Neutral Citation Number: [2018] EWHC 108 (Ch)

Case No: 8276 of 2016

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN BIRMINGHAM
Insolvency and Companies List (ChD)

Birmingham Civil Justice Centre
Bull Street, Birmingham B4 6DS

Date: 25/01/2018

Before :

HHJ DAVID COOKE

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Between :

Simon Franklin Plant (1) **Daniel Plant (2)** **(Administrators of Relentless Software Ltd)**	**Applicants**
- and -	
Vision Games 1 Ltd (1) **Ultimate Finance Ltd (2)** **Thincats Loan Syndicates Ltd (3)** **Relentless Vision 1 Ltd (4)**	**Respondents**

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Andrew Ayres QC and James Kinman (instructed by **Trethowans LLP**) for the **Applicants**
Christopher Boardman (instructed by **Osborne Clark LLP**) for the **First and Fourth Respondents**
The **Second and Third Respondents** did not appear and were not represented

Hearing date: 3 November 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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HHJ DAVID COOKE

HHJ David Cooke:

Introduction

1. The application before me was issued by the administrators of Relentless Software Ltd ("the Company") to determine "whether the First Respondent and/or the Fourth Respondent has any security or other proprietary interest in monies standing to the credit of the Company's bank accounts and, if so, what that interest is." At the time it was issued, the administrators' intention was to clarify the position in relation to certain tax credit payments ("the Tax Credits") that had been received into a bank account of the Company. However shortly before the hearing evidence was filed on behalf of the first and fourth respondents relating to sales revenue that had also been paid into the Company's account, referred to as the "PA Sales Revenue". It was agreed however at the commencement of the hearing that this would not be dealt with at that hearing, so to the extent the parties are unable to resolve matters between them they will be dealt with separately.

2. The company is a developer of video games. Some years ago it achieved commercial success with a game called *Buzz!*, but thereafter it found that it needed finance to develop further games, for which it approached the first respondent (which I will call "the Funder"). As a result, three agreements (each referred to as a Development and Sales Agreement or "DSA" and intended to fund the development of a specific new game) were entered into in 2013 and 2014, together with various security documents intended to provide security to the Funder for the sums due to it.

3. It is clear that the Company was in need of yet further funding to carry on its operations (which were not limited to development and sale of the three games financed by the Funder) and so it entered into additional secured funding arrangements with the second and third respondents ("Ultimate" and "Thincats" respectively). These arrangements led to disagreements with the Funder, which was concerned that security granted to Ultimate and Thincats was in conflict with its own and that sales revenues that ought to have been applied to pay sums due to it were or might be being paid instead to the other financiers.

4. Eventually Ultimate, which was the holder of a qualifying floating charge, appointed the administrators on 8 August 2016. A few days before that, on 3 August 2016, the Company had received a payment into its trading bank account of just over £190,000 from HMRC, and it is this payment, or rather the traceable proceeds of it remaining (which the administrators say are about £155,000), that constitutes the Tax Credits in issue before me.

5. The records available to the administrators are not complete, but their understanding is that the payment by HMRC was in respect of tax credits to which the Company had made a claim under Part 15B of the Corporation Tax Act 2009, which provides for Video Games Tax Relief ("VGTR"). I am grateful to Mr Ayres for his description of how these credits arise, an abbreviation of which is:

   i) a company developing a culturally British videogame for commercial supply may make a claim for VGTR in respect of certain qualifying expenditure incurred in the development

ii) VGTR takes the form of an enhanced allowance for part of the qualifying expenditure as a deduction in computation of profits or losses for purposes of corporation tax

iii) if loss making, the developer may surrender some of its losses in return for a tax credit of 25% of the losses surrendered. This clearly produces cash for the developer at a time it is making losses, but means that as and when profits are generated the losses are no longer available to set against those profits.

6. It is possible however that part of the payment received represents tax credits payable in respect of research and development expenditure pursuant to Chapter 6A of Part 3 of the 2009 Act. The administrators cannot be certain given the present state of the records, but it is not suggested that this would make any difference for present purposes.

7. An overview of the structure established by the DSAs is as follows:

i) There were three DSAs, entered into on 7th and 11th October 2013 and 22nd of July 2014 in respect of games that were named as "Hidden Secrets", "Crime Lab" and "It's Quiz Time" respectively. Later on, different names were given to these games. The agreements were in materially similar form. Page and clause references I give are to the first of them.

ii) The fourth respondent ("RVL") was also a party. It was referred to (recital D) as a wholly-owned subsidiary of the Company although it appears that it was newly incorporated and shares that had been issued to representatives of the Funder were never transferred to the Company. Clause 8.2 envisages that it is the Company that will have the power to appoint directors of RVL, though it provides that these must include at least one person specified by the Funder, and that the Funder must approve any other appointments, though it gave its approval in advance to any existing director of the Company. In practice, there were two directors, Mr O'Rahilly who was a director of the Funder and Mr Eades who was a director of the Company, but there was nothing to prevent the Company appointing one or more additional directors, at least if they were already directors of the Company itself, so as to procure board control of RVL.

