Aavanti Offshore Pte Ltd v Bab Al Khail General Trading* [2020] SGHC 50, noted at para 27 above.

87 Eilís Ferran & Look Chan Ho, *Principles of Corporate Finance Law* (Oxford University Press, 2nd Ed, 2014) at p 335. This was heralded by Hoffmann J's *dictum* in *Re Brightlife Ltd* [1987] Ch 200 and his decision in *Re Permanent Houses (Holdings) Ltd* (1989) 5 BCC 151.

B. Nature of a floating charge

(1) Floating charge as a non-proprietary interest

41 On the nature of a floating charge, the Court of Appeal in *Bakri* continued to further its views previously set out in *Diablo Fortune*. It held in *Diablo Fortune* that the chargee's interest in a floating charge before crystallisation was: (a) not a proprietary interest;[88] and (b) a security interest in the fund of charged assets.[89]

42 Gough views the floating charge's proprietary nature as even weaker, saying that the negative pledge is a mere equity, *even when attached to a floating charge*, and binds third parties because of their unconscionability.[90] On a different view, the negative pledge's coupling to the floating charge makes the latter's proprietary characteristics clearer,[91] since a subsequent fixed chargee with notice of the floating charge and negative pledge would take subject to the prior floating charge.[92]

43 It is unclear whether Gough's views above will be taken further in the long delayed forthcoming edition of his book.[93] The author will certainly gather support from *Bakri*, which reaffirmed the view in *Diablo Fortune* that the "constraint placed on the chargor is … fairly weak".[94] This view of the floating charge as inherently weak dovetails with other Singapore decisions such as *Ernest Ferdinand Perez De La Sala v Compañia De Navegación Palomar, SA*,[95] which saw the beneficial interest under a trust as "a right against a right". The floating charge may likely be "exactly in point" (as *Goode and Gullifer* opine)[96] or even weaker, like "a power to

88 *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [55] and [47].
89 *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [49].
90 William Gough, *Company Charges* (Butterworths, 2nd Ed, 1996) at p 392.
91 Robert Austin & Ian Ramsay, *Ford, Austin & Ramsay's Principles of Corporations Law* (LexisNexis Butterworths, loose-leaf) at para 19.321.12.
92 *Kay Hian & Co (Pte) v Phua Ooi Yong Jon* [1988] 2 SLR(R) 439 at [32], *per* Chan Sek Keong J; *Wilson v Kelland* [1910] 2 Ch 306.
93 Simon Firth, *Gough: Company Charges* (LexisNexis Butterworths, 3rd Ed, 2020) (forthcoming).
94 *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [46]; quoted in *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [90] and *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [121].
95 [2018] 1 SLR 894 at [145].
96 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at p 129.

acquire a persistent right",[97] that is, a fixed charge,[98] as McFarlane[99] and Stevens[100] suggest.

44 While floating charges might have a weak proprietary nature in *general*, it has been pointed out elsewhere that a given floating charge's *specific* interest probably lies somewhere on a spectrum between property and contract, where there is "a complex morass of context specific intermediate situations".[101] Returning to the floating charge coupled with a negative pledge,[102] it should be analysed as a combination of two intermediate rights, each otherwise being near the middle of the proprietary/contract spectrum, which enables them to bind more third parties.[103]

45 Accordingly, a neutral label for floating charges, like "intermediate" rights, may be more apposite,[104] and more definitive labels would be unhelpful. As Lord Phillips MR noted in the English Court of Appeal in *National Westminster Bank plc v Spectrum Plus Ltd*,[105] certain types of security (such as a floating charge with a negative pledge clause) fit uncomfortably with traditional notions of a fixed or floating charge. He also suggested (but dismissed) the idea that there may be a third category of charge. To him,[106] one solution could be to adopt the functional approach of a single, unified security interest found in personal property security

97 Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) at p 599. McFarlane sees this "power" as a mere equity, which binds third parties only after crystallisation. This analysis is based on the general framework that proprietary rights are either (a) "property rights", *ie*, legal property rights; or (b) "persistent rights", *ie*, equitable property rights. Here, "persistent rights" are understood as "right against a right".

