BP Singapore Pte Ltd *v* Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others and another appeal
[2020] SGCA 9

Case Number	: Civil Appeal Nos 28 and 29 of 2019
Decision Date	: 26 February 2020
Tribunal/Court	: Court of Appeal
Coram	: Sundaresh Menon CJ; Andrew Phang Boon Leong JA; Judith Prakash JA
Counsel Name(s)	: Davinder Singh SC, Jaikanth Shankar, Tan Ruo Yu, Darren Low Jun Jie, Yee Guang Yi and Terence De Silva (Davinder Singh Chambers LLC) for the appellants; Lee Eng Beng SC, Disa Sim and Torsten Cheong (Rajah & Tann Singapore LLP) (instructed); and Tham Hsu Hsien, Peh Aik Hin, Lee May Ling and Alisa Toh Qian Wen (Allen & Gledhill LLP) for the respondents
Parties	: BP Singapore Pte Ltd — Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) — Cosimo Borrelli — Jason Kardachi — Glencore Singapore Pte Ltd

Debt and Recovery – Right of set-off – Bankruptcy

Debt and Recovery – Right of set-off – Equitable

Credit and Security – Charges

[LawNet Editorial Note: This was an appeal from the decision of the High Court in [2018] SGHC 215.]

26 February 2020 Judgment reserved.

Judith Prakash JA (delivering the judgment of the court):

1 The right of set-off provides a convenient mechanism for the settlement of claims and cross-claims. For it to apply, the debts must be due between the same parties, in the same right: Rory Derham, *Derham on the Law of Set-Off* (Oxford University Press, 4th Ed, 2010) ("*Derham on the Law of Set-Off*") at para 11.01. As straightforward as this principle may seem, it is not always easy to apply especially where the cross claims are between corporate entities, one of whom has charged its receivables to a financier, and the chargor company is subsequently placed in receivership but continues thereafter to do business with the other entity. These appeals arise in this context. The company in question and its trading partners had mutual claims and cross-claims. A secured creditor of the company appointed a receiver to take charge of the company's business, crystallising the floating charge over the company's present and future book debts. The company entered into new trading arrangements with the trade partners, albeit under the direction of the receiver. The question that arose was whether the trading partners could set-off their post-receivership indebtedness to the company against the company's pre-existing indebtedness to them.

Background facts

2 The first respondent in both appeals, Jurong Aromatics Corp Pte Ltd ("JAC"), is a Singapore company that was incorporated for the purposes of constructing, developing and operating a condensate splitter integrated with an aromatics plant on Jurong Island ("the Plant"). The Plant was designed to process condensate feedstock and other raw materials in order to produce aromatics and

petroleum products.

3 In April 2011, a syndicate of financiers ("the Senior Lenders") provided loans to JAC totalling approximately US$1.68bn. By way of a debenture dated 30 April 2011 ("the Debenture") entered into between JAC and BNP Paribas, Singapore Branch ("the Agent") for and on behalf of the Senior Lenders, the Senior Lenders obtained from JAC a comprehensive security package over all of JAC's undertaking and assets to secure their loans. In particular, by cl 3.1(c) of the Debenture, JAC granted in favour of the Agent a first fixed charge over all its assets listed in that clause, including all its present and future book debts. By cl 4.1, JAC granted in favour of the Agent a first floating charge over its undertaking and all its present and future assets, including all assets charged under cl 3.1.

4 The appellant in Civil Appeal No 28 of 2019, BP Singapore Pte Ltd ("BP"), and the appellant in Civil Appeal No 29 of 2019, Glencore Singapore Pte Ltd ("Glencore"), were both suppliers and customers of JAC. In March 2011, they each entered into feedstock supply and product offtake agreements with JAC (the "BP-JAC feedstock supply agreement", "BP-JAC product offtake agreement", "Glencore-JAC feedstock supply agreement" and "Glencore-JAC product offtake agreement", collectively "the Trade Agreements"). Under each feedstock supply agreement, JAC agreed to purchase feedstock from the particular supplier for processing into aromatics and petroleum products. Under each product offtake agreement, JAC agreed to sell the products back to the relevant supplier of the feedstock.

2014: the Set-Off Agreement

5 The Glencore-JAC feedstock supply agreement and Glencore-JAC product offtake agreement themselves expressly provide, by cl 10(a) and cl 2.6(f) respectively, that parties are not entitled to exercise a right of set-off in respect of any sums due under those agreements. Parties subsequently varied these terms by way of a set-off agreement dated 23 December 2014 ("the Set-Off Agreement"), under which Glencore and JAC agreed to set-off mutual claims arising out of the Glencore-JAC feedstock supply agreement and Glencore-JAC product offtake agreement. It is common ground that the net effect of the Set-Off Agreement is the creation of a debt ("the Set-Off Agreement Debt") payable by Glencore to JAC. No such debt is owed by BP.

2014–2015: receivers and managers appointed

6 JAC ran into financial difficulties sometime in 2014. The operations of the Plant were shut down in December 2014. Eventually, on 28 September 2015, Mr Cosimo Borelli and Mr Jason Kardachi, respectively the second and third respondents in these appeals, were appointed receivers and managers of JAC pursuant to the terms of the Debenture. We will refer to them as "the Receivers" hereafter. The appellants were given notice of this appointment on 29 September 2015.