iii) Clause 2 (bundle page 47) sets out an overview of the project, stating that RVL will develop the game with funding provided by the Funder and that the Company will provide RVL with the people facilities and other resources that it needs to do so. RVL and the Company are jointly referred to as "the Developer", and assign any intellectual property rights created in respect of the game to the Funder with an option for reassignment when the agreement comes to an end.

iv) Clause 3 provides that RVL must develop the software so as to achieve specified objectives or "Milestones" in accordance with a schedule of dates. Versions of the source code (each referred to as a "Deliverable") sufficient to show that the relevant Milestone has been reached are to be provided to the Funder, which it would test and either accept or reject.

v) On signature, and subsequently upon being satisfied that the software delivered met a Milestone, the Funder would pay an instalment of its promised funding into a "Production Account", being an account in the name of RVL

(Cl 7.1). RVL was authorised to release these funds to the Company "in such amounts and at such times as [RVL] determines appropriate" but also use them "to meet any other costs and expenses in connection with the Project".

The DSA thus appears to envisage that the actual development work will be done by RVL with personnel and resources provided to it, presumably either by way of secondment or subcontracting, by the Company. In practice however this did not happen; all of the employees and other resources were those of the Company and there does not seem to have been any arrangement for them to work, even notionally, for RVL. The administrators have not been able to establish whether any funds provided by the Funder were ever paid into the Production Account or simply paid direct to the Company. If they were paid to the Production Account they do not appear to have been retained there and were presumably paid over to the Company.

vi) Once the game was completed, it was envisaged that it would be marketed and distributed by the Company. Since the intellectual property rights had been transferred to the Funder, the Funder granted a licence back to the Company to enable it to do so. It was envisaged that this would be done by making the games available for sale on various "platforms" such as Apple's App Store.

vii) Schedule 5 (p69) provided that the "Net Receipts" (defined, broadly, as sales revenue less sales taxes and various fees such as those payable to the platform provider) were to be paid into an "Exploitation Account", stated to be an account opened by RVL from which withdrawals could only be made with the written authorisation of one person nominated by the Funder and a second nominated by the Company (paragraph 2.1).

viii) The Net Receipts were to be shared between the Company and the Funder in stages described as "the Waterfall" (see Sch 5) i.e. (again broadly):

a) 100% to the Funder until it had been repaid its "Project Investment"

b) thereafter 70% to the Funder and 30% to the Company until the Funder had received an additional 30% per annum return on its Project Investment, and

c) thereafter 30% to the Funder and 70% to the Company.

ix) There was a residual obligation on the Company to repay on demand "an amount equal to all sums that [the Funder] has paid to [the Company] under this agreement" if the Funder exercised its right to terminate the agreement by reason of the insolvency of the Company or its failure to perform (schedule 7, paragraph 2.1, p76).

This structure can thus be seen to set up two streams of payments, the first of which I will refer to as the "funding stream", being amounts that would be provided by the Funder in order to finance development costs, and which were intended to be paid into the Production Account and from there paid out to the Company (or towards RVL's costs) and the second, which I will refer to as the "payment stream" which flowed in the other direction, by which net sales revenue was to be paid into the Exploitation Account and from there divided between the Company and the Funder.

x) The DSA refers specifically to "Tax Credits", defined as including all R&D tax credits and VGTR tax credits (p 61), to a limited extent. Clause 7.6 provides that "[the Company] and [RVL] shall procure that all Tax Credits are paid into the Production Account. If [the Company] discovers that it has overpaid the Production Account, then it will notify [RVL, and RVL] shall repay the amount within 30 days".

8. There is no other provision however that explains why Tax Credits are to be paid into the Production Account, or what is to happen to them once they have been. The possibility was canvassed in argument that it might have been intended that any tax credits available would operate to reduce the amount of funding required from the Funder, but on reading the agreement in my judgment no such intention can be derived from it. There is no obligation on the Company to apply for tax credits, as might have been expected if the Funder was anxious to minimise the finance required from it. There is no provision to reduce the amount of any of the funding payments by the amount of any tax credits received, or to treat those payments as if they were funding provided by the Funder. There is no provision for payment of the amount of the tax credits, or any notional surplus arising because the Production Account contains more than the funding scheduled to be provided, back to the Funder.

9. There are only two provisions for payment out of the Production Account. The first is in clause 7.5 which entitles RVL to release to the Company "the instalments of the Development Funding it receives from [the Funder] in such amounts and at such times as [RVL] determines appropriate." On the face of it, this does not apply to tax credits, which were not received from the Funder and are not defined as "Development Funding". The second is in clause 7.6 above which provides that the Company is to be repaid any amount by which it has "overpaid the Production Account". This would only appear to apply if the Company paid in an amount that for some reason exceeded the amount of Tax Credits actually received by it.

