CURRENT ASPECTS OF UNSECURED LENDING
TECHNIQUES FOR SUBORDINATING CORPORATE DEBT

MAURICE J CASHMERE

Minter Ellison
Solicitors, Sydney

The techniques for effectively subordinating corporate debt at law are circumscribed by two legal principles:-

(1) the rule of privity of contract; and

(2) public policy which prohibits private arrangements for contracting out of the rules regarding pari passu distribution of company assets on a liquidation.

These considerations apply to all subordinations, whether there is a complete subordination of the subordinated creditor's position, or whether there is an inchoate subordination, whereby the subordinated creditor is able to receive payments on the debt until some calamity arises e.g. the insolvency of the borrower.

Subordination agreements are commonly used in the United States of America and the law relating to the subordination of debt has been substantially developed there. However, in the United States the Courts in most jurisdictions have been prepared to recognise the concept of a third party contract in one shape or another [1], and to recognise private contracts which alter the order of asset distribution amongst creditors of equal rank on a liquidation [2].

This is in marked contrast to the situation which applies in Australia and other common law jurisdictions, such as United Kingdom. Therefore, techniques which are commonly used, or relied on, in the United States to subordinate debt effectively, will not necessarily be effective here.

The three principal means of achieving a subordination of debt are:

(i) contractual;

(ii) non-contractual;

(a) subordination trusts; and
(b) estoppels.

(i) Contractual Subordination

In Australia, the most direct way of conferring the benefit of an undertaking to subordinate a debt on another is through a tripartite agreement between the borrower, the subordinated creditor and the senior creditor. In this way the senior creditor would be able to enforce the undertaking of the subordinated creditor to subordinate its debt, because of the contractual nexus which exists. The agreement would be enforceable in its terms, subject to any public policy considerations which may impinge as a result of the application of section 440 of the Companies Code.

(ii) Non-Contractual Subordination

Where a senior creditor is not a party to such an agreement, the senior creditor must rely on some non-contractual nexus in order to take advantage of the benefit arising from the subordinated creditor having subordinated its debt. This situation could arise where, for instance, the senior creditors constitute a class of creditor, or consist of all the other creditors of the borrower, in which case it would be impractical to enter into an agreement with all of them, or, where the senior creditor lends subsequent to the loan made by the subordinated creditor. If a senior creditor in these circumstances wishes to avail itself of what is, in effect, a third party benefit, this must be accomplished in a manner recognised by law.

In the United States the nexus is provided by the third party beneficiary doctrine. This has developed into a rule of law which ensures that unilateral subordination agreements entered into between a borrower and a subordinating creditor, intended to benefit existing or subsequent senior creditors, will be enforced in virtually all jurisdictions [3].

In Australia this can only be achieved through a subordination trust or by relying on the doctrine of estoppel.

(ii) (a) Subordination Trusts

If a trust is used, the subordinated creditor would declare a trust for the senior creditor in respect of distributions received from the borrower, or its liquidator.

In its capacity as a beneficiary of the trust the senior creditor would be able to force the subordinated creditor to pay over any distributions made by the borrower to the subordinated creditor which are properly payable to the senior creditor.

A recent English case which involved a trust, and which is helpful on many issues relating to subordinated debt is Carreras Rothmans Limited v. Freeman Matthews Treasure Limited [4].

This was a case where a cigarette manufacturer arranged to pay money which it owed its Advertising Agent each month into a special bank account. The Agency could only draw on this account for paying debts incurred on behalf of the cigarette manufacturer. When the Agency went into liquidation there was money in this account and the cigarette company was able to enforce payment of the money for satisfying the debt incurred by the Agency on behalf of the cigarette manufacturer.

There was no formally established trust in this case, and no mention of the word "trust", merely an agreement between the parties setting out the manner in which payments would be made, together with the establishment of a special bank account pursuant to this agreement. The agreement was followed by payments being made into the special account. It was argued that the arrangements disclosed nothing more than a contractual arrangement. The Court took the view that a fiduciary relationship had been established and that the trust was completely constituted by the payment of money into the bank account.

