Case No. CHANI 95/0971/B

IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM ORDER OF MR JUSTICE ROBERT WALKER

Royal Courts of Justice
Strand
London WC2

Date: Wednesday 9th October 1996

B e f o r e:

LORD JUSTICE PETER GIBSON

LORD JUSTICE OTTON

LORD JUSTICE HUTCHISON

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WARD

\- v -

AITKEN and Others

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(Handed down judgment prepared by
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MRS E TALBOT-RICE (Instructed by Messrs Ingledew Brown Dennison, London EC1) appeared on behalf of the First Appellant

MR R DICKER (Instructed by Messrs Ingledew Brown Dennison, London EC1) appeared on behalf of the Second Appellant

MR R WRIGHT QC (Instructed by J Denning Levine & Partners, London W1) appeared on behalf of the Respondent

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J U D G M E N T (As Approved by the Court)

**LORD JUSTICE PETER GIBSON**: This is the judgment of the court.

In English law maintenance (the giving of assistance or encouragement to a litigant by a person with no interest in the litigation nor any other motive recognised by the law as justifying his interference) and champerty (maintenance of a plaintiff bringing an action in consideration of a share in the fruits of the action) are no longer crimes or torts. But the abolition of such criminal and tortious liability in 1967 has left unaffected any rule of law that a contract involving maintenance or champerty is to be treated as contrary to public policy or otherwise illegal (s.14(2) Criminal Law Act 1967). This appeal raises the question of the validity of a prima facie champertous agreement, entered into by a liquidator in purported exercise of a statutory power of sale, to assign to a purchaser the fruits of an action brought by the liquidator in exercise of a statutory power conferred on him alone in respect of alleged wrongful trading by directors.

It is an appeal by the Sixth Respondent, London Wall Litigation Claims Ltd. ("LWL"), with the leave of Robert Walker J. from his order of 7 June 1995. By that order the Judge on the application of the First, Second, Fourth and Fifth Respondents stayed proceedings brought under s.214 Insolvency Act 1986 ("the s.214 action") by the Liquidator of Oasis Merchandising Services Ltd. ("the Company") against the First to Fifth Respondents, who had at some stage been directors, or are alleged to have been shadow directors, of the Company. Before instituting those proceedings the Liquidator had on 18 November 1991 entered into an agreement ("the Agreement") with LWL whereby LWL would fund the s.214 action. On 16 October 1991 the Companies Court gave the Liquidator authority to enter into the Agreement. The Judge set aside the order of Mr. Registrar Pimm giving that authority. The Liquidator was given leave to appeal but after serving a Notice of Appeal he has taken no part in the hearing before this Court.

The Company was incorporated in 1985. It traded in video and audio cassettes and associated

products. It went into administrative receivership on 9 November 1987 and, being insolvent, was compulsorily wound up on 17 January 1988. The Liquidator came to the conclusion that there was a prima facie case against the First to Fifth Respondents for wrongful trading. On 12 October 1992 he commenced the s.214 action by issuing an originating application against those Respondents, claiming relief under s.214. The s.214 action is being contested by them. It is unnecessary to say anything further about the issues in it. LWL on its own application was joined as the Sixth Respondent shortly before the hearing before the Judge.

S.214 allows the liquidator of a company in the course of the winding up to bring proceedings against a person who is a present or former director (including a shadow director) of that company if it appears to the liquidator in the course of the winding up that subsection (2) applies. It applies in relation to a person if (i) the company has gone into insolvent liquidation, (ii) at some time before the commencement of the winding up that person knew or ought to have concluded that there was no reasonable prospect that the company would avoid going into insolvent liquidation, and (iii) that person was a director of the company at that time. The relief which may be granted is in this form:
"the court, on the application of the liquidator, may declare that that person is to be liable to make such

> contribution (if any) to the company's assets as the court thinks proper" (S.214(1).

S.215(2),(3) and (4) provide that where the court makes a declaration under s.214(1) it may give certain further directions, including, where it makes a declaration in relation to a creditor, that any debt owed by the company to the creditor and interest thereon be postponed.