98 Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) at p 600.

99 Ben McFarlane, *The Structure of Property Law* (Hart Publishing, 2008) at pp 599–604.

100 Robert Stevens, "Debt Finance Issues in Corporate Finance" in *Corporate Finance Law in the UK and the EU* (Dan Prentice & Arad Reisberg eds) (Oxford University Press, 2011) at pp 222–223.

101 Hans Tjio, "Merrill and Smith's Intermediate Rights Lying between Contract and Property: Are Singapore Trusts and Secured Transactions Drifting Away from English Law towards American Law" [2019] Sing JLS 235 at 260.

102 See para 42 above.

103 Hans Tjio, "Merrill and Smith's Intermediate Rights Lying between Contract and Property: Are Singapore Trusts and Secured Transactions Drifting Away from English Law towards American Law" [2019] Sing JLS 235 at 260.

104 Hans Tjio, "Merrill and Smith's Intermediate Rights Lying between Contract and Property: Are Singapore Trusts and Secured Transactions Drifting Away from English Law towards American Law" [2019] Sing JLS 235 at 260.

105 [2004] Ch 337 at [52]–[53].

106 *National Westminster Bank plc v Spectrum Plus Ltd* [2004] Ch 337 at [99].

legislation in the US[107] and other common law jurisdictions.[108] Singapore courts also stress the importance of substance over form,[109] and it may be that we are moving closer to a US first-to-file position through the use of s 4 of the Companies Act and its definition of a charge to characterise almost all forms of agreements to grant a charge or floating charge as floating charges. Although this incentivises registration of security at an early stage, the rules of priority are still intertwined with traditional property rules as seen in *Bakri*. It will require statutory intervention for registration to itself confer priority.

(2) Security interests as proprietary or persistent interests

46 The court in *Diablo Fortune* maintained its weak or "no proprietary interest" view in holding that the floating charge was a "security interest",[110] which it thought may fall within certain other definitions of "proprietary interest".[111] It recognised that the term "security interest" could refer to the notion that "the asset subject to the charge [can be] appropriated as a security for the payment of the debt".[112]

47 US law recognises "security interest" as a *specie* of "proprietary interests". This is seen in US legislation on secured transactions law[113] and insolvency law[114]. The US Supreme Court defined the chargee's property right similarly to the above definition.[115] American theorists explain that the creditor "owns" the value of the collateral up to the full amount of the debt.[116] Similarly in respect of English law, Iwan Davies has argued, in an old textbook, that a security is an interest carved out of the absolute ownership interest.[117]

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107 Uniform Commercial Code, Art 9, as adopted by the states in the US.

108 These include Canada, Australia and New Zealand, which have Art 9-style personal property security regimes.

109 *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [57]; *Aavanti Offshore Pte Ltd v Bab Al Khail General Trading* [2020] SGHC 50 at [43]. See also para 27 above.

110 *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [53].

111 *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [55].

112 *National Westminster Bank plc v Spectrum Plus Ltd* [2004] Ch 337 at [111], *per* Lord Scott; cited in *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [53].

113 Uniform Commercial Code, Art 9, § 1-201(37).

114 Bankruptcy Code 11 USC §101(37) (1994) (US): "'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation."

115 *Wright v Union Central Life Insurance Co* 311 US 273 at 278–279 (1940); *John Hancock Mutual Life Insurance Co v Bartels* 308 US 180 at 186–187 (1939).

116 Thomas Plank, "The Outer Boundaries of the Bankruptcy Estate" (1998) 47 Emory LJ 1193 at 1200–1213; Julia Forrester, "Bankruptcy Takings" (1999) 51 Fla L Rev 851 at 877.