10. The DSA recited (clause 2.2, p 48) that at the same time it was executed the parties were entering into "various security documents… to protect [the Funder] in the event of the insolvency or administration of [the Company]". The security documents were not specified, and in fact it appears that the security documents envisaged were not executed until 23 June 2014, some nine months after the first two DSAs. On that date:

i) the Company executed a document titled "Fixed Charge" (p165, referred to as the "Deed of Charge") to secure all its existing and future liabilities to the Funder

ii) the Company executed a document titled "Share Charge" (p191) by which it purported to charge "1 ordinary share of £1 in the capital of [RVL] registered in the name of [the Company]" to secure the same liabilities. On the evidence before me, it does not appear that any share was in fact registered in the name of the Company, although as referred to above it appears that the DSA envisaged that RVL would be the Company's subsidiary. It may well therefore be that any shares still held by representatives of the Funder were held on trust for the Company and if so no doubt the share charge would attach to the beneficial interest in them.

iii) RVL executed a document titled "Debenture" by which it charged all its assets as security for payment of all its (not the Company's) present and future liabilities to the Funder. The charges granted included a charge, stated to be a

fixed charge, over "all monies standing to the credit of [RVL's] accounts" with any bank, which would include the Production Account and the Exploitation Account. As to what those secured liabilities are, many of the obligations set out in the DSA are expressed to be undertaken jointly by the Company and RVL, but not, I observe, the obligation to pay sales revenues into the Exploitation Account (Schedule 5 para 2.1 p 69) or the residual obligation to repay funding to the Funder in the event of termination (Schedule 7, para 2.1, p 76). The DSA provides that the Company guarantees the obligations of RVL to the Funder (clause 8.3, p 53), but there is no such guarantee by RVL of the obligations of the Company. RVL does not appear to have any beneficial interest in monies in the Exploitation Account to which the charge could attach, since these are paid in by the Company and to be divided between the Company and the Funder, with no part going to RVL.

11. By the Deed of Charge, the Company charged to the Funder "by way of first fixed charge… the Charged Property", again to secure all present and future liabilities to the Funder. The Charged Property was defined as:

   i) the "Designated Accounts", meaning "any account of [the Company] designated by [the Funder] as a designated account for the purposes of this deed",

   ii) the "Relevant Agreements" which were to be listed in a schedule. The only schedule attached to the copy in the bundle does not deal with this. I assume there may be another and that the agreements referred to were the DSAs, but nothing turns on it.

   iii) The "Book Debts", defined as "all present and future book and other debts and monetary claims due or owing to [the Company] in respect of the Products…". The "Products" were the games funded by the DSAs.

12. Clause 7.1 (p 173) was headed "Realising Book Debts" and provided that the Company should:

> “(a) as an agent for [the Funder] collect in and realise all Book Debts, pay the proceeds into a Designated Account immediately on receipt and, pending payment, hold those proceeds in trust for [the Funder]
>
> (b) not, without the prior written consent of [the Funder] (such consent not to be unreasonably withheld or delayed) withdraw any amounts standing to the credit of any Designated Account and
>
> (c) if called on to do so by [the Funder] execute a legal assignment of the Book Debts to [the Funder]… ”

13. Clause 6.7 provided that the Company should give notice to any bank with which it had a Designated Account of the charge in favour of the Funder, and a form of notice was attached in schedule 2. This envisaged that a list of accounts would be provided to the bank, and that each of them would be designated as either "blocked" or "not blocked". The form of notice stated that no withdrawals should be made from any account designated as "blocked" without the prior written consent of the Funder, but

withdrawals might be made freely from any account designated as "not blocked" until the Funder notified the bank to the contrary.

14. It will be apparent from the above that

    i) not all sums receivable by the Company constituted Book Debts, because, for instance the Company sold games other than the defined Products,

    ii) only part of the Book Debts, once separated from other receivables, constituted Net Receipts, and

    iii) the Funder's ability to restrict the use by the Company of the proceeds of realisation of Book Debts depended on it designating an account for them to be paid into and notifying the bank that it should be treated as "blocked".

15. In practice no account was ever designated for the purposes of the Deed of Charge, whether "blocked" or "not blocked". Mr Boardman submits that it would not have been immediately necessary to do so since no Book Debts would arise until the funded games were available for sale (though this does not sit well with his case that the Tax Credits constitute Book Debts as defined, and in any event no such account was designated even when sales began to be made).