The Company had no assets which could be utilised to fund wrongful trading proceedings because on 12 September 1986 the Company created a debenture in favour of Beaverbrook Investment plc which as a secured creditor has been entitled to realise the entire assets of the Company. Nor are the creditors of the Company, none of whom is owed more than £30,000, able or willing to fund such proceedings.

The Liquidator obtained the consent of the liquidation committee as well as of the Companies Court before entering into the Agreement 5 weeks after the commencement of proceedings. LWL is not a creditor of the Company. Its main business is described in its accounts as "the provision of specialist litigation support service for liquidators". The Agreement recited that due to the statutory basis of the s.214 action it had to be brought by the Liquidator in his name and not by the Company, that the Liquidator was unwilling to incur liability for the costs and expenses of pursuing the proceedings against the First to Fifth Respondents and that LWL had agreed to finance the proceedings. Recital (G) was in this form:

"The Liquidator considers it desirable that he himself and/or [the Company] by him should sell and assign to LWL all the "Fruits" of the Section 214 Action and (as provided in .... Clauses 2 and 3 below) his or [the Company's]" rights in respect of the Fruits of any other action or actions upon the terms hereof and in this Agreement or the Schedules hereto the said "Fruits" shall mean any sum or sums of money (including any amount or amounts which shall have been received in respect of interest costs charges disbursements and expenses) received by the Liquidator as Plaintiff or as Liquidator of [the Company] or by [the Company]

(i) under and by virtue of final judgment in or compromise or settlement of .... the Section 214 Action or

(ii) in any way received from all or any of the [First to Fifth Respondents] (whether directly or indirectly) or from any other defendant or defendants or from any third person or persons on their behalf in settlement of any such claim or claims against all or any of them and whether before or after any proceedings shall have been issued or commenced".

By cl. 2 of the Agreement:

"In consideration of the undertakings by LWL herein contained to the Liquidator [the Company] acting by the Liquidator and the Liquidator himself in respect of his rights in respect of .... the Fruits of the Section 214 Action hereby sells and assigns to LWL absolutely all of the said rights of

himself and [the Company] respectively:

(i) in the Section 214 Action to be brought by the Liquidator on behalf of [the Company] against the [First to Fifth Respondents] or any one or more of them ...."

That assignment was expressed to be an equitable assignment of the Fruits.

By cl. 4(a) the Liquidator was to institute, carry on and prosecute the s.214 action and to do all such lawful acts and things as LWL might require for the purpose of instituting carrying on and prosecuting the s.214 action. Cl. 4(b) required him to retain named solicitors to conduct the s.214 action. By cl.5 the Liquidator was to conduct the s.214 action and in particular any settlement negotiations in accordance with the requirements and directions of LWL and in making such requirements and directions LWL was to be entitled to have regard to its own best interests as it should think fit. By clause 6 the Liquidator was to compromise or settle the action and take out of court any monies which had been paid into court as LWL advised and upon such terms as LWL considered fit. This clause was subject to the following proviso:

"Provided further that notwithstanding the foregoing the Liquidator shall be entitled to compromise settle or withdraw from [the s. 214 action] and to decline to commence any proceedings or to take any such monies out of Court without the agreement of LWL if the Leading Counsel having the conduct of the relevant case and approved or chosen by LWL shall have advised that any such compromise or withdrawal or taking of monies out of Court should be made in the best interests of the Liquidator and/or [the Company] and before giving any such advice Counsel shall be instructed to assume that [the Company] has adequate financial resources of its own with which to finance [the s. 214 action] without recourse to LWL and to ignore the financial effect of this Agreement."

Cls. 7 and 8 contained detailed undertakings by LWL to finance litigation. Much of the remainder of the Agreement was concerned with the division between the Company and LWL of the fruits of the litigation. As the Judge said:

"The general effects of these provisions .... is in substance for [LWL] to be reimbursed for its expenditure on the litigation and .... for the excess to be divided in varying percentages for different tranches of excess, with the Liquidator's percentage rising from 10% to a maximum of 50% on any excess of £500,000. As a matter of form, however, this is expressed as additional consideration for the purchase by [LWL] of all the fruits".

By a further agreement dated 19 May 1992 the sole shareholder of LWL was to pay £100,000 into a deposit account to be charged by the Liquidator to secure any order for costs which might be made in favour of the First to Fifth Respondents against the Liquidator.

