

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

**IN THE HIGH COURT OF JUSTICE
(Civil)**

SLUHCV2016/0696

BETWEEN:

KCL CAPITAL MARKET BROKERS LIMITED

Claimant

and

THE ATTORNEY GENERAL

Defendant

Before:

The Hon. Mde. Justice Kimberly Cenac-Phulgence

High Court Judge

Appearances:

Mr. Leslie Prospere with Ms. Kristian Henry for the Claimant

Mr. Rene Williams with Mr. George K. Charlemagne for the Defendant

2020: January 15, 21;
May 18 (written submissions);
December 17.

JUDGMENT

Background

- [1] **CENAC-PHULGENCE, J:** This claim is brought by the claimant, KCL Capital Market Brokers Limited (“KCL”) against the defendant, the Attorney General of Saint Lucia (“the AG”) for special damages, interest, and costs arising out of an alleged breach of a factoring agreement.

The Claim

- [2] KCL is a company duly registered under the Companies Act of Trinidad and Tobago, and licensed and regulated by the Trinidad and Tobago Securities and Exchange Commission. It formerly operated under the name AIC Capital Market Brokers Limited ("AIC"). It is in the business of providing financial advisory, arrangement, and underwriting services for securities offered for sale in Trinidad and Tobago.
- [3] KCL states that on 15th September 2011, it executed a factoring agreement with Asphalt & Mining (Saint Lucia) Limited ("A&M"), a company duly incorporated under the provisions of the Companies Act of Saint Lucia ("the Factoring Agreement"), for the purchase and sale of accounts receivable due to A&M under the terms of a contract with the Government of Saint Lucia ("the Crown") for construction/rehabilitation of the Anse Ger to Desruisseaux Road ("the Project"). On 1st March 2012¹, KCL further executed a purchase confirmation agreement with A&M, confirming KCL's acquisition of the accounts receivable previously belonging to A&M under the terms of the Project ("the Purchase Confirmation Agreement"). KCL, thus, alleges that it became the rightful legal owner of all the accounts receivable under the terms of the Project.
- [4] Further A&M, on 20th February 2012 and again on 19th March 2013², issued notices of direction to pay, expressly directing the Crown to remit payment to KCL of all accounts receivable due to it under the Project ("the Notices"). KCL contends that the Crown, accordingly, became contractually bound to pay all the said accounts receivable under the Project to KCL, which comprised a total of 20 payments.
- [5] KCL states that the Crown commenced making payments to it; however on 18th August 2014, another company, L Caribbean Construction Inc ("LCC") was granted

¹ Contained in a Letter dated 15th September 2011.

² Stated in the Statement of Claim as 6th March 2013.

an order in the High Court of Saint Lucia in SLUHCV2014/0383³, directing the Crown to make payment to LCC for works executed by A&M under the Project, in satisfaction of a judgment in default obtained by LCC against A&M together with interest (“the Garnishment Order”). The Garnishment Order was made without KCL or the Crown being made parties to the proceedings.

- [6] KCL contends that although the Garnishment Order redirected to LCC the accounts receivable belonging to it, the Garnishment Order did not interfere with the Crown’s contractual obligations to it. The Crown has, however, failed to pay to KCL the remaining accounts receivable as at 5th November 2015, in the sum of \$1,335,892.78 despite its requests for the Crown to do so. This constitutes a breach of the Notices, for which the AG is liable.

The Defence

- [7] The AG admits that A&M, by the Notices, directed the Crown to pay all moneys payable or which may become payable under the Project to First Citizens Investment Services Limited (“First Citizens”), the local agents for KCL and that the Crown commenced making payments to First Citizens as directed. The AG’s case, however, is that the Crown was not party to the Factoring Agreement or any agreement between KCL and A&M, and therefore, denies that the Crown became contractually bound to remit all accounts receivable under the Project to KCL.
- [8] The AG admits that a claim had been filed by LCC against A&M in SLUHCV2014/0383 resulting in the Garnishment Order being granted to LCC over the accounts receivable of A&M under the Project and that the Garnishment Order was made without KCL or the Crown being made parties to the proceedings. It agrees that the Garnishment Order redirected to LCC the accounts receivable it had been directed to pay to KCL but disagrees that the Garnishment Order did not interfere with that directive.

³ LCaribbean Construction Inc v Asphalt & Mining (Saint Lucia) Company Limited and Globetec Construction LLC (“Globetec”).

- [9] The AG states that upon receipt of the Garnishment Order, the Crown, on 23rd September 2014, filed an application in the High Court to vary or discharge same (“the Vary/Discharge Application”). It contends that it placed into evidence before the Court the directive to pay all monies owed or which shall become payable to A&M to KCL, and that the said application was served on all parties in the claim, as well as on KCL and First Citizens. The AG, however, contends that by order dated 4th May 2015, the High Court struck out the Vary/Discharge Application.
- [10] Therefore, it says the Garnishment Order remained a valid and binding order of the Court, with which the Crown complied. The AG admits therefore that the Crown has not paid KCL the remaining accounts receivable under the Project and states that the Garnishment Order directing payment to LCC overrides any directive given to it in relation to A&M or any other party. The AG denies that its failure to pay KCL the remaining accounts receivable constitutes a breach of the Notices or that it is liable in respect of non-payment.
- [11] The AG denies any particulars of breach of contract or any special damages as pleaded and wishes the Court