16. It is unlikely that any account that was not set up solely to receive the defined Book Debts could have been used as a Designated Account (at least unless it was "not blocked") because the Company had sales revenue from games other than the defined Products, and no doubt other receipts that would not fall within the definition of Book Debts because they were not related to those Products, which it would need to pay into an account to which it had free access. Further, even if a separate designated account were set up there would be practical difficulties in operation because it appears that payments received from the platform providers were of a global amount for all sales in a month, and so covered sales of the Products and other games. Accordingly it would be necessary in practice to pay these mixed monies into one account before the amount of them that related to Products and so constituted a Book Debt could be separated out. These and other matters will no doubt be explored if any issue comes before the court about the PA Sales Revenue.

17. By the middle of 2016 the Funder was extremely concerned that the Company was in financial difficulties and that it had entered into invoice discounting agreements with Ultimate and Thincats which it considered might be used to assign receivables relating to the Products, so conflicting with its charge over Book Debts. Further, security granted to those lenders might conflict with its own security. It sought through solicitors assurances that what it regarded as its funds would be kept separate from any that might be claimed by the other lenders, and was not reassured by the answers received.

18. In particular the Funder sought to insist that receivables from sales of the Products were kept separate from others and paid direct as a separate amount by the platform providers, but was told that they would only pay a single global amount that the Company would have to separate after receipt.

19. Another strand of correspondence concerned the Tax Credits, which the Funder was aware had been applied for by Grant Thornton on behalf of the Company and which were due to be received imminently. On 10 June (p457) Osborne Clark ("OC") for the

Funder wrote referring to the obligation to pay the Tax Credits into the Production Account and demanding that Grant Thornton be instructed to ensure that payment was made by HMRC directly into that account, or if payment was made to Grant Thornton, that Grant Thornton would pay it directly into the Production Account.

20. On 15 June 2016 (p459) James Ware Stephenson ("JWS") wrote saying that the Company had instructed them that it would pay any tax credits "received in respect of the Products and payable to your client" into the Production Account, but saying that payment would be made by HMRC direct to the Company and not to Grant Thornton, and that the amount received might include tax credits unrelated to the Products. In relation to any funds paid into the Production Account they said "such payments are made on the basis that they will be applied in full towards the reduction of the Total Project Investment. Payments made from the Production Account will only be made with Mr Eades' approval as a director of [RVL]." Mr Eades was the director appointed by the Company, so it would seem that the intention of this reference was that agreement was being sought that Mr Eades would have control over when and to whom the funds would be paid out of the Production Account.

21. OC responded (p460) saying that their client was concerned that if the tax credits were paid to the Company they might be dissipated or come under the control of other secured creditors, and again demanding that arrangements be made to have them paid direct from HMRC or Grant Thornton into the Production Account. They went on to say "as you will be aware, the Tax Credits are subject to the fixed charge granted by your client…" and to assert that this gave them the right to give the necessary instructions to Grant Thornton directly. JWS replied on 17 June (p466) denying that there was any obligation to ensure direct payment from HMRC and saying:

> "More importantly, you have not provided any assurances or answers regarding our specific points concerning the operation and details of the Production Account and the necessary approvals required of Mr Eades as a director of [RVL] with respect to any payments from the Production Account, nor have you confirmed that any Tax Credits received into the Production Account will only be used for their specific and intended purpose and credited towards the Total Project Investment."

22. The response to this from OC (p467) was: "Subject to the Tax Credit payments actually being paid into the Production Account, our client is prepared to agree that [they] will be used solely to reduce the amount of the Project Investment in relation to each of the relevant games – following receipt, they will therefore be paid out to our client for this purpose" but that any payments out would only be made with the approval of Mr Eades, not to be unreasonably withheld. It appears that this was the confirmation that JWS had been seeking, since their reply of 23 June thanked OC for it without disagreeing with what was said. It went on to confirm however that Grant Thornton did not themselves operate a client account and so could not receive payment direct from HMRC, but that it might be possible to arrange payment through another firm of accountants that did have such an account.

23. By letters dated 24 June 2016, so about 6 weeks before receipt of the Tax Credits, the Funder exercised its right to terminate the DSAs with immediate effect on grounds of insolvency of the Company and demanded repayment of all sums that it had paid to RVL under those agreements (see p 473). Those letters did not make any specific

reference to the Tax Credits, but a further letter was written the same day (p482) seeking to pursue arrangements for payment to be made through the alternative accountants. Thereafter however the solicitors became involved in protracted correspondence about provision of copies of the software and source code to the Funder, and it does not appear that any steps were progressed to arrange payment through those accountants.

24. The Tax Credit payment was received in to the Company's own bank account on 3 August 2016. Ultimate gave notice of its intention to appoint an administrator the following day, and the appointment was made on 8 August.

The Respondents' primary case

25. Mr Boardman's primary submission is that the Tax Credits constitute Book Debts, and so are caught either by the charge on such debts created by the Company, which he submits is a fixed charge, or by the trust set out in clause 7.1(a) of the Deed of Charge pending payment into a Designated Account. It is, he says, so fundamental to the fixed charge on debts that tax credits be included that it would be an obvious absurdity not to do so.