The form of the Agreement was no doubt governed by the fact that a claim under s.214 is incapable of outright legal assignment because it can only be made and pursued by a liquidator. It also reflects the natural desire of LWL to retain as much control as possible over the litigation which it is to fund.

The basis of the application for a stay was that the Agreement was champertous and the s.214 action being funded by LWL thereunder was an abuse of process. The Judge described the issue before him as whether the Agreement was, in relation to the s.214 action, contrary to public policy on the ground of champerty. He considered a number of authorities on trustees in bankruptcy and liquidators assigning rights of action or rights in the fruits of a action and pointed out that there are three routes by which one person may seek to dispose of, and another person may seek to acquire, the prospect of benefiting from current or future litigation against a third party. The first is the transfer of property carrying with it the right to prosecute any cause of action closely related to that property, such as the assignment of a debt. Such a transfer and any action brought by the transferee to enforce that right are not champertous (see, for example, Camdex International Ltd v Bank of Zambia [1996] 3 All E.R. 431). The second is the assignment of a bare cause of action or bare right to litigate. Such assignments offend public policy (see, for example, Trendtex Trading v Credit Suisse [1982] A.C.

679). The third is the assignment of the damages or other monetary compensation that may be awarded in an action in which judgment has not yet been given. Such an assignment, being an agreement to assign future property (damages if and when awarded), operates in equity and if supported by consideration will be valid and no question of unlawful maintenance or champerty will arise, at any rate when the assignee has no right to influence the course of the proceedings (see Glegg v Bromley [1912] 3 K.B. 474).

It was common ground before the Judge, as it is before us, that the Agreement is one for the assignment of the fruits of litigation, falling within the third category, rather than a transfer of property carrying a right of litigation or a legal or equitable assignment of a cause of action. It was not disputed by the Liquidator or LWL that the Agreement was champertous. But it was contended by them that the power conferred on the Liquidator by para. 6 of Sch. 4 to the 1986 Act "to sell any of the company's property" gave statutory authority to the sale of the fruits of the s.214 action and so made valid what otherwise would be void for champerty.

The First, Second, Fourth and Fifth Respondents contended that the fruits of a s.214 claim were not "the company's property" within the meaning of para. 6 of Sch. 4, and that construction was upheld by the Judge. He also said that this view was supported by the fact that proceedings under s.214 had a public or penal element and that in such litigation the court was entitled to expect to have the assistance of the liquidator, aware as he would be of his statutory responsibilities, and that even a partial loss of control by the liquidator of the litigation was objectionable. The Judge accordingly granted a stay and of the court's own motion corrected the authority given by Mr. Registrar Pimm to the Liquidator to enter into the Agreement.

LWL now appeals. Mr. Robert Wright Q.C. on its behalf again accepts that the Agreement is champertous, but submits that there are two strands of public policy involved. One is the rule which

prohibits an outsider with no commercial interest in the litigation, apart from obtaining a share of the proceeds, from financing the litigation for that share. The other is the rule that a liquidator should be able to obtain financial assistance under agreements which would otherwise be champertous to enable monies to be recovered for the benefit of creditors. He submits that the Agreement is lawful because it was a sale of the Company's property within para.6 of Sch.4. Alternatively he submits that the Agreement is lawful because entering it was an act necessary for winding up the Company's affairs and distributing its assets and so it was an act which the Liquidator had power to undertake under para. 13 of Sch.4.

There is a long line of authorities to the effect that where a trustee in bankruptcy or a liquidator wishes to exercise a power of sale to assign a cause of action for valuable consideration, the trustee or liquidator can enter into an agreement which otherwise would be void for maintenance or champerty. Thus in Seear v Lawson (1880) 15 Ch. D. 429 this court held that a trustee in bankruptcy could make an outright assignment of a cause of action against the grantee of property conveyed by the bankrupt. As Sir George Jessel M.R. said (at p.433):

"The proper office of a trustee is to realize the property for the sake of distributing the proceeds among the creditors. Why should we hold as a matter of policy that it is necessary for him to sue in his own name? He may have no funds, or he may consider it undesirable to delay the winding-up of the bankruptcy till the end of the litigation. Considering these things, it seems to me to be a priori probable that he would be entitled to sell it, but I prefer to rest my decision upon the plain words of the statute."