117 Iwan Davies, *Textbook on Commercial Law* (Blackstone, 1992).

48 However, it is submitted that "security interests" may be different in nature from "proprietary interests". As Ponoroff and Knippenberg argue in the context of bankruptcy, a "security interest" should not be understood as a right *in* property, but rather as a claim *to* property up to the value of the collateral at the time of filing.[118] This focuses on the parties' "legal relations" rather than the "thing" of property, as suggested in the first American *Restatement of Property*.[119] Such focus can also be seen in *SCK Serijadi Sdn Bhd v Artison Interior Pte Ltd*,[120] where the Singapore Court of Appeal said that in some contexts, the term "proprietary interest" could refer to:

> … a much less extensive right to prevent the owner of the property from exercising his 'full, unfettered right to "deal" with the property charged' in a manner that is inconsistent with the rightholder's interest" (as in *Lyford* at 273; see also William James Gough, Company Charges (Butterworths, 2nd Ed, 1996) ('*Company Charges*') at pp 38–39).

49 Going forward, the floating charge's personal and proprietary nature would offer continued challenges as it requires *ex post* justification in many situations. This demonstrates Holmes' point that "the life of the law has not been logic: it has been experience",[121] and it might not be possible to fully justify some things like the floating charge conceptually. Nonetheless, the label of "property" should only be used when necessary, to avoid loose and imprecise usage.

(3) Decrystallisation and the licence to deal

50 The Court of Appeal in *Bakri* described the floating charge as "a security for the chargee coupled with a business dealing licence for

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118 Lawrence Ponoroff & Stephen Knippenberg, "The Immovable Object *versus* the Irresistible Force: Rethinking the Relationship between Secured Credit and Bankruptcy Policy" (1997) 95 Mich L Rev 2234 at 2290–2294. Their article focuses on the nature of a security interest as property in the context of *Dewsnup v Timm* 502 US 410 (1992). See also Alan Schwartz, "A Contract Theory Approach to Business Bankruptcy" (1998) 107 Yale LJ 1807.

119 See the Introductory Note of the *Restatement First, Property* (1936) at p 3:

> The word 'property' is used sometimes to denote the thing with respect to which legal relations between persons exist and sometimes to denote the legal relations. The former … does not occur in this Restatement. When it is desired to indicate the thing with regard to which legal relations exist, it will be referred to either specifically as 'the land', … or 'the thing'.

Compare James Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020).

120 [2019] 1 SLR 680 at [18].

121 Oliver Wendell Holmes Jr, *The Common Law* (1881). *Cf* the 17th-century English jurist Sir Edward Coke's view that "[r]eason is the life of the law": Edward Coke, *The First Part of the Institutes of the Laws of England* (Societie of Stationers, 1st Ed, 1628). As with most things, the truth lies somewhere in the middle.

the chargor"[122] that was implied.[123] The Court of Appeal's licence analysis may be difficult to fully reconcile with the "interest in a fund" theory it adopted in *Diablo Fortune*. For instance, one of the latter's proponents, Goode, opines that decrystallisation does not create a new charge,[124] because crystallisation and decrystallisation *only* removes or restores the chargor's management powers respectively.[125] While this might somewhat resemble theories where the floating charge has the same proprietary nature before and after crystallisation,[126] he also appeared to take the contradictory view that crystallisation changes the *proprietary nature* from an interest in a fund to an interest in specific assets.[127] In this regard, the view that crystallisation (and decrystallisation) does not have proprietary consequences may have been rejected by the Court of Appeal in *Diablo Fortune*, because it fails to "capture the event of crystallisation",[128] in that "the chargee enjoys a proprietary interest … only after the event of crystallisation".[129]

51 In *Bakri (HC)*, however, Coomaraswamy J saw decrystallisation as causing the crystallised fixed charge to "cease to operate".[130] The charge would still bite on the charged assets as if it were fixed, until notice of decrystallisation is given with respect to the rest of the undertaking *sans* the ships.[131] This, along with the analysis of apparent authority made at the outset of our comments, suggests that the more convenient view may be that the refloated charge is not new and takes the place of the previous fixed charge which, "as created", was a floating charge. If so, the refloated charge would be covered by the previous floating charge's initial registration under s 131 of the Companies Act and need not be re-registered.