Clearly, if there is a proper trust established, money which is paid to the subordinated creditor, and which becomes subject to the trust, will be available only for the senior creditor. Likewise, if the subordinated creditor became insolvent the money would be protected from the claims of its general creditors.

While it may be possible to achieve the same result without establishing a formal trust (and the Carreras Rothmans case is yet another illustration of the fact that trust relationships can be implied from the circumstances of a situation) a draftsman runs the risk of failing to ensure that the trust obligation is enforceable.

In order to have an enforceable trust there must be certainty of subject matter, and there must be certainty in relation to the beneficiaries.

It has been suggested [5] that a trust of distributions to be received in the future may be void for uncertainty on the grounds that there is no present trust property. The absence of present trust property at the time a trust is declared does not necessarily mean that a trust does not arise when property is transferred to the entity which undertook the obligation. The crucial question in these circumstances is whether there is someone who has the right to enforce the obligation undertaken. Where money is paid to a recipient who undertakes to hold the money on trust the right can be enforced by the payor [6]. But in a subordination agreement to which the senior creditor is not a party there may be no-one who can enforce the trust without present property being the subject of the trust. To overcome this potential problem the trust could be drafted as a trust of a covenant to subordinate, or, of the subordinated creditor's contractual rights under its loan agreement, rather than a trust of an uncertain amount to be received.

It has also been suggested that a trust for senior creditors would be void for uncertainty where the senior creditors were not named as beneficiaries, or, were not known and merely described as a class e.g. a class of bond holders. Reference is consistently made to IRC v. Broadway Cottages Trust [7] where it was held by the English Court of Appeal that a discretionary trust is void for uncertainty if it is not possible at any particular time to determine the whole range of members of the class of potential beneficiaries, even although certain members of the trust are ascertainable. But IRC v. Broadway Cottages Trust was overruled by the House of Lords in McPhail v. Doulton [8]. As a result of this decision trust certainty exists for a discretionary trust, if it can be said at any given time that a person is, or is not, a member of the class of beneficiaries designated by the trust.

However, a trust established for senior creditors is unlikely to be a discretionary trust, so the rules relating to object certainty in a discretionary trust would not apply. The trustee would be holding for named senior creditors, or a class of senior creditors, in accordance with the entitlement of each beneficiary. Hence the trust is a fixed trust which will be void for uncertainty if it is not possible to provide a complete list of the beneficiaries: Re Gulbenkian's Settlement Trust [9].

This does not mean that it is necessary to know the actual identity of the beneficiary in every case. It would be sufficient if the beneficiary were identifiable. Consequently, if the senior creditors were the holders of bearer notes trust certainty is likely so long as there is a record of the total amount secured by the issue, the face value of each note, the number on issue and some means of identifying each bearer note. It would also be necessary to ensure that the rule against perpetuities was not breached, otherwise the trust would be void.

The establishment of a trust lessens the risk of a payment made to the subordinated creditor not being handed to the senior creditor. In the case of a complete subordination, if the subordinated creditor receives a prohibited payment which it fails to turn over, the senior creditor can trace the trust moneys. In the case of an inchoate subordination crystallizing on liquidation, there is less likelihood that a distribution will be made to the subordinated creditor without the knowledge of the senior creditor. Any risk can be diminished further by the appointment of an independent trustee to hold the subordinated debt, which is a technique often followed in the case of bond issues.

(ii) (b) Estoppel

While the American Courts have indicated a willingness to utilize the principle of estoppel in this area, the application of the doctrine in Australia, and in common law jurisdictions generally, is fraught with difficulties. An estoppel may be relied upon in

the absence of a contract or trust, where there has been a representation made to the senior creditor who has relied on it to his detriment. Unless both these elements are present a senior creditor will find it difficult to derive any benefit from a subordination agreement to which he is not a party. The difficulty is that many lenders will not be able to rely on any doctrine of estoppel, because they are willing to maintain outstanding balances and make new advances whether or not they knew of the representation to subordinate. Likewise, although they may know of the agreement to subordinate they do not rely on it.