He held that a chose in action vested in the bankrupt before his bankruptcy fell within the words "all the property" of the bankrupt which the trustee was empowered to sell.

In Re Park Gate Waggon Works Co. (1881) 17 Ch. D. 234 a liquidator was similarly held by this court to be entitled to assign outright a cause of action against a director for misfeasance. In Guy v

Churchill (1888) 40 Ch. D. 481 Chitty J. considered an assignment by a trustee in bankruptcy of a chose in action on terms that the trustee and the assignee would share the fruits of the litigation. He said (at p.488):

> "The policy of the statute seems to be to give power to the trustee .... to make arrangements in reference to choses in action which are considered beneficial to the creditors. It would be a strange and inconsistent result to say that although the right of action may be sold out and out it cannot be disposed of on the terms that some part of the fruit of the action if successful shall come back to the bankrupt's estate for division among his creditors."

That decision was applied by this court in Ramsey v Hartley [1977] 1 W.L.R. 686, where it was held that the statutory power of sale could be exercised by a trustee in bankruptcy assigning to the bankrupt himself a chose in action in return for a share of the fruits of the litigation.

Similarly in Bang and Olufsen UK Ltd. v Ton Systeme Ltd. (unreported, 16 July 1993) this court held that a liquidator can assign a cause of action in return for a share of the fruits of the action, there being no valid distinction on this point between the law of bankruptcy and the insolvent company legislation.

In Grovewood Holdings plc v James Capel & Co. Ltd. [1995] Ch. 80 Lightman J. aptly summarised the state of the law in this way (at p.86):

> "Accordingly the authorities establish beyond question that both a trustee in bankruptcy and a liquidator are given power to sell a cause of action on terms that the assignees by way of consideration will pay over a share of the recoveries. This statutory power necessarily precludes any challenge on grounds of maintenance or champerty to such an agreement."

Grovewood was a case where the sale by a liquidator to an outsider, who was to fund an action in negligence against the company's stockbroker and adviser, was not of the cause of action but of a beneficial interest in the fruits of the action. Lightman J. held that such a transaction was a "sale" of the company's property within para. 6 of Sch.4. It is not suggested in this court that an assignment for

valuable consideration such as was effected by the Agreement was not a sale for the purposes of para.6. Lightman J. went on to hold that para.6 conferred no exemption from the law of champerty on a sale of fruits of litigation (as opposed to the sale of a bare cause of action) when the sale included provision for the purchaser to finance the litigation, and that accordingly the proceedings were champertous and an abuse of process and would be stayed.

In the present case Robert Walker J. in obiter comments said that he had considerable difficulty with that part of Lightman J.'s judgment on which the Grovewood case was decided. Mr. Dicker for the Fourth and Fifth Respondents disclaimed any reliance on this part of Lightman J.'s judgment and accordingly we have heard no argument on the point. We will confine ourselves to saying that we see considerable force in Robert Walker J.'s comments and that we in particular agree with him when he says ([1995] 2 B.C.L.C. 493 at p.504) that it is a question of construing the statutory power of sale. That seems to us to be the primary question in the present case.

It is to be noted at the outset that the present case is dissimilar to all the other cases to which we have referred, none of those cases relating to the assignment of the fruits of litigation when an essential part of the cause of action (viz. that it should appear to the liquidator in the course of the winding up that s.214(2) applied) did not arise until after the liquidation or bankruptcy commenced.

The starting point must be para.6, allowing, as it does, the liquidator to sell "any of the company's property". The reference to the property of the company imports the extended meaning given to "property" by s.436, viz.

""property" includes money, goods, things in action, land and every description of property wherever situated and also obligations and every description of interest, whether present or future or vested or contingent, arising out of, or incidental to, property".