26. Mr Ayres' response is that he accepts that the Tax Credits are capable of falling within the wording of the definition of Book Debts, in that they are monetary claims payable to the Company in respect of the Products, but that on a proper construction of the Deed of Charge, they are excluded from the definition.

27. This is so, he says, because the Deed of Charge must be construed together with the DSAs (Mr Boardman does not dissent from this) and the DSAs provide that any Tax Credits are to be paid into the Production Account, which is an account of RVL, whereas the Deed of Charge provides that Book Debts must be paid into a Designated Account, which is to be an account of the Company. Plainly, the Company cannot do both. The general provisions relating to the broad category of Book Debts must, he submits, be construed so as not to contradict the specific provisions in relation to the particular category of Tax Credits, and the different treatment of Tax Credits is such that it must be concluded that they are not regarded as within the definition of Book Debts.

28. Both counsel made submissions on the question whether the charge on Book Debts amounted to a fixed charge or whether, in the circumstances and particularly in light of the fact that although the Funder had the right at any time to "designate" a blocked account into which they should be paid it did not in the event ever do so, it is in law to be considered as a floating charge, following the decision of the House of Lords in *Re Spectrum Plus Ltd* [2005] 2 AC 680. The issues arising on that point are interesting, and by no means straightforward. In the end however I have concluded that the issue relating to Tax Credits turns on whether they are Book Debts at all within the meaning of that term in the Deed of Charge, with the result that I do not need to express an opinion on the general status of the charge on Book Debts for the purposes of determining that issue, and it would be better not to express a view that would necessarily be obiter, especially when the issue may arise if the case returns in relation to the PA Sales Revenue.

29. On this point of construction, in my judgment Mr Ayres is correct. The Deed of Charge sets out to impose security and control over a limited class of assets which (apart from the agreements themselves) comprise Book Debts and the Designated

Accounts into which they are required to be paid on collection. It appears to be aimed at monies from which the payment stream will arise, in that part at least of the Book debts will be "Net Receipts" and the overall scheme is that from the Designated Account that part will be paid to the Exploitation Account and then distributed in accordance with the Waterfall.

30. No doubt it is the case that the security, if it catches the whole of the Book Debts (and not just the part that amounts to Net Receipts) and indeed any sums that may be in the Designated Accounts that do not derive from Book Debts, extends beyond the amounts that would be expected to be applied to payment of sums due to the Funder, if the contractual arrangements were continuing in the ordinary course. That is not a difficulty in itself; it is understandable that the security and the control it gives should extend to the whole fund even if part of it may be expected to be separated out and applied in payment and the chargeholder may agree to release the rest from its control in order that the Company can continue in business.

31. The Tax Credits however are not part of that payment stream. They are not to be paid into a Designated Account (which might be "blocked" and so under the control of the Funder) but into an account held by RVL. RVL cannot be regarded as a proxy or agent for the Funder, since it is not necessarily under the Funder's control, so that account is not equivalent to a Designated Account in the name of the Company. Further, in the absence of any express provision in the contractual or security documents as to what is to be done with any Tax Credits paid into the Production Account, (and there is certainly no provision that either the Tax Credits or monies held in the Production Account belong to the Funder) on the face of it RVL has the power to deal with them without requiring any consent of the Funder (I deal below with the question whether RVL itself has any interest in those monies).

32. The DSAs do not, as I have said above, contain any express provision as to application of Tax Credits. Neither RVL nor the Company is obliged to apply them in repayment of the project funding already provided. If it was anticipated that they would be offset against instalments of funding to be provided by the Funder in future then (a) the DSA does not say so, and (b) that would not of itself mean that pending any further instalment falling due the Tax Credits belonged to or should be paid to the Funder.

33. Mr Boardman pointed out that in the correspondence referred to above shortly before insolvency the parties had agreed (indeed the Company seems to have demanded) that if the Tax Credits were paid to the Production Account they should be used for their "intended purpose" in reduction of Project Investment. But I have no evidence that such an intention was expressed, let alone shared by other parties, at the time the DSAs were entered into, and there is certainly no application to rectify them to set out an agreement to that effect. It appears from the tone of the Company's correspondence that it was concerned that the Funder had not in fact previously agreed to deal with the credits in this way, and from the Funder's response that it did not regard itself as already bound to do so, since it said it "will agree" with the Company's demand, on conditions including payment out to it at a time when such payment might not already be due. This correspondence therefore appears to set out an agreement reached at the time, not one which was in place at the date of the DSAs.

34. If the Funder has any interest in or right of control over monies in the Production Account under the DSAs or security documents it can only arise under the debenture given to it by RVL. That is expressed to create fixed charges over, inter alia

i) All monies held in any bank or other account of RVL and

ii) All "Book Debts", defined in similar terms to the Company's Deed of Charge ie, in summary, debts and money claims due to RVL in respect of Products, with a similar obligation to collect them and pay them into a Designated Account (in this case no doubt being an account in the name of RVL, though it has not been said that any such account was so designated).