Re Industrial Welding Co. Pty. Limited [10] shows clearly that it cannot be inferred from knowledge of a situation that a representation, which will give rise to an estoppel, has been made. In this case the issue of an estoppel was raised by the senior creditors to protect their position, but it failed. A meeting of creditors was held after the company had passed a resolution to wind up voluntarily. The meeting was told that the family creditors had agreed to defer their debts to the trade creditors to enable the senior creditors to be paid in full. The statement was incorrect because the family creditors had not agreed to subordinate their debts. During the liquidation it became clear that the senior creditors would not be paid in full. The senior creditors sought to prove priority for their debts, inter alia, on the basis of an estoppel.

This argument failed for three reasons. Firstly, because it was not established that the representation was made by a person having the requisite authority. Secondly, there was no evidence that the senior creditors relied upon the representations which were made. Needham J took the view that the senior creditors considered the priority of the payment was irrelevant. What motivated the senior creditors to accept the situation was the knowledge that their debts would be repaid in full. "Reliance upon a representation is not to be inferred merely from knowledge that it was made" [11]. Thirdly, the senior creditors did not change their position as a result of the information, because their position after the meeting was the same as it was before the meeting. It was argued that they had changed their position by forgoing the right to have the company wound up. As the company had already been wound up this was not a right they had in any event.

Where there has been an established relationship preceding the representation it is likely to be more difficult to establish an estoppel: Dalgety Australia Limited v. Harris [12].

> "Where the evidence established a course of dealing between the offeree and a third party which precedes the offer and follows it without alteration, the basis for inferring a causal connection between the offer and subsequent dealing may be entirely lacking." Glass JA [13].

In this case Dalgetys had continued to sell livestock to a company in financial difficulty after it had knowledge, through a bureau of which it was a member, that the shareholders had given the bureau a guarantee that the company would meet its commitments for livestock purchased. The Court of Appeal refused to enforce the guarantee in Dalgetys favour on the grounds that knowledge of an offer followed by performance of its conditions is not sufficient in itself to show that the performance of the act involved the acceptance of the offer.

The acceptance and performance must be actuated at least in part, by the offer. Here, Dalgetys was just as likely to have continued to supply livestock to the company whether it knew of the offer or not.

Public Policy Considerations under Section 440 Companies Code

One major difficulty associated with subordination is that the subordination of a debt, to the debt of another creditor of equal rank, us regarded as inimical to the:

> "... general rule ... applicable to both voluntary and compulsory winding up ... that the property of the company is to be applied in satisfaction of its liabilities equally" [14].

Section 440 of the Companies Code provides for a pari passu distribution of a company's assets to creditors on a liquidation.

> "Except as otherwise provided by this Code all debts proved in a winding up rank equally and, if the property of the Company is insufficient to meet them in full, they shall be paid proportionately".

Judicial authority in Australasia as to whether or not subordination contravenes section 440 is equivocal.

The case which appears to have caused most difficulty is the early New Zealand case in Re Walker Construction Co. Limited (In Liquidation) [15] where FB Adams J considered the equivalent equal distribution section in the New Zealand Companies Act. In this case an order was sought that the official liquidator should accord a preference in the liquidation to certain creditors to whom the company had become indebted after a particular date. When the Company was in financial difficulty the existing creditors entered into a private scheme to give creditors who became creditors after a particular date payment in full before the deferred creditors. FB Adams J regarded the equivalent of section 440 as permitting creditors to waive its protection, so that if the creditors chose to waive or qualify their right to pari passu payment, the liquidator was not compelled to pay them out pari passu.