52 As for how a crystallised floating charge can be decrystallised, however, the Court of Appeal in *Jurong Aromatics (CA)* held that whether

122 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [82].
123 *Malayan Banking Bhd v Bakri Navigation Co Ltd* [2020] 2 SLR 167 at [82] and [85].
124 *Cf* Tan Cheng Han, "Crystallisation, Decrystallisation and the Convertibility of Charges" [1998] CFILR 41.
125 Roy Goode, "Charges over Book Debts: A Missed Opportunity" (1994) 110 LQR 592 at 604.
126 Sarah Worthington, *Proprietary Interests in Commercial Transactions* (Clarendon Press, 1996) at p 81; Richard Nolan, "Property in a Fund" (2004) 120 LQR 108.
127 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 4-62.
128 *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [54].
129 *Diablo Fortune Inc v Duncan, Cameron Lindsay* [2018] 2 SLR 129 at [47].
130 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [98]; citing *Jurong Aromatics Corp Pte Ltd v BP Singapore Pte Ltd* [2018] SGHC 215 at [95], *per* Aedit Abdullah J.
131 *Malayan Banking Bhd v ASL Shipyard Pte Ltd* [2019] SGHC 61 at [99].

decrystallisation had occurred was not affected by the chargee's actual control (or lack thereof) over the charged assets,[132] even though that notion was applied by the UK House of Lords in *In re Spectrum Plus*[133] to characterise the original form of the charge. Rather, what is needed is a clear evidence of the chargee's intention to decrystallise the charge, although the court in *Jurong Aromatics (CA)* had reservations whether the only way to do so was to contract with the chargee directly.[134]

V. Conclusion

53 Ultimately, *Bakri*'s clarificatory comments on priorities and crystallisation were *obiter*. Perhaps the broader takeaway from *Bakri* is that due to the fluid and amorphous nature of floating charges, even if the courts laudably address one problem, another tends to spring forth as there are just too many holes in the wall to plug. The floating charge's flexibility, its greatest strength, might just be its inherent weakness, first conceptually, and then in its effectiveness as seen in *Bakri*. This is then amplified by statutory provisions such as its loss of priority to preferential unsecured creditors under s 203 of the Insolvency, Restructuring and Dissolution Act 2018,[135] which took effect on 30 July 2020.

54 Following *Bakri*, further questions remain. If the automatic crystallisation clause had been successfully triggered a moment before the buyer obtained its interest, could apparent authority (or ostensible ownership, especially if we follow through on the idea that chargees have no proprietary interest)[136] have protected the buyer as opposed to, say, an unsecured creditor?[137] If so, issues arise as to how buyers should navigate and interact with prior charges, such as whether buyers are required to search registers, as notice defeats both Equity's Darling and reliance on apparent authority. With that, the issue of constructive notice comes to the fore – raising also the question of on whom lies the burden of proving

132 *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd* [2020] 1 SLR 627 at [26]–[27].

133 *National Westminster Bank plc v Spectrum Plus Ltd* [2004] Ch 337 at [61], *per* Lord Hope.

134 *BP Singapore Pte Ltd v Jurong Aromatics Corp Pte Ltd* [2020] 1 SLR 627 at [41].

135 Act 40 of 2018, which replaced s 328 of the Companies Act (Cap 50, 2006 Rev Ed). In the UK, 20% of collateral subject to a floating charge up to £800,0000 will go to unsecured creditors after the preferential creditors under s 176A of the Insolvency Act 1986 (c 45).

136 See also Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 5-02.

137 Roy Goode & Louise Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security* (Sweet & Maxwell, 6th Ed, 2017) at para 5-53 states that unsecured creditors (eg, execution creditors) "have no interest in the assets of the company and are therefore not concerned with the company's actual or ostensible dealing powers".

notice (or the lack thereof) in the case of a buyer.[138] Thus, while *Bakri* has made important clarifications, other issues with respect to floating charges will continue to consume us.

138 For a recent decision imposing the burden on a *bona fide* purchase of value to be without notice of a fraudulent disposal of property, see *Credit Agricole Corp and Investment Bank v Papadimitriou* [2015] 1 WLR 4265. In the context of apparent authority and the indoor management rule, see *East Asia Co Ltd v PT Satria Tirtatama Energindo* [2020] 2 All ER 294 (noted Hans Tjio & Daniel Ang, "No Magic to the Indoor Management Rule: *East Asia v PT Satria*" [2020] LMCLQ 217).