7 Later that year, both BP and Glencore issued enforcement notices stating their intention, amongst other things, to apply for the winding-up of JAC. As at November 2015, Glencore quantified the amount which JAC owed it as being US$162,293,222.38 and BP quantified the amount which JAC owed it as being US$106,433,075.32. There was, subsequently, dispute about some of the amounts claimed by Glencore but it was common ground in these proceedings that nevertheless, prior to the appointment of the Receivers, JAC was substantially indebted to both appellants as a result of the Trade Agreements. We refer to this indebtedness as "the JAC indebtedness".

2016–2017: the Tolling Agreement and the sale of the Plant

8 The plan to wind up JAC was postponed because the Receivers put forward a plan for the

continued functioning of the Plant while a purchaser for the Plant was sought. Negotiations in this regard between the appellants and the Receivers resulted in an agreement dated 19 April 2016 ("the Tolling Agreement") under which the appellants would be able to use the Plant for production of their products until its sale. As a condition precedent to entering into the Tolling Agreement, the appellants required that the Senior Lenders provide an irrevocable undertaking in respect of two matters: (a) not to remove the Receivers from their position as JAC's receivers until the tolling and transitional period thereafter was completed; and (b) not to take any step that would have the effect of frustrating, preventing or interfering with the performance of the Receivers' and/or JAC's obligations under the Tolling Agreement. Various letters of undertaking to this effect were accordingly issued by the Senior Lenders prior to the commencement of the tolling process under the Tolling Agreement.

9 Essentially, tolling was a process in which the appellants utilised the Plant to process the feedstock they supplied into aromatics and petroleum products which they could sell. In exchange, JAC was to be paid a monthly tolling fee by the appellants for the use of the Plant. Between August 2016 and August 2017, the appellants duly paid the monthly tolling fees under the Tolling Agreement. They did not, however, pay the tolling fee for the month of August 2017 amounting to some US$5.46m due from each of Glencore and BP ("the Tolling Fee Debt").

10 Instead, on 28 August 2017, Glencore, with the support of BP, instituted winding-up proceedings against JAC. This action was followed on 20 September 2017 by a letter from the appellants to JAC in which they asserted, for the first time, that the Tolling Fee Debt was subject to insolvency set-off against the JAC indebtedness. JAC was ordered to be wound up on 18 February 2019.

11 In the meantime, in May 2017, a purchaser for the Plant, ExxonMobil Asia Pacific Pte Ltd ("ExxonMobil"), had been found. BP, Glencore, JAC and ExxonMobil entered into a transitional agreement dated 16 June 2017 ("the Transitional Agreement"). BP, Glencore and JAC entered into a supplemental agreement in respect of the Transitional Agreement dated 16 June 2017 as well ("the Transitional Supplemental Agreement"). These agreements facilitated the "hot transition" of the Plant. A "hot transition"', as opposed to a "cold" one, would allow the Plant to be transferred to ExxonMobil while operations were ongoing rather than JAC having to shut down the Plant before effecting its transfer. The sale of the Plant in this way would fetch a substantially higher price than if it were sold to ExxonMobil in a "cold transition".

12 The appellants had agreed to undertake various obligations to facilitate the hot transition. One of these was their agreement pursuant to cl 2.1 of the Transitional Supplemental Agreement to pay JAC a sum of money known as the Final Payment Amount. The Final Payment Amount represented the value of certain feedstock ("the Initial Inventory"), that JAC had transferred to the appellants at the start of the tolling process and which the appellants were obliged to return to JAC at the end of tolling pursuant to cl 5.3 of the Tolling Agreement. For present purposes, it suffices to note that the Initial Inventory consisted of that residual base of feedstock that, for physical reasons, could not be extracted from the Plant's processing machinery. The Final Payment Amount, a sum of US$16,205,334.86, was not paid when due and, as with the Tolling Fee Debt, the appellants asserted on 20 September 2017 that the Final Payment Amount was subject to insolvency set-off against the JAC indebtedness.

13 As part of the entire tolling arrangement, the Receivers also agreed with Glencore and BP that they would receive a monetary incentive ("the Performance Incentive") if certain key performance indicators relating to the output capability of the Plant were achieved in the course of tolling. The appellants were eventually paid some US$110m on 28 August 2017 under this arrangement. This was also the date on which the sale of the Plant to ExxonMobil was completed.

The proceedings and decision below

14 The decision below arose out of the Receivers' applications by originating summons for declarations that the appellants were not entitled to set-off the Tolling Fee Debt and the Final Payment Amount against any debts owed by JAC. In relation to Glencore, the Receivers sought an additional declaration that it was not entitled to set-off the Set-Off Agreement Debt against any debts owed by JAC. The appellants responded below that they were entitled to set-off the receivables claimed by JAC, namely, the Tolling Fee Debt, the Final Payment Amount and the Set-Off Agreement Debt (in Glencore's case), against the JAC indebtedness, all such receivables being hereafter collectively referred to as "the claimed receivables". According to the Receivers, in total the claimed receivables amounted to at least US$57.5m and of this sum more than US$46m had arisen post the Tolling Fee Agreement.