Some years later in Re Orion Sound Limited [16] Mahon J had to consider a factual situation which was indistinguishable from the

facts in Re Walker Construction Company Limited. His Honour held that the creditors, who had advanced credit after the date of the subordination deed could not rely on it for a number of reasons, but particularly because his Honour considered that it was impossible for creditors to contract out of the pari passu distribution rule laid down by the Act. In this regard the decision of FB Adams J in Re Walker Construction Company Limited was regarded as being wrong.

Since then there have been two English decisions bearing on the matter. The first of these was National Westminster Bank v. Halesowen Presswork and Assemblies Limited [17]. This case concerned the claim by the Bank to set off credits and debits in accordance with the statutory right of set off under section 31 of the Bankruptcy Act 1914.

The majority of the House of Lords held that the statutory right could not be renounced because it was not possible to contract out of the provisions requiring amounts in different accounts to be off set and therefore the Bank was entitled to off set.

This reasoning was applied in British Eagle International Airlines v. Compagnie Nationale Air France [18]. British Eagle and Air France were members of IATA which had established a clearing house for settling credits and debits arising from the mutual provision of air transportation services. No member could claim against any other member, but could claim only against IATA for the balance owed under the scheme. British Eagle ceased trading and went into liquidation. At the time Air France owed the clearing house money for services provided by British Eagle. The liquidator sued Air France for the balance due. It was argued for Air France that the clearing house arrangement must prevail and that the net balance owed by an airline in respect of services provided for it by British Eagle must be applied in reduction of the amount owed by British Eagle in respect of services provided for it by the other airline, and only the net balance accounted for. The House of Lords by a majority of three to two found in favour of British Eagle for the whole of the amount owed by Air France for services performed by British Eagle, on the basis that the clearing house arrangement was a contracting out of the English equivalent of section 440, and therefore contrary to public policy. The minority did not question this principle. The dissent in the House of Lords was restricted to the true nature of the clearing house agreement. The minority were of the opinion that the property of British Eagle did not include any direct claim against Air France, by reason of the commercial agreement by which British Eagle and its liquidator were bound.

In New Zealand the principle established by the British Eagle case has been accepted [19].

In Australia, however, British Eagle has been distinguished on several occasions without explanation.

In Re Marlborough Concrete Constructions Pty. Limited [20], Douglas J dealt with a Court approved scheme and approved Re Walker Construction Company Limited without recognising or acknowledging that Walker's case dealt with an informal scheme. At the end of his judgment his Honour, without any discussion, maintained that the British Eagle case was not applicable because it was distinguishable on its facts.

In Industrial Welding Company, Needham J obiter dictum, commented that the British Eagle case did not lay down a principle that a creditor could not defer his claim to be paid to the claim of others. There is no discussion on this point and it is not clear what his Honour had in mind.

In Re NBT Builders Pty. Limited [21], O'Bryan J thought that the language of section 440 of the Companies Code was not mandatory.

In Re Price Mitchell Pty. Limited [22], the Court refused to sanction a scheme under section 315 of the Companies Code because there was a conflict of authority on whether a claim by deferred creditors should be promoted to rank over other creditors not a party to the scheme, but otherwise entitled to priority under section 441.

Until the Australian Courts have properly considered the British Eagle case it is difficult to know what view will ultimately be regarded as correct here. It is also difficult to know even if the British Eagle case is adopted here whether it is possible to structure arrangements which fall outside the public policy considerations which were determinative in that case.

Notwithstanding this, the prohibition on private contractual alterations relates only to property which is actually owned by a Company at the commencement of the liquidation. Property held on trust at the date of the commencement of liquidation is not the property of the company and therefore the provisions of section 440 Companies Code do not apply: Carreras Rothmans Limited v. Freeman Matthews Treasure Limited.

The question which remains is whether the British Eagle case leaves open the possibility of a company's property being shorn of certain attributes which will place it in a deterred position in a manner which is not contrary to the majority decision of the House of Lords. The answer depends on how wide the ratio is in the British Eagle case. A narrow view of the ratio may restrict the decision to its facts (a clearing house arrangement) or to an arrangement of similar effect. If this prevails, then it may be possible to follow the approach suggested by the minority and consider whether it is possible to structure arrangements which create limited rights of property in the subordinated creditor which might be successful in avoiding the public policy considerations of section 440.