35. But the Tax Credits received cannot be Book Debts in relation to the RVL debenture, because they are not sums "due to" RVL in respect of Products. They are to be paid to RVL by virtue of the Company's obligation to the Funder under the DSA, and not because of any obligation owed by any person to RVL. It might have been otherwise if RVL had made its own claim for tax credits (and it might have done so if the development had in fact been carried on by it as the DSAs appear to have envisaged) but that was not what happened.

36. In *Spectrum* the House of Lords concluded that a debenture under which a company was obliged to collect book debts and pay them into an account with the bank created only a floating charge on those debts because in practice the company had the ability to draw on that account unless and until the bank took action to prevent it, such as terminating the company's overdraft facility. This amounted to the company having the ability to withdraw the proceeds from the security in the meantime, or meant that those proceeds were not finally appropriated to the security until such a step was taken, see eg the opinion of Lord Scott at paras 111-120.

37. There are no specific provisions in RVL's debenture restricting how it may deal with monies in the Production or Exploitation Accounts. There is a general provision in clause 6.1 (p218) that RVL may not without the consent of the Funder (not to be unreasonably withheld or delayed) deal with any of the charged assets, except to the extent they are subject only to uncrystallised floating charges. But given that the Production Account at least was intended to be an operating account under the control of RVL's directors from which they had the authority under the DSA to disburse funding as they saw fit, this provision, if it is construed to apply to that account at all, must in my judgment be regarded as one not intended in fact to impose any restriction on RVL's ability to deal with monies in that account unless and until the security in the debenture was enforced (cf *Agnew v CIR* [2001] UKPC 28).

38. It follows that the charge created by RVL over that account although stated to be a fixed charge is in law to be construed as only a floating charge.

39. Further, any charge created by RVL over monies in the Production Account would attach only to any beneficial interest RVL had in those monies. For reasons given below, in my judgment RVL would have had no beneficial interest in the Tax Credits (at least) and so could not create any effective charge over them in favour of the Funder in any event.

40. Drawing this together, the contractual and security documents treat Tax Credits in a materially different manner from other sums that would undoubtedly be regarded as Book Debts, such as debts arising on sale of Products. They are not subject to the contractual controls provided for in favour of the Funder through the mechanism of payment into a Designated Account (leaving aside for the moment any issue whether they are sufficient to create a fixed charge) but are to be dealt with in a wholly different manner by payment to an account in the name of RVL. If the Funder has any

control over them or interest in them it is only indirectly through security granted by RVL, rather than the Company. Even if the two securities were in some way to be read together as creating a composite security arrangement (and I am not saying that they should be) the security created by RVL is either ineffective in relation to the Tax Credits or at best in law a floating rather than a fixed charge, and so not equivalent to that intended to be created by the Company's charge. That difference of treatment indicates that the Tax Credits were not intended to be treated as Book Debts for the purpose of the security created by the Company, and accordingly in my judgment the Company's charge over Book Debts does not apply to them.

41. I do not agree with Mr Boardman that this construction creates an obvious absurdity. At the time the DSAs were entered into, it may presumably have been expected that tax credits might be recovered while the development of the Products was still in progress. It is simply impossible to tell from the documents or evidence what the parties intended would then happen to them. The possibilities might be (a) the Company was entitled to them, subject to release from the Production Account at any time at RVL's discretion, and also remained entitled to any further funding falling due under the DSAs, or (b) they would be paid to the Funder, which would thereafter make any further funding instalments due from its own resources, or (c) they would be held by RVL until further instalments of funding fell due, and applied towards them. If (a) or (c) applied they would be part of the funding stream, or additional to it, and not the payment stream. Only (b) would be consistent with an expectation that they would be paid to the Funder before the termination of the DSA, and so suggest a commercial imperative to have security over them to ensure that this happened. But (b) seems unlikely; if it was the intended outcome it would have been easier to provide for payment straight to the Funder rather than to RVL. It is no doubt true that security over the Tax Credits would be valuable if the agreement had been terminated and the Funder was seeking to recover what it had advanced, but the same could be true of any other asset owned by the Company and yet the security arrangements did not extend to all such assets.

42. If they were not Book Debts, the only other category of asset charged by the Deed of Charge into which the Tax Credits might have fallen would be monies paid into a Designated Account. But it is accepted that no account was ever "designated", so that charge cannot apply to them.

43. It follows that the provision for Book Debts to be held on trust for the Funder pending payment to a Designated Account does not apply to the Tax Credits, simply because they are not Book Debts.