15 The Judge, in *Jurong Aromatics Corp Pte Ltd (receivers and managers appointed) and others v BP Singapore Pte Ltd and another matter* [2018] SGHC 215 ("*Jurong Aromatics (HC)*"), granted the declarations sought by the Receivers, finding that no set-off could arise between the claimed receivables on the one hand and the JAC indebtedness on the other. This was because as soon as they arose, all receivables payable to JAC, which included the claimed receivables, became subject to the fixed charge or crystallised floating charge in favour of the Senior Lenders. This meant that the persons entitled to payment of the claimed receivables were in fact the Senior Lenders rather than JAC itself. On the other hand, it was JAC, not the Senior Lenders, that owed the appellants the JAC indebtedness. The requirement of mutuality of debts for insolvency set-off to operate was thus not met. Further, the Senior Lenders had neither ceded control over the claimed receivables nor released their security in the charges so as to permit any estoppel, waiver or decrystallisation to arise. And although the Tolling Agreement, the Transitional Agreement and the Set-Off Agreement each contained clauses prohibiting the assignment of JAC's rights under such agreement, these clauses could not prevent the equitable interest in the claimed receivables from being vested in the Senior Lenders: *Jurong Aromatics (HC)* at [35].

The parties' submissions

The appellants

16 The appellants' case, broadly, is that they are entitled to set off the claimed receivables against the JAC indebtedness. They advance their case on the basis of insolvency set-off or, in the alternative, equitable set-off.

17 Counsel for the appellants, Mr Davinder Singh SC ("Mr Singh"), accepts that insolvency set-off only applies if there is a mutuality of debts and that mutuality is destroyed if the claimed receivables are in law subject to a fixed or crystallised floating charge in favour of the Senior Lenders. Mr Singh also accepts that the floating charge created by cl 4.1 of the Debenture had crystallised upon the appointment of the Receivers on 28 September 2015. His broad point, however, is that the Senior Lenders had relinquished control over the claimed receivables to such an extent that the crystallised floating charge must have in law been decrystallised.

18 In respect of equitable set-off, Mr Singh submits that the claims and cross-claims in respect of the Final Payment Amount and the Set-Off Agreement Debt are so closely connected that it would be manifestly unjust not to allow an equitable set-off. The appellants do not appear to assert that the Tolling Fee Debt is subject to an equitable set-off against the JAC indebtedness.

The respondents

19 Counsel for the respondents, Mr Lee Eng Beng SC ("Mr Lee"), focuses much of his submissions on the legal requirements that must be met for a court to find that a crystallised charge has decrystallised or that assets have been released from the charge. In this regard, he submits that there must be unequivocal consent, whether by words or conduct, from the chargees (that is, the Secured Lenders) before decrystallisation can occur. Here, the floating charge over JAC's existing and future receivables crystallised upon the appointment of the Receivers. That meant that the receivables that arose thereafter such as the Tolling Fee debt and the Final Payment Amount immediately became subject to a fixed charge in favour of the Senior Lenders. Although the Receivers were given broad powers to use the moneys payable by the appellants under the tolling arrangement in the course of JAC's business, that in itself was insufficient to constitute a relinquishment of control on the part of the Senior Lenders over the claimed receivables (which therefore had to be regarded as charged to the Senior Lenders). Mr Lee goes so far as to say that in law, receivers appointed by debenture-holders cannot through their own conduct effect a release of security; the security holders themselves must agree to do so for there to be any such release. In the circumstances, since the Senior Lenders had not, either by express words or their conduct, indicated their agreement to a release, the claimed receivables remain charged in the Senior Lenders' favour, and consequently, mutuality does not exist and no insolvency set-off can take place.

20 Mr Lee submits that equitable set-off cannot apply in relation to the Set-Off Agreement Debt, as parties had agreed under the Glencore-JAC feedstock supply agreement and Glencore-JAC product offtake agreement that they would not be entitled to exercise a right of set-off in respect of any sums due under those agreements. In relation to the Final Payment Amount, there is no close connection between this and the JAC indebtedness, and consequently, it was not manifestly unjust to disallow an equitable set-off in this context.

Issues

21 Two main issues arise from the parties' submissions, which we address in turn:

(a) Whether insolvency set-off was applicable either because the floating charge that crystallised on the appointment of the Receivers had been decrystallised or because assets had otherwise been released from the charge.

(b) Whether the Set-Off Agreement Debt and the Final Payment Amount are so closely connected with the JAC indebtedness that it would be manifestly unjust not to allow an equitable set-off to apply.

Insolvency set-off and decrystallisation

The Tolling Fee Debt

22 The issue here turns, broadly-speaking, on the question of control over the use of the receivables; parties appear to be in agreement on this proposition. In this regard, the appellants relied heavily on the authority of *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 AC 680 ("*Spectrum Plus*"). Lord Hope of Craighead listed there (at [54]) the limited number of ways by which a charge over book debts attains the character of a fixed charge. The first is that all dealings with the book debts are prevented so that they are preserved for the chargee's security. The second is that all dealings with book debts other than their collection are prevented and the proceeds when collected must be paid to the chargee in reduction of the chargor's outstanding debt. The third way is similar to the second except that upon collection of the book debts the proceeds must be paid into an account with the chargee bank. The fourth way is similar to the third, save that the collected proceeds are required to

be paid into a separate account with a third-party bank, which account is charged to the chargee under a fixed charge. In other words, the essential requirement for a fixed charge is that assets can only be subject to a fixed charge if the chargor is unable to deal with the charged assets at all without the chargee's concurrence.