It should be said immediately that any arrangement whereby one debt is deferred to another would on the insolvency of the debtor be invalidated as against public policy.

But a contractual arrangement whereby the subordinated creditor agrees that money advanced by it would not be repayable until the senior creditor's debt was fully repaid may withstand challenge. This concept is the essence of the Perpetual Floating Rate Notes which were until recently a popular kind of subrogated eurobond. The Perpetual Floating Rate Note entitled the holder to interest, but no absolute right to the repayment of the face value of the note. The holder's only right is to a share of the surplus of assets after all other debts of the issuer have been repaid following the liquidation of the issuer.

Sometimes the Perpetual Floating Rate Notes have been supported by a trust deed which has provided additional strength to the subordination. Under the trust deed the Trustee is directed to apply payments in such an order as to give effect to the status of the notes.

The subordinated convertible unsecured notes issued by the National Australia Bank earlier in the year utilise the same concept as the Perpetual Floating Rate Notes, except that there was no trust deed.

The essence of this technique is that the property created and issued to noteholders entitles the holder to that property, viz a right to participate in a surplus on a winding up in accordance with the specified arrangements, not to repayment of the face value of the note. Therefore, there is no attempt to oust the mandatory obligations of distribution on a winding up. The note holder simply has limited property rights which arise from the time of the creation of the property and it is with those rights that the liquidator must deal.

While public policy may prevent creditors altering their statutory rights to receive payments from a liquidator, there seems to be no public policy preventing creditors from making arrangements for the application of payments after receipt. The British Eagle case does not provide that creditors cannot agree to apply payments received from a liquidator towards satisfying the debt of another creditor, even although this may effectively circumvent the provisions of the Code. There is nothing contrary to public policy in a creditor applying his own money for the benefit of another creditor in the absence of fraud or duress. The senior creditor would, of course, have no protection in the event of the subordinated creditor's liquidation unless some trust arrangement were established.

Assignments

An assignment of the subordinated debt by way of additional security may provide protection to the senior creditor if the

subordinated creditor becomes insolvent, but the assignment obviates the need for the subordination itself. If the subordinated debt is so assigned, the senior creditor has the full benefit of the subordinated debt and any payments which are made by the borrower to it. The assignee can prove the debt, or take whatever steps may be necessary to protect its position without recourse to the subordination agreement.

If the senior creditor seeks an assignment not of the whole or part of the debt, but of the interest payable on the debt this would not be effective without consideration because interest is a mere expectancy: Norman v. FCT [23]. Likewise, any assignment of a future entitlement to receive distributions from a liquidator would require consideration: Re Irving ex p Brett [24].

The danger in taking an assignment of the debt is that the need to register the assignment under section 200 of the Companies Code may be overlooked. A charge on a book debt is registrable, and an assignment of a loan or debt by way of security appears to fall within the statutory definition of a charge on book debts [25] but not part of a book debt [26].

An assignment, with consideration, of interest payable on a debt would probably fall within the statutory definition, and accordingly be registrable. The payment of a dividend from the liquidator is unlikely to be regarded as a book debt and therefore would not be registrable, even if the assignment were accompanied by consideration [27].

The concept of a charge is not defined for the purpose of section 200 and so must, in the absence of any indication to the contrary, bear its ordinary meaning.

In essence a charge is created by the appropriation of specific property to the discharge of some debt or other obligation without there being any change in ownership either at law or in equity, and it confers on the chargee rights to apply to the Court for an order for sale or the appointment of a receiver, but no right to foreclose or take possession [28].

In the absence of any extended statutory definition it is difficult to see how the suggestion that the agreement to subordinate can in itself be regarded as a charge [29]. The senior creditor does not obtain proprietary rights in the subordinated creditor's debt which can be used to satisfy his debt. The senior creditor merely has a right to compel the performance of the contractual obligations undertaken by the subordinated creditor.