Under the provisions relating to the insolvency of individuals, a bankrupt's estate is defined in a way that recognises that there is a distinction between, on the one hand, property belonging to or vested in the bankrupt at the commencement of the bankruptcy and, on the other hand, property which by virtue of a provision of the 1986 Act is comprised in that estate or treated as falling within such property belonging to or vested in the bankrupt at the commencement of the bankruptcy (s.283(1) of the 1986 Act). By s.307 ibid. the trustee may by notice claim for the bankrupt's estate any property which has been acquired by or has devolved upon the bankrupt since the commencement of the bankruptcy, and by s.351 ibid. references to property comprised in the bankrupt's estate include any property which could be such property if a notice in respect of it were given under s.307. By para. 9 of Sch. 5 ibid. the trustee in bankruptcy has power to sell any part of the property for the time being comprised in the bankrupt's estate.

In contrast the provisions relating to company insolvency do not define the property of a company which liquidators can sell (save to the extent, already noted, that "property" is given an extended meaning in s.436). By s.143 the liquidator's functions in a compulsory winding up are to secure that the assets of the company are got in, realised and distributed. He is required to take into his custody or under his control "all the property and things in action" to which the company is or appears to be entitled (s.144(1)), but in addition and quite separately from that duty the liquidator is given certain powers to apply to the court, and if the application is successful there will be an increase in the distributable assets, even though the company as such was never entitled to make that application. The statutory provisions do not expressly state that such after-acquired assets are "the property of the company".

The effect of the commencement of the liquidation of a company is that all assets then held by the company become subject to a statutory trust for unsecured creditors and, if there is a surplus, for contributories (Ayerst v C & K (Construction) Ltd. [1976] A.C. 167). A secured creditor and his

security fall outside the statutory trust to the extent that the creditor relies on his security. However he can value or realise the security and prove for the balance as an unsecured creditor or he can surrender his security and prove for the whole debt as an unsecured creditor.

The phrase "the property of the company" is to be found not only in para. 6 of Sch.4, but also in provisions relating to the powers of an administrator or administrative receiver, each of whom has the like power to sell "the property of the company" (para. 2 of Sch.1). That must have the same meaning as in para.6 of Sch.4. It would be very surprising if an administrator or an administrative receiver (who could continue to act after a liquidator was appointed) was empowered to sell the fruits of a future action under s.213 or s.214 by the liquidator. If such fruits fall within "the property of a company", it is hard to see why they are not caught by a debenture holder's fixed and floating charge over all present and future assets of a company. But Mr. Wright does not contend for such a result.

Considerations such as these lead us to consider whether a distinction should not be drawn between assets which are the property of the company at the time of the commencement of the liquidation (and the property representing the same), including rights of action which arose and might have been pursued by the company itself prior to the liquidation, and assets which only arise after the liquidation of the company and are recoverable only by the liquidator pursuant to statutory powers conferred on him. The scheme of the 1986 Act suggests that only the former falls within "the property of the company" which an administrator or administrative receiver or liquidator can sell. Thus a right of action against directors for misfeasance which the liquidator (amongst others) can enforce under s.212 of the 1986 Act and the fruits of such an action are property of the company capable of being charged by a debenture, because the right of action arose and was available to the company prior to the winding up. But with this can be contrasted the right of action by a liquidator, and the fruits of such an action, for fraudulent preference or fraudulent or wrongful trading, which are not the property of the company and are not caught by a debenture (see Gough, Company Charges, 2nd ed. (1996), 122).

Such a distinction is supported by a number of authorities. First in Re Yagerphone Ltd. [1935] Ch. 392 Bennett J. held that a debenture charging all the present and future assets of a company did not cover money recovered by the liquidators from fraudulently preferred creditors, because it never became part of the general assets of the company, but when received by the liquidators was impressed in their hands with a trust for those creditors amongst whom they had to distribute the assets of the company. Russell L.J. in N.W. Robbie & Co. Ltd. v Witney Warehouse Co. Ltd. [1963] 1 W.L.R. 1324 at p.1334 explained the decision in this way:

> "a statutory right in and only in the liquidator to make such a [fraudulent preference] claim could never have been property of the company subject to the charge."