44. In case I am wrong on this point and the Tax Credits are to be regarded as Book Debts, in my judgment the position in relation to any interest the Funder might have in them under the Deed of Charge is as follows:

i) Whatever the true nature of the charge created by the Company over other categories of Book Debts, by virtue of the separate contractual provisions for payment to an account over which RVL had effective free control, to the extent that charge applies to Tax Credits it would in law be only a floating charge. This is because payment to the Production Account means that the funds are not under the control of the chargeholder, either at all (if it has no effective security given by RVL) or at best unless and until it enforced its security over assets of RVL. It is true the funds are not under the immediate control of the Company either, but the essence of security is control by the

holder of the security, and control by RVL which was a separate entity not acting as agent of the chargeholder is not the same thing. By payment to RVL, the Company would thus have taken the Tax Credits out of the security it had created, and not paid them to or into the control of the Funder. Its right to do so shows that the charge over those Credits was floating in nature; per *Spectrum*. I see no reason why a charge that applies to two assets and which makes different provision for dealing with each of them may not be categorised as fixed in relation to one and floating in relation to the other, that categorisation being a matter of law depending on the effect of the arrangements as a whole on the assets charged (see *Agnew*, above).

ii) The provision that Book Debts be held on trust for the Funder pending payment in to a Designated Account does not on its true construction apply to Tax Credits, because the Company is not required to pay (and indeed by the DSA is precluded from paying) them into a Designated Account.

45. Mr Ayres submitted that in any event the trust provision should be construed as not applying to Tax Credits, because

i) If it did, there would be no commercial incentive for the Company to apply for such credits; it would do better to retain its losses to set against future profits rather than surrender them. But that it seems to me depends on whether in practice the Company expected or could seek to obtain the agreement of the Funder that the benefit of the credits would in one way or another be made available to it if the provisions of the security and contractual documents were followed. Given the lack of explanation in those documents as to what was anticipated to happen to any Tax Credits received, I cannot conclude that there would be no potential benefit to the Company in seeking them.

ii) It would make no sense that the secured creditor would have the unfettered rights of a beneficial owner pending payment to a Designated Account, but only the rights of a chargeholder once the monies had been so paid. The creditor would have an incentive to refuse to designate such an account and maintain this advantage, eg by directing payment of the whole of the Book Debts to itself rather than into any account held by the Company. But that argument would apply to anything that would be within the definition of Book Debts, not just the Tax Credits. Further, I do not agree that the trust created amounts to unrestricted beneficial ownership; in the context of a security document, any interest, legal or beneficial, vested in the creditor would be held by way of security, and so (for instance) subject to an equity of redemption if the secured liabilities were discharged. Nor is it any objection that the creditor might direct how the trust property is dealt with by virtue of its beneficial interest under such a trust; if it did so for instance by directing payment to itself that would have the effect of discharging pro tanto the secured liabilities, and be no different in substance to the result the creditor could have achieved by standing on its rights as holder of a fixed charge.

46. In light of my conclusions above, these last points do not arise, but for completeness in view of the submissions raised, if they had become material I would have held that they were no objection to the imposition of the trust claimed.

The secondary case: specifically enforceable contract

47. The secondary case advanced by Mr Boardman is that RVL, rather than the Funder, has a proprietary or security interest in the Tax Credits because the Company was obliged by the DSA to pay them to the Production Account held by RVL, which obligation he submits amounts to a specifically enforceable contract to transfer or charge the Tax Credits and so one which passes an immediate beneficial interest in them to RVL.

48. This argument is in my judgment fundamentally flawed in that:

    i) The obligation to pay Tax Credits to the Production Account is one imposed on both the Company and RVL (presumably because it was envisaged RVL might also have been in a position to claim such credits), not one imposed on the Company for the benefit of RVL. It is thus not an obligation enforceable by RVL against the Company but, if enforceable by anyone, by the other party to the DSA, ie the Funder, against both of them.

    ii) Even if the obligation were in principle enforceable by RVL, as noted above the DSA does not provide what is to happen to the money once paid to the Production Account. It is not suggested the Company has any obligation owed to RVL that such payment might be intended to discharge. If there were such an obligation, payment to the Production Account would be a strange way of satisfying it, since the Production Account exists (otherwise) as a holding account for the administration of the funding stream, ie funds to be disbursed to the Company.

    iii) There is nothing else in the DSA that might support a conclusion that any such payment is intended to vest beneficial ownership of the Tax Credits in RVL. RVL appears to exist only as a vehicle for arrangements between the Funder and the Company, not to make a profit or acquire any asset or benefit for itself. Insofar as it receives anything from the monies provided by the Funder it is only to reimburse any costs and expenses it may have incurred in the Project (clause 7.6). If RVL had incurred any such costs on its own account, there does not appear to be any obligation on the Company to reimburse it. Though RVL might have acquired some intellectual property rights if it had developed the Products itself in whole or in part, these are automatically vested in the Funder and licensed by it for exploitation to the Company, not RVL. The proceeds of exploitation may (in part) be paid to the Exploitation Account held by RVL, but not for RVL's benefit since they are to be shared between the Company and the Funder (and not RVL) under the Waterfall provisions. It would be wholly inconsistent with this scheme for RVL to acquire a windfall beneficial ownership of Tax Credits by virtue of payment into an account in its name.