23 Parenthetically, although the limited methods of creating (and distinguishing) a fixed charge endorsed in *Spectrum Plus* obviously mean that a charge that does not meet any of those requirements must be a floating charge, a floating charge becomes a fixed charge upon crystallisation: *Dresdner Bank AG and others v Ho Mun-Tuke Don and another* [1992] 3 SLR(R) 307 at [60].

24 The appellants submit that control over the receivables in the *Spectrum Plus* sense was absent on the facts here. They place great weight in this regard on two undisputed facts. First, the monthly tolling fees payable under the Tolling Agreement were deliberately sized to cover the operating costs of the tolling process. Secondly, these moneys were freely available for JAC and the Receivers to use in the course of tolling. In the appellants' submission, these facts show that despite the appointment of the Receivers, the Senior Lenders did not directly benefit from the monthly tolling fees that were being paid under the Tolling Agreement, as the moneys went towards the operating expenses of the tolling process rather than to repayment of the Senior Lenders' loans. The fact that moneys paid as tolling fees were part of JAC's circulating capital also meant that it was JAC, in effect, that had control over the use of those receivables, since the Receivers were acting as JAC's agents in the tolling process. That the Senior Lenders did not have control over the use of the moneys paid as monthly tolling fees was also evident in the fact that the Senior Lenders only received updates from the Receivers on how the moneys were used; their consent was not required for that use.

25 The respondents accept that decrystallisation is possible in principle. As noted earlier, they submit, however, that there needs to be clear evidence before the court can conclude that decrystallisation has actually taken place. In particular, they submit that once the floating charge here crystallised on the appointment by the Senior Lenders of the Receivers, the only way to effect a decrystallisation was for the appellants to contract directly with the Senior Lenders. Since there was no such agreement with the Senior Lenders, the crystallisation of the floating charge was not adversely impacted in any way.

26 We begin our analysis by considering the appellants' reliance on *Spectrum Plus*. In our judgment, that case is of limited assistance to the appellants in a context such as this, where we are dealing with a fixed charge created by operation of law or by conversion from a floating charge in accordance with the terms of the debenture that created the floating charge. There is no authority that such a charge re-floats if the controls described in *Spectrum Plus* are not followed strictly after crystallisation. The chargee bank in *Spectrum Plus* was attempting to obtain a declaration that its charge over book debts was, as created, a fixed charge. Accordingly, the situations Lord Hope enumerated in which a charge over book debts would amount to a fixed charge were limited to a consideration of the features of the charge as created. He was not considering or commenting on the situation in which a charge created as a floating charge had been transformed into a fixed charge due to the appointment of receivers. *A fortiori*, the effect of the receivers being thereafter authorised by the chargee to use the charged receivables for certain specific purposes relating to the company's business was not addressed.

27 As to the facts, the eponymous charging company in *Spectrum Plus* had obtained an overdraft facility for the purpose of providing working capital for the its business. By a debenture the company created a charge, expressed to be "by way of specific charge", in favour of the bank over the company's book debts in order to secure moneys owing to the bank. The company was obligated

under the debenture to pay the proceeds of any book debt into the company's account with the bank, and not to sell, factor, discount or otherwise charge or assign any such book debt in favour of any other person without the bank's consent. The company collected the proceeds of book debts and paid them into its account with the bank, thereby reducing the overdraft. The company also drew on the account as and when required, thereby increasing the overdraft. Eventually, the company went into creditors' voluntary liquidation. The liquidators collected book debts but refused to account for them to the bank. The bank sought a declaration that the debenture created a fixed charge over the company's book debts and the proceeds thereof and an order that the liquidators account to the bank in respect of them. This was denied. *Spectrum Plus* was therefore a case concerning the way the charge had operated while the company was carrying on business on its own account. The court did not consider, and did not have to consider, what would be needed to re-float a crystallised floating charge post-receivership.

28 In contrast, at the outset the charge in question here was a floating charge which was then turned into a fixed charge both by operation of law and by the provisions of the Debenture. The Senior Lenders here took the step of enforcing their security over JAC's book debts by appointing the Receivers, an act which the Judge correctly held was sufficient to crystallise the floating charge by virtue of cl 4.4(b) of the Debenture: *Jurong Aromatics (HC)* at [58]. Further, this act was in law an assertion of control over the charged assets by the chargee, as Coomaraswamy J had stated in *Malayan Banking Bhd v ASL Shipyard Pte Ltd and others* [2019] SGHC 61 at [128]:

> … the appointment of receivers is a crystallising event not because it indicates that the company is no longer trading as a going concern, but because it is *a form of intervention by the chargee to take control of the charged assets* … . [emphasis added]

29 The whole point of a security holder appointing receivers and managers is to realise, as a going concern, the business of the company in receivership: *Woon's Corporations Law* (Walter Woon gen ed) (LexisNexis, 2015) at para 51.2. Consequently, the affairs of the company will thereafter almost inevitably have to be arranged in such a manner as to facilitate the carrying on of the business of the company, despite the onset of receivership. Thus, for example, funds will flow in and out in the usual way, as if the company was carrying on its business in the ordinary course of things. Yet this ought not to deceive one into thinking that the holder of a charge over receivables exercises no control at all over those receivables, or that the company is at liberty to carry on its business using the charged assets in any way it pleases. To begin with, "the company" in receivership is not "the company" as it is known prior to receivership. Upon the appointment of receivers and managers, the company's affairs fall to be managed by the receivers, as stated by the learned authors of *Goode on Legal Problems of Credit and Security* (Louise Gullifer, ed) (Sweet & Maxwell, 5th Ed, 2013) ("*Goode 5th Ed*") at para 4–44:

> The appointment of an administrative receiver by the debenture holder out of court has long been the most common method of crystallising a floating charge and is well established as effective for that purpose. … Crystallisation does not depend on the receiver taking possession of the assets; the commencement of the receiver's appointment is all that is required, for by executing a debenture which authorises the debenture holder to appoint a receiver in stated events *the company implicitly recognises that its right to continue managing its business is terminated upon such appointment*. [emphasis added]

Lightman & Moss on the Law of Administrators and Receivers of Companies (Gavin Lightman et al, gen eds) (Sweet & Maxwell, 6th Ed, 2017) ("*Lightman & Moss*") at para 10–014 makes the similar observation that "[t]he powers of management of the directors are suspended and the receiver has complete control of the company's affairs".

30 The appellants' submission that JAC had control over the claimed receivables because the Receivers acted as agents of JAC in continuing its ordinary business cannot, in the light of these principles, be accepted. It is correct that the Receivers were the agents of JAC by virtue of cl 16.4 of the Debenture. But the receiver and manager of a company in receivership is not an agent of the company itself in the same sense as its directors are. This is clear from the judgment of Brightman J in *In re Emmadart Ltd* [1979] 1 Ch 540 at 544–547:

> … [T]he appointment of a receiver for debenture holders suspends the powers of the directors over the assets in respect of which the receiver has been appointed *so far as is requisite to enable the receiver to discharge his functions* …
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> …
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> The authority of a receiver is *not*, however, co-terminous with the authority of the board of directors. The powers of the receiver stem from (i) the powers contained in the memorandum and articles of association of the company to create mortgages and charges, coupled with (ii) the particular powers which have been conferred on a duly appointed receiver pursuant to the due exercise of the company's borrowing powers. …
>
> [emphasis added]

31 Unlike the directors of the company, the receivers and managers are, after all, duty-bound to carry out their functions in the interests of those who appointed them in the first place – the security holders. As the Judge correctly noted (see *Jurong Aromatics (HC)* at [69], citing David Milman in "Receivers as Agents" (1981) 44(6) MLR 658 at pp 660–663), the receiver and manager actually owes little by way of duties as an agent to the company. That a security document confers upon the receiver the power to carry on the company's business and the right to do so as agent of the company is simply an arrangement "to enable the mortgagee to enjoy the advantage of his nominee, the receiver, displacing the mortgagor from control of the mortgaged property and from receipt of the income derived from it whilst at the same time avoiding assuming the liabilities of a mortgagee in possession": *Lightman & Moss* at para 10–013. Accordingly, although the Receivers exercised control over the use of JAC's working capital, and although they were agents of JAC in receivership under cl 16.4 of the Debenture, it does not follow that JAC *qua* the company controlled the use of the claimed receivables.

32 In our judgment, the Judge was therefore correct in holding (see *Jurong Aromatics (HC)* at [70]) that the control over the business of JAC exercised by the Receivers after they were appointed by the Senior Lenders on 28 September 2015 constituted control exercised by the Senior Lenders. Further, while the Receivers used the tolling fees to pay for the operations of the Plant, it is not inconsequential that the appellants actually paid the same each month into the bank account charged to the Senior Lenders and the Receivers could not, therefore, have used the moneys without the assent of the Senior Lenders. It follows that the claimed receivables became subject to the crystallised floating charge under the terms of the Debenture. They were therefore subject to the equitable interest of the Senior Lenders. Consequently, the mutuality between the claimed receivables and the JAC indebtedness that was necessary for insolvency set-off to be applied did not exist.

33 Of course, in their submissions on decrystallisation, the appellants do not rely solely on the fact that the Receivers had carried on the business of JAC and treated the book debts of JAC as circulating capital. They also make the following points. First, the letters of undertaking signed by the Senior Lenders (see [8] above) evidenced the fact that the appellants wanted to be sure the book debts would not be caught by the crystallised floating charge. These letters also confirm that the

appellants are entitled to exercise insolvency set-off. Secondly, the fact that parties felt able to agree to limited set-off arrangements suggests that there was never any issue of mutuality for the purposes of insolvency set-off. Thirdly, the appellants rely on *N W Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 1 WLR 1324 ("*N W Robbie*") for the proposition that, where a receiver carries on the usual business of the company, a trade creditor ought not to be lightly deprived of rights of set-off to which it would have been entitled if the business were being carried on by the company on its own account. And finally, the various prohibitions against assignment clauses under the Tolling Agreement, the Transitional Agreement and the Set-Off Agreement (see [15] above) would be meaningless if the claimed receivables had not been released from the Senior Lenders' security. In our judgment, however, none of these points detracts from the conclusion we have reached, that the claimed receivables remain subject to the crystallised floating charge in favour of the Senior Lenders.