In Re M.C. Bacon Ltd. (No.2) [1990] B.C.L.C. 607 Millett J. was concerned with the question whether costs of certain proceedings instituted by the liquidator were expenses in realising or getting in the assets of the company and as such entitled to priority under r.4 218(1)(a) of the Insolvency Rules 1986. The proceedings were (1) to challenge the validity of a future charge as a voidable preference and (2) to make the bank liable under s.214. Millett J. in answering the question in the negative referred to each of the limbs of the proceedings and said (at p.611) that the proceedings were not brought by or on behalf of the company nor were they brought in order to recover assets belonging to the company at the date of the winding up. He pointed out that neither claim could have been made by the company itself. After referring with approval to Yagerphone, he said that a claim to set aside a voidable preference was not a claim to realise or get in any asset of the company. He continued (at p.613):

> "In my judgment, the same reasoning applies with even greater force to a claim brought under s.214 of the 1986 Act, which can be brought only by a liquidator not an administrator and in the absence of an insolvent liquidation cannot be brought at all. In any case, I do not see how an application for such an order under the section can properly be described as an attempt to realise or get in an asset of the company. This must, in my view, mean an existing asset and,

until the order has been made and complied with, there is no such asset."

Mr. Wright accepts that Millett J. correctly recognised that a claim under s.214 is not an asset of the company, but submits that the decision does not affect the question whether the proceeds of a claim under s.214 are included in "the property of the company" for the purposes of para.6 of Sch.4. Robert Walker J. [1995] 2 B.C.L.C. 493 (at p.501) thought that the reasoning of Millett J. was general in its application and followed it. We respectfully agree, supporting as it does the distinction which we would draw between the property of the company at the commencement of the litigation (and property representing the same) and property which is subsequently acquired by the liquidator through the exercise of rights conferred on him alone by statute and which is to be held on the statutory trust for distribution by the liquidator.

A similar distinction is drawn in Re Ayala Holdings Ltd. [1996] 1 B.C.L.C. 467. In that case Knox J. was concerned with the effectiveness of an assignment by the liquidator to a creditor of all rights to and choses in action relating to or in any way arising out of or in connection with an action against a secured creditor. The rights purportedly assigned included the right to assert that certain dispositions of the company's property after the commencement of the winding up were void under s.127 of the 1986 Act and that certain charges on the company's property were void under s.395 Companies Act 1985 as against the liquidator for non-registration. The assignee argued that the assigned rights were property of the company which a liquidator can sell under para.6 of Sch.4. Knox J. posed the question: what does para.6 mean when it used the expression "property of the company"? He continued (at p.480):

"In my judgment [the assignee's] argument overlooks one important distinction between property of the company, on the one hand, and the rights and powers of a liquidator on the other. The property of a company includes rights of action against third parties vested in a company at the commencement of the winding up and to that extent the principles in Ramsey v Hartley undoubtedly apply and such rights

can, as I see it, be sold by a liquidator pursuant to para.6 of Sch.4. What is to be distinguished in my view are the statutory privileges and liberties conferred upon liquidators as such and indeed upon trustees in bankruptcy who are officers of the court and act under the court's directions".

Knox J. went on to cite two passages from Millett J.'s judgment in Bacon and continued (at p.483): "Those passages, in my view, underline the fundamental distinction between assets of a company and rights conferred upon a liquidator in relation to the conduct of the liquidation. The former are assignable by sale under para.6 of Sch.4, the latter are not because they are an incident of the office of liquidator. This conclusion is, in my view supported by the special status of the liquidator in company law."

Mr. Wright points out that Ayala was concerned with the question whether a liquidator can abdicate his duties by assignment and that s.214 was not in issue. But, as Robert Walker J. observed (at p.501), if a claim under s.127, which relates to the avoidance of any dispositions of "the company's property" after the commencement of the winding up and which therefore is likely to affect assets belonging to the company before the commencement of the winding up, cannot be assigned, Knox J.'s general distinction between the company's property and rights conferred upon the liquidator is even more strongly applicable to s.214.