    iv) Nor can RVL be intended to have any security interest in the Tax Credits. It holds no security over any assets of the Company (unsurprisingly).

    v) It follows that if the Tax Credits had been paid into the Production Account there would have been no transfer of any beneficial interest in them to RVL and RVL would as between itself and the Company have held them on resulting trust for the Company. There can be no basis for equity intervening to vest a beneficial interest in an intended transferee under a contract if

performance of the contract was not intended to give the transferee such an interest in the first place.

The third case: proprietary estoppel

49. Mr Boardman's tertiary case is that either the Funder or RVL is entitled to a proprietary estoppel arising from what he submits were repeated assurances in a number of letters referred to in para 15 of his skeleton (and referred to above) that the Company was dealing and would deal with Net Receipts and Tax Credits in accordance with the DSAs and the Fixed Charge, on which the Funder had relied in not taking steps to prevent payment into the Company's account and/or to require payment to the Production Account and/or in not appointing a receiver to intercept them.

50. For the most part the letters referred to relate to the treatment of Net Receipts. Insofar as they deal with Tax Credits, they begin with the efforts by the Funder to arrange for direct payment to the Production Account. When that proves impossible to achieve, the Company offers to pay them itself into the Production Account, "on the basis that they will be applied in full towards the reduction of the Total Project Investment" or "credited back towards the Total Project Investment".

51. At best from the Funder's perspective the letters conclude with the Company apparently accepting that they will be paid out to the Funder towards repayment of Total Project Investment, as and when agreed by Mr Eades "such agreement not to be unreasonably withheld".

52. That in my judgment amounts (at best) to a promise to make repayment of such investment earlier than it might otherwise have been due.

53. Under the DSAs "Project Investment" is a term defined to mean the aggregate of the Development Funding advanced and certain "Additional Costs" that the Funder might incur itself in relation to development of the Products. "Total Project Investment" is an additional term in the third DSA, meaning the aggregate under all three of them. It is to be "recouped" from payments made in accordance with the Waterfall, but there is no other provision for it to be repaid, as such, by the Company to the Funder. Even on termination the Company's obligation (p76 Sch 7 para 2.1) is to repay on request "an amount equal to all sums that [the Funder] has paid to [the Company] under this agreement", which seems apt to cover Development Funding (insofar as it actually reached the Company and was not for instance still held by RVL) but not Additional Costs.

54. At the time the letters relied on were written (the last was on 17 June 2016), the DSAs had not been terminated, though no doubt the Funder could by then have exercised its right to do so as it did a few days later. The agreement to pay from Tax Credits therefore might have had the effect of accelerating payment if no termination had been made, or may only have identified a source of payment if it had been.

55. But a promise to make payment out of funds expected to be received does not of itself create any immediate proprietary interest in those funds, or the promisor's right to receive them. Nor can the promise made in this case be construed as an agreement to create any new immediate interest in the Tax Credits; it was not expressed in such terms and the Funder, at least, was not seeking by this correspondence to obtain any

such new interest but to realise the interest it asserted it already had (mistakenly, as I have held).

56. There was not therefore any representation or assurance that the Funder would acquire any proprietary interest in the Tax Credits which could be given effect to by an estoppel. The promise of payment was no more than a contractual obligation, no doubt secured under the existing security but not creating any fresh or additional security.

57. Further, the suggested reliance is in my judgment not shown or illusory. The Funder did not refrain from taking any steps available to it to secure direct payment; on the contrary it pursued that objective as far as it could and, if it settled for the promise that the Company would pay the funds on to RVL, it did so because it had no means available to obtain direct payment. Although it now says it would have appointed a receiver, I am not persuaded by the evidence that it had intended to do so but held back because this agreement was reached. The assertion made now is in my view made with hindsight. In any event, even if the Funder had made such an appointment that would not have availed it because, for the reasons given above, it did not have any security or other interest over the Tax Credits either prior to or after collection by the Company.

58. Accordingly I reject the claim to an estoppel.

Conclusion

59. For these reasons, I determine the preliminary issue by holding that at least in relation to the monies derived from the Tax Credits, the Funder and RVL have no security or other interest in any bank account of the Company. Issues in relation to the PA Sales Revenue must await a further hearing, if not agreed between the parties.

60. I will list a hearing for this judgment to be handed down, and invite the parties to seek to agree the order resulting, including any necessary directions. There need be no attendance save that if there are matters arising that can be dealt with within 30 minutes I will take them at the handing down. If longer is required counsel should provide an agreed time estimate and dates of availability to my clerk so that a later hearing can be arranged.