34 In relation to the first point, we fail to see how these letters of undertaking confirm that the appellants are entitled to exercise insolvency set-off; the position is quite the contrary. These letters essentially sought to obtain the Senior Lenders' undertaking not to replace the Receivers or otherwise disrupt the entire tolling arrangement. The appellants point out that the whole purpose of the Tolling Agreement was to keep the business of JAC going. To that end, it would not make commercial sense if the Senior Lenders were able to suddenly put a halt to the entire tolling process and appropriate the charged assets to satisfy JAC's indebtedness. But the appellants, with the advice of counsel, must have concluded that the Senior Lenders had every right to do so, leaving aside questions concerning the commercial sense of such a course of action. Otherwise the appellants would not have felt it necessary to obtain these undertakings from the Senior Lenders as a condition precedent for their entry into the Tolling Agreement. In the end, that the appellants deemed it necessary to obtain the letters of undertaking from the Senior Lenders only bolsters the conclusion that the Senior Lenders had every right to halt the tolling process and appropriate the charged assets. This conclusion is consistent with the view that, even as JAC was allowed to carry on its ordinary business of tolling, the Senior Lenders nonetheless had a beneficial interest in the tolling fees by virtue of the crystallised floating charge. The appellants' conduct in insisting on obtaining the letters of undertaking shows that at the material time, they held that view as well.

35 On the second point, the appellants point to cll 17.5 and 17.9 of the Tolling Agreement. These provisions essentially prohibit the appellants from setting off debts owed by JAC against the monthly tolling fees, subject to certain specifically identified carve-outs. That JAC and the appellants felt at liberty to agree on limited set-offs in respect of the monthly tolling fees payable by the latter suggests, in the appellants' submission, that the Senior Lenders were content to let JAC treat these receivables as its own and to agree to the circumstances of set-off. Yet this submission does not, in our judgment, show that the Senior Lenders had relinquished control over the use of the tolling fees. Of course, by agreeing to cll 17.5 and 17.9 of the Tolling Agreement, the Senior Lenders were content to let certain defined sums be set off against the tolling fees. But the Tolling Agreement was negotiated and entered into after the Receivers were appointed. It was not entered into between the appellants and JAC *qua* the company; the Receivers were, by that time, at JAC's helm. The significance of cll 17.5 and 17.9 must be viewed in the light of the Receivers having been appointed by the Senior Lenders under the Debenture to conduct the affairs of JAC in the best interests of the Senior Lenders. Those best interests obviously included obtaining the best possible price for the Plant through a "hot" rather than a "cold" transition. In that context, we cannot agree with the appellants that the Senior Lenders had relinquished control over the use of the tolling fees by virtue of cll 17.5 and 17.9 of the Tolling Agreement.

36 As regards the third point, the appellants rely on *N W Robbie* in support of their point that it would be manifestly unjust in the present circumstances to preclude them from setting off the claimed receivables against the JAC indebtedness. In *N W Robbie*, the defendant ("Whitney Co") became

indebted to the company for a liquidated amount during the receivership of the company. Whitney Co then sought to set off its indebtedness against a debt due to it from the company. The latter debt had existed as a liquidated debt at the time when the floating charge crystallised. At that time, however, that debt was vested in another company and not Whitney Co. The debt was only assigned to Whitney Co after it had become indebted to the company in receivership (*N W Robbie* at 1336). The Court of Appeal of England and Wales by a two-to-one majority held that the two claims could not be set off. The decision has been interpreted to stand for the proposition that "a debtor cannot after notice of an assignment of his debt by his creditor improve his position as regards set off by acquiring debts incurred by the assignor creditor to a third party": *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578 at 584, *per* Templeman J.

37 The appellants however, referred us to the dissenting judgment of Donovan LJ in support of their argument that, where the Receivers carry on the ordinary business of JAC in receivership, and where moneys are paid by the appellants so as to keep JAC's business going, the appellants ought to be entitled to exercise insolvency set-off. Donovan LJ stated at 1334–1335 of *N W Robbie* that:

> It is clear upon authority that this floating charge crystallises into a fixed charge on, inter alia, the company's stock-in-trade, at the moment the receiver is appointed. But when, as the company's agent and as manager of this continuing business, he sells that stock-in-trade, does the charge shift to the chose in action, being the debt owed by the customer? … I do not follow why this should necessarily be so. …
>
> …
>
> … [T]he appointment of the receiver and manager under the terms and conditions of this debenture does not prevent the mutuality of the cross-debts, and a set-off should be allowed. Between May and September, 1961, the receiver and manager, as agent for the company, sold the Witney Co. 16 separate parcels of goods, which looks much more like trading than mere realisation: and indeed he was appointed, inter alia, to manage a continuing business … . *If a receiver and manager carries on trading in this way, selling goods to a customer, I think he ought not to expect to be paid without paying what the company owe[s] the customer*.
>
> [emphasis added]

38 Although Donovan LJ was in the minority in *N W Robbie*, the appellants submit that the observation he expressed (italicised in the extract above) was not at variance with the majority's views. We note that Sellers LJ, one of the majority judges, had expressed "much sympathy" for that observation (*N W Robbie* at 1330). As the Judge pointed out at [132] of *Jurong Aromatics (HC*), however, that sympathy did not prevent Sellers LJ from concluding that to agree to the observation would not give the necessary full effect to the crystallisation of the floating charge and that it "*must be held* that the debenture had the effect of making each debt as it arose after the appointment of a receiver a chose in action of the company subject to an equitable charge in favour of the … debenture-holders" [emphasis added] (at 1330–1331).