It is also relevant to note the authorities on the predecessors to s.213 of the 1986 Act relating to fraudulent trading, though it should be borne in mind that the relief that could be granted under s.75 Companies Act 1928, s.275 Companies Act 1929 and s.332 Companies Act 1948 on the application of the official receiver, liquidator, a creditor or a contributory was a declaration that the guilty party should be personally responsible for all or any of the debts or other liabilities of the company as the court might direct. Under s.213, like s.214, the court may declare on the application of the liquidator alone that any guilty party is liable to make such contributions to the assets of the company as the court thinks proper. The effect of the earlier fraudulent trading provisions was that recoveries ordered to be

made in respect of fraudulent trading were to swell the assets of the company to be distributed in accordance with the statutory scheme (see Re Esal (Commodities) Ltd [1993] B.C.L.C. 872, affirmed by this court sub nom. London & Overseas (Sugar) Co. Ltd. v Punjab National Bank, unreported, 19 November 1993, in which obiter dicta to the contrary of Lord Denning M.R. and Danckwerts L.J. in Re Cyona Distributors Ltd. [1966] Ch. 462 were disapproved). In the Esal case Lindsay J. (at p.883) said that he saw sums recovered under s.332 of the 1948 Act in a way corresponding to that whereby the recoveries of a liquidator from a fraudulent preference were held by Bennett J. in Yagerphone to be impressed with a trust for those creditors to whom distributions were to be made in the liquidation. In our judgment the wording of s.213 even more clearly requires the same result, only the liquidator now being able to bring fraudulent trading proceedings and the recoveries being contributions to the assets of the company held on the statutory trust.

Mr. Wright placed heavy reliance on a recent decision in the Australian Federal Court, Re Movitor Pty Ltd. v Sims (1995) 19 A.C.S.R. 440. In that case the liquidator of a company sought directions from the court as to whether he could enter into a funding arrangement (involving both maintenance and champerty) with an insurer in respect of proposed proceedings by the liquidator against former directors of the company for insolvent trading. Drummond J. held that the liquidator could do so in exercise of a statutory power to sell all or any part of "the property of the company" in aid of performing his duty of realising the company assets. He said (at pp.444,5):

"The provision by strangers to the litigation of funds to insolvency administrators for the purpose of enabling them to pursue worthwhile claims on behalf of the entity under administration when, without that assistance, good claims might not be able to be prosecuted, will often serve a good public purpose. The policy of the legislature .... will frequently be frustrated because the insolvency administrator will often not have access to the financial resources necessary to pursue, for the benefit of the administration, claims which have reasonable prospects of success."

After considering various authorities, to many of which we have already referred, he said that to do that which Parliament has authorised, either expressly or by necessary implication, cannot involve the doing of anything that is unlawful. He continued (at p.449):

"Whether he sells a bare right of action or the fruits of the action, the only authority a liquidator has to make any such sale is this statutory power. It has long been accepted that a trustee in bankruptcy can lawfully sell a bare right of action owned by the insolvent to a stranger with no interest in it, although that would involve maintenance or champerty, but for the fact that he sells under the statutory authority. A liquidator has the same power. In my opinion, there is no reason why this statutory authority should not make lawful any other sale of the insolvent company's property by a liquidator, including the sale of a share in the proceeds of an action belonging to the company to a person with no interest in the litigation on terms that that person is to have control of the litigation, although that would involve champerty but for the transaction being made under that authority. This will be the position, provided only that the subject matter of the sale is "property of the company" within the statutory power."

He referred to Millett J.'s remarks in Bacon [1990] B.C.L.C. 607 at p.613, which we have already cited, and continued (at p.450):

"But given the difference between the insolvent trading provisions of s 214 of the English legislation and those of ss. 588M and 588W the Corporations Law, this decision provides no authority, in my opinion, for contending that the property of the company does not include the expected fruits of an action brought under ss 588M or under 588W. The right of the liquidator to recover damages created by each of these sections is described as a right to recover from the director and the holding company an amount equal to the loss or damage suffered as a result of the company's insolvent trading in which the director and the holding company were implicated "as a debt due to the company". That "debt" arises once the conditions of liability have been fulfilled, something that must occur prior to commencement of any action for recovery under either section. Such a "debt" can properly be regarded as part of the property of the company which the liquidator is empowered to sell. Even if the

rights to compensation created by ss 588M and 588W are not regarded as true debts but rights sui generis, Magor & St. Mellons Rural District Council v Newport Corp [1950] 2 All E.R. 1226 at 1230-1 is authority for holding that they are still well capable of falling within the definition of "property of a company" in the relevant provisions of the Corporations Law."