A declaration of trust, in itself, should not constitute either a legal or an equitable charge. The right which a beneficiary has under a trust against the trustee is only a right to compel performance of the trust obligation, which is a right quite

different from the proprietary rights conferred by a charge: Carreras Rothmans Limited. However, the reverse is also true and what in effect is a charge cannot be camouflaged by calling it a trust [30].

The essence of an equitable charge was referred to by Lord Truro in Rodick v. Gandell [31].

> "An agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor, or an order given by a debtor to his creditor upon a person owing money or holding funds belonging to the giver of the order directing such person to pay such funds to the creditor will create a valid equitable assignment of the debts or funds to which the order refers.
>
> An agreement for valuable consideration that a fund shall be applied in a particular way may found an injunction to restrain its application in another way. But if there is nothing more, such a stipulation will not amount to an equitable assignment. It is necessary to find, further, that an obligation has been imposed in favour of the creditor to pay the debt out of the fund."

Similar definitions are to be found in National Provincial and Union Bank of England v. Charnley [32] per Atkin LJ at p. 449:

> "It is not necessary to give a formal definition of a charge, but I think there can be no doubt that where, in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an order of the Court."

Thus the essence of an equitable charge is that specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt.

The argument that a trust is an equitable assignment tends to rest on the assumption that the substantive purpose of the transaction is to provide security. The effect of a declaration of a trust for a group of lenders is then likened to a mortgage and the right of a subordinated creditor to retain the trust property after prior interests have been satisfied is likened to an equity of redemption. This approach tends to gloss over the need to carefully analyse whether the transaction does in fact

appropriate property for the payment of a debt to the extent that a right is conferred to resort to the property for the purpose of having it realised to satisfy the debt. In many cases these basic requirements will not be satisfied and it will be found that the senior creditor has nothing more than a right to compel another (i.e. the trustee) to perform an obligation which is owed to the senior creditor.

SOME CONSIDERATIONS FOR DRAFTSMEN

1. When does the Subordination Agreement become effective?

With an inchoate subordination this is often the liquidation of the borrower. It is not necessarily desirable from the point of view of the senior creditor to be able to implement the subordination only on liquidation. It may be preferable to trigger the subordination at an earlier date, e.g. a default on the senior debt or a failure to maintain predetermined debt/equity ratios.

2. Restrictions on Subordinated Creditor

Where the subordination is complete so that no payments can be made until the senior debt has been paid, this may be too restrictive on the subordinated creditor. In this regard it may be possible to permit interest to be paid on the debt until some default occurs. Alternatively, there may be some formula for dividend restriction so long as payments are being received by the subordinated creditor with a view to restraining the depletion of its cash resources. The subordinated creditor should also be prepared to accept that if the subordination provisions are broken, or if the repayment of the subordinated debt is accelerated, then the senior debt should be accelerated, otherwise the subordinated creditor could be paid out before the subordinated debt crystallises and the purpose for subordinating would be lost.

Where the senior creditor is not a party to the Subordination Agreement there should be provisions in the agreement prohibiting amendments which would adversely affect the subordination.

If the senior creditor is a party to the Subordination Agreement and it expressly provides for amendments, the senior creditor should endeavour to limit that right to amendments which do not prejudice his position. In this regard it is desirable to prohibit the subordinated creditor from transferring, assigning or pledging the subordinated debt. Without such restrictions the senior creditor could find that the subordinated securities were destroyed, new securities issued which did not refer to the subordination and sold to a bona fide purchaser for value without notice.

Proper protection of the senior creditor may also require that the subordinated creditor be prohibited from taking security. If

security were created later, the subordinated debt would then be paid from the security and not from the liquidation dividends available to unsecured creditors, and the senior creditor would lose the contemplated right to dividends due from the subordinated creditor. As an alternative to a prohibition on the giving of security a provision could be inserted that payments on the subordinated debt out of the proceeds of the security are to be made available to the senior creditor.