39 Nonetheless, leaving aside the fact that Donovan LJ was in the minority, in our judgment, the present case is materially distinguishable. Here, the appellants knew full well when the Receivers were appointed that their rights of set-off would be curtailed. This was made known to them in the notices of appointment of receivers and managers that were sent out to JAC's creditors on 29 September 2015 (see [6] above). Although the appellants issued enforcement notices later that year stating their intention, amongst other things, to apply for the winding-up of JAC, they held back on that course of action, entering into the Tolling Agreement with JAC instead. This, they did, as they

themselves recognised that the Tolling Agreement would be a "win-win for all parties". To allow JAC to continue its business under the Tolling Agreement would be to allow the operations of the Plant to continue so as to preserve and even enhance the Plant's value on a sale. This would benefit the Senior Lenders. At the same time, keeping the Plant operational would also allow the appellants themselves to use the Plant for the production of aromatics and petroleum products. They duly paid the monthly tolling fees without asserting any right of set-off, and only asserted that right in respect of the fees payable for August 2017, after they had themselves presented a winding-up petition against JAC. The appellants are in a sense correct to say that the Tolling Agreement effectively allowed JAC, despite being in receivership, to continue with its business. But this continuation was with full awareness and even consent on the appellants' part; indeed the appellants gave that consent in order to benefit from the arrangement. Donovan LJ's concern – that the customer trading with the company in receivership ought not to be unknowingly deprived of his right to set-off – quite clearly does not arise on the facts of this case.

40 We turn next to the final point – that the prohibition against assignment clause under the Tolling Agreement would be meaningless if the claimed receivables under that agreement had not been released from the Senior Lenders' security. In our judgment, the short answer to this is that the prohibition against assignment clause only comes into play in the situation in which a charge had not yet been affixed to the relevant assets. In that situation, and without having to decide the point for the present purposes, the prohibition against assignment clause may well prevent any further crystallisation of security. We say this tentatively because we recognise that much ink was spilt below over whether prohibition against assignment clauses technically prevent the creation or crystallisation of a charge over assets. The point need not be decided for present purposes because the prohibition against assignment clause under the Tolling Agreement only came into existence *after* the crystallisation of the floating charge. In our tentative view, however, the prohibition against assignment clause here would only be relevant where the crystallised floating charge can be shown to have decrystallised. For the reasons we have given, however, the appellants have not shown that the crystallised floating charge here had subsequently decrystallised.

41 Although we have held that the circumstances did not result in any decrystallisation of the charge, we caution that we are not necessarily in entire agreement with the respondents' case. We agree with the respondents that there needs to be clear evidence before the court can conclude that there has been any decrystallisation. Such evidence was clearly lacking in the present case. We are hesitant to agree, however, with the principle that decrystallisation can *only* be effected by contracting directly with the charge-holder. Given the outcome of this case, the point is of course moot, and will fall to be decided in an appropriate future case.

42 We therefore uphold the Judge's finding below that the crystallised floating charge over the Tolling Fee Debt had not decrystallised, and that consequently, there was no mutuality of debt for insolvency set-off to apply.

The Final Payment Amount

43 The appellants' main contention here is that the release of the Senior Lenders' security over the Initial Inventory meant that the Final Payment Amount was likewise released from the security and was thus available for set-off against the JAC indebtedness. Although they accept that they were obligated to transfer ownership over the Initial Inventory back to JAC at the end of the tolling process, they rely on the fact that the conversion of that obligation into an obligation to pay the Final Payment Amount took place after the floating charge had crystallised. This means, in their submission, that the obligation to pay the Final Payment Amount could not have joined the pool of assets over which the floating charge had crystallised.

44 We do not accept the appellants' submissions. It was common ground that parties had agreed in 2016, prior to the commencement of tolling under the Tolling Agreement, that there would be a transfer to the appellants of full legal and beneficial title to the Initial Inventory for the purposes of the tolling arrangements. It is also clear that, even at that stage, parties agreed that full title to the Initial Inventory would have to be transferred back to JAC at the conclusion of the tolling arrangement so that JAC could sell the same with the Plant. This is reflected in cl 5.3 of the Tolling Agreement. After ExxonMobil came into the picture as a purchaser of the Plant sometime in May 2017, parties worked towards a 'hot' transition where the appellants could exit the tolling arrangements and transfer the Plant to ExxonMobil while operations were ongoing. This culminated, on 16 June 2017, in the Transitional Supplemental Agreement. Under this agreement, parties worked out an arrangement where the original obligation on the part of the appellants to transfer title to the Initial Inventory back to JAC was converted into obligations to: (i) transfer the title to ExxonMobil (for which it was agreed they would receive payment from ExxonMobil); and (ii) pay to JAC an amount reflecting the value of the Initial Inventory, *ie*, the Final Payment Amount. As we see it, there is no reason whatsoever why the Final Payment Amount ought not to be paid to JAC. As an amount owing to JAC it was, on accrual, *prima facie* subject to the crystallised charge over JAC's book debts and the fact that this debt replaced the appellants' initial obligation to transfer the Initial Inventory to JAC cannot change its nature as a book debt.

45 In the circumstances, we uphold the Judge's finding that the Final Payment Amount remains charged in favour of the Senior Lenders. The requisite mutuality for insolvency set-off to apply against the JAC indebtedness is accordingly absent.