We see the force of the policy argument expounded by Drummond J., but the actual decision is in our judgment readily distinguishable. Indeed that judge himself distinguished what Millett J. said on s.214 because that provision was different from the Australian provisions. Both s.588M and s.588W of the Corporations Law allowed the liquidator to recover "as a debt due to the company" an amount equal to the loss or damage resulting from insolvency. The debt arose once the conditions of liability were fulfilled. That is not the language of s.214. We would add that we were referred by Mr. Dicker to Gough: Company Charges, op. cit. 122-3, in which the author, an Australian solicitor, draws attention to the fact that in Australia recoveries made by the liquidator under the Corporations Law for insolvent trading cannot form part of the assets charged by a fixed and floating charge over all present and future assets of the company and that there is a specific provision that moneys so recovered are not available to pay a secured debt of the company unless all the company's unsecured debts have been paid in full. For completeness we should say that the Magor & St. Mellons case, relating as it does to the question whether the right of a council to a financial adjustment was property within the meaning of s.100 Local Government Act 1888, does not appear to us to provide relevant assistance.

Like Robert Walker J. we therefore conclude that on its true construction "the property of the company" in para.6 of Sch.4 does not include the fruits of litigation brought by the liquidator under s.214. The Judge also found that his conclusion was strongly supported by the consideration that the liquidator pursuing an application under s.213 or s.214 was not conducting ordinary civil litigation but litigation with a public or penal element and any loss of control by the liquidator of that litigation was objectionable. For our part we regard that as relevant not to the question whether the fruits of such

litigation are "property of the company" within para. 6 of Sch. 4 but to the propriety of the Liquidator's act in entering into the Agreement and the correctness of the Companies Court in authorising that act. As a matter of policy we think that there is much to be said for allowing a liquidator to sell the fruits of an action for the reasons given by Drummond J., provided that it does not give the purchaser the right to influence the course of, or to interfere with the liquidator's conduct of, the proceedings. The liquidator as an officer of the court exercising a statutory power in pursuing the proceedings must be free to behave accordingly. We are far from happy with the right of interference given by LWL by the Agreement, which, as it now stands, does enable LWL to dictate how the Liquidator is to conduct the action (see in particular clause 5). Indeed, despite Mr. Wright's argument to the contrary, it seems to us to enable LWL to prevent the Liquidator from exercising his statutory power under s.168(3) of the 1986 Act to apply to the court for directions in relation to this litigation, though we should record Mr. Wright's offer on behalf of LWL that the Agreement should take effect as if the Liquidator retained that power. The proviso to clause 6 on which Mr. Wright placed reliance is by its terms limited in its application. It is to be noted that the rights of the insurer under the funding agreement in Movitor were considerably less than those of LWL under the Agreement.

Mr. Wright relied in the alternative on the power contained in para.13 of Sch.4 enabling the liquidator "to do all such other things as may be necessary for winding up the company's affairs and distributing its assets." We are not persuaded that that power is wide enough to cover the present circumstances. It is limited to what is necessary for winding up the company's affairs and distributing its assets. Let us assume, without deciding, that where a liquidator considers it desirable to exercise a power to apply to the court for relief under s.214, that is for winding up the company's affairs. The Liquidator's statement in his Affidavit of 11 July 1991, viz. that unless he was able to conclude the Agreement and thereby fund the action the wrongful trading proceedings could not be brought, must now b viewed against the fact that the Liquidator has negotiated a contingency agreement with a large and highly reputable firm of solicitors for the pursuit of his claims, as appears from a letter dated 30 April 1996

from those solicitors to the solicitors of the Fourth and Fifth Respondents. Whilst that would appear not to cover all the expenses of the litigation, it does suggest that the Liquidator no longer regards the Agreement as the only way of funding the s.214 action.

But in any event we cannot accept that general words such as are to be found in para.13 of Sch 4 (in contrast to the specific power of sale in para.6 of Sch.4) must be taken to give statutory authority to do that which otherwise is unlawful under the general law. In our judgment that power does not give the Liquidator carte blanche to do an illegal act such as entering a champertous agreement.

For these reasons which owe much to the Judge's lucid judgment and to Mr. Dicker's admirable argument, we would dismiss this appeal.

Order: 1. Appeal dismissed.

2. Respondent's costs to be paid by the Appellant to be taxed forthwith.

3. Appellant's application for leave to appeal to the House of Lords be refused.