3. Alteration of Senior Debt

While it is doubtful that a subordination is akin to a guarantee by the subordinated creditor or even collateral security without personal obligation [33], nevertheless it is common practice to include clauses which enable the senior creditor to deal with the senior debt whether by extension, variation or the release of collateral security. In this way the benefits of the covenants given by the subordinated debtor will not be lost if the subordinated creditor were held to be a guarantor.

4. Rights of Set-Off

Some subordination agreements provide that the subordinated creditor will not exercise any right of set-off. Similarly the borrower will contract not to exercise any right of set-off it may have. In the light of the decision in National Westminster Bank v. Halesowen Presswork such a clause would be ineffective against section 85 Bankruptcy Act 1966 (Cth).

However, it may be possible to overcome the effect of the decision by providing that the subordinated creditor's debt is not due and payable even on the winding up until the senior creditor's debt is paid in full. At the date of winding up the debt would still be contingent and would only become payable when the senior creditor is paid [34]. This would have relevance only to debts which are completely subordinated.

Footnotes

[1] See generally Restatement, Contracts para 302-315 2d; Williston, Contracts para 347-403 (3 ed 1959); 57 Colum. L.R. cu 406 (1957), Trident General Insurance v. McNiece (C of A unreported 31 March 1987).
[2] Article 9 Uniform Commercial Code (as amended).
[3] The concept has less validity in Massachusetts.
[4] 1984 3 W.L.R. 1016.
[5] M. Fitzgerald, International Financial Law Rev. 1983, 17.
[6] Toovey v. Milne (1819) 2B & A 683; Quistclose Investments v. Rolls Razor Limited 1970 A.C. 567; Carreras Rothmans Limited v. Freeman Matthews Treasure Limited.
[7] 1955 Ch. 20.
[8] (1970) 2 All E.R. 228.
[9] (1968) 3 All E.R. 785.
[10] (1977-79) 3 A.C.L.R. 754.

[11] Ibid P 759.
[12] (1977) 1 N.S.W.L.R. 324.
[13] Ibid P 328.
[14] B.H. McPherson, Law of Company Liquidation (2nd Ed., 1980) P 347; Ex parte MacKay (1873) 8 Ch App 643.
[15] (1960) N.Z.L.R. 191.
[16] (1979) 2 N.Z.L.R. 574.
[17] (1972) A.C. 785.
[18] (1975) 1 W.L.R. 758.
[19] Re Orion Sound Limited
[20] (1976-77) 2 A.C.L.R. 270.
[21] (1983-84) 8 A.C.L.R. 724.
[22] (1984) 2 A.C.L.C. 524.
[23] (1963) 109 C.L.R. 9.
[24] (1878) 7 Ch D 419.
[25] The reference in paragraph (1)(f) [section 220] to a charge on a book debt is a reference to a charge on a debt due or to become due to the Company at some future time on account of or in connection with a profession, trade or business carried on by the company, whether entered in a book or not, and includes a reference to a charge on a future debt of the same nature although not incurred or owing at the time of the creation of the charge, but does not include a reference to a charge on a marketable security, on a negotiable instrument or on a debt owing in respect of a mortgage charge or lease of land.
[26] Ashby Warner & Co. v. Simmons (1936) L.J.K.B. 127.
[27] Spence v. Coleman (1901) 2 K.B. 199; Birchin Lane Nominees Ltd. v. Nicholas (1969) 1 W.L.R. 1372.
[28] Megarry and Wade, The Law of Real Property (4th ed., 1975) pp 902-925.
[29] M Fitzgerald, International Financial Law Review, 1983.
[30] Re Bond Worth (1979) 3 W.L.R. 667.
[31] (1851) 1 De M & G 763.
[32] (1924) 1 K.B. 431.
[33] Philip Wood, Law and Practice of International Finance, 1980, para 17.3(4).
[34] Re Charge Card Services [1986] Ch. 697; [1986] 3 All ER 289.