The Set-Off Agreement Debt

46 The appellants submit that the Senior Lenders' lack of control over the Set-Off Agreement Debt was evidenced in the fact that JAC and Glencore could enter into the Set-Off Agreement in the first place. By that agreement the parties agreed to set off mutual claims arising out of the Glencore-JAC feedstock supply agreement and Glencore-JAC product offtake agreement, which set-off could not otherwise have been achieved due to the clauses prohibiting set-off in the latter two agreements.

47 We see little merit in this submission. It is not consistent with the following: (a) a floating charge is a charge over a class of assets of the company both present and future; (b) that this class of assets is one which would, in the company's ordinary course of business, be changing from time to time; and (c) that until some future step is taken by or on behalf of those interested in the charge, the company may carry on business in the ordinary way so far as this class of assets is concerned: *Diablo Fortune Inc v Duncan, Cameron Lindsay and another* [2018] 2 SLR 129 at [38]. The Set-Off Agreement was entered into on 23 December 2014, prior to the appointment of the Receivers on 28 September 2015. Thus, at the point when the Set-Off Agreement was entered into, the floating charge had not yet crystallised over the receivables that were to be the subject matter of the Set-Off Agreement. As was characteristic of assets subject to a floating charge, the company could carry on its business in the ordinary way in respect of this class of assets. This would obviously encompass JAC's ability to enter into agreements with its trade creditors to set-off mutual credits, as was the case here when it entered into the Set-Off Agreement with Glencore. Accordingly, we see no reason why a floating charge cannot be said to have existed over the Set-Off Agreement Debt, which charge crystallised on the appointment of the Receivers. In the absence of anything on the facts pointing to the Senior Lenders' relinquishing control over this debt, we likewise agree with the Judge below that the Set-Off Agreement Debt remains charged in favour of the Senior Lenders, thus precluding Glencore from exercising any set-off against the JAC indebtedness.

Equitable set-off

48 Having upheld the Judge's decision in relation to insolvency set-off, we turn now to consider whether the appellants can avail themselves of the remedy of equitable set-off.

49 Although it need not be the case that the claim and cross-claim arise out of the same contract, equitable set-off is available only where there is a close and inseparable relationship or connection between the dealings and the transactions which give rise to the respective claims, such that it would offend one's sense of fairness or justice to allow one claim to be enforced without regard to the other: *Abdul Salam Asanaru Pillai (trading as South Kerala Cashew Exporters) v Nomanbhoy & Sons Pte Ltd* [2007] 2 SLR(R) 856 at [26].

50 The Judge held that equitable set-off is not excluded by the statutory provisions on insolvency set-off in Singapore, and that insolvency set-off should not bar equitable set-off as a matter of principle (*Jurong Aromatics (HC)* at [141], citing *Derham on the Law of Set-Off* at paras 6.25–6.32). There is no need for us to decide this point, because for the reasons we give below, even if equitable set-off is not excluded by the statutory provisions on insolvency set-off in Singapore, on the facts, the appellants would not be able to avail themselves of this remedy.

51 Essentially, the appellants submit that the claims and cross-claims in respect of the Final Payment Amount and the Set-Off Agreement Debt on the one hand, and those under the Trade Agreements on the other, are so closely connected that it would be manifestly unjust not to allow an equitable set-off.

52 We do not accept this submission. In relation to the Final Payment Amount, we disagree that this sum finds its source in the Trade Agreements that gave rise to the JAC indebtedness. As covered above, the Final Payment Amount represented the value of the Initial Inventory, which inventory could not be extracted from the processing machinery of the Plant. The transfer to the appellants of title to the Initial Inventory was necessitated by the tolling arrangements that parties desired to enter into following the appointment of the Receivers. It was then envisaged that title to the Initial Inventory would be transferred back to JAC at the end of the Tolling Agreement. That obligation to transfer back title was converted, on 16 June 2017, into an obligation to pay the Final Payment Amount under the Transitional Supplemental Agreement. Of course, it is possible that some of the feedstock supplied by the appellants under the Trade Agreements was present in the Initial Inventory. But in our judgment, even leaving aside the fact that the Initial Inventory would also consist of feedstock supplied by other suppliers, that is insufficient to establish a close and inseparable relationship or connection between the JAC indebtedness and the Final Payment Amount. In any event, we fail to see why it would offend one's sense of fairness or justice to disallow equitable set-off, especially since parties had agreed under the Transitional Supplemental Agreement that the appellants would have to pay the Final Payment Amount to JAC in replacement of an obligation to transfer back title to the Initial Inventory.

53 Turning to the Set-Off Agreement Debt, we begin with the observation that parties can agree to contract out of the right of set-off, including the right to assert equitable set-off: *Koh Lin Yee v Terrestrial Pte Ltd and another appeal* [2015] 2 SLR 497 at [15]. The Set-Off Agreement was entered into between Glencore and JAC so as to set-off mutual claims between themselves arising under the Glencore-JAC feedstock supply agreement and Glencore-JAC product offtake agreement. It was necessitated because those agreements themselves expressly provide that parties are not entitled to exercise a right of set-off in respect of any sums due thereunder (see [5] above). In our judgment, these provisions in the Glencore-JAC feedstock supply agreement and Glencore-JAC product offtake agreement suffice to establish parties' agreement to contract out of the right to exercise equitable set-off in respect of sums arising under these agreements.

Conclusion

54 We accordingly dismiss the appeals with costs. Parties shall file written submissions on costs limited to eight pages within ten days of the date of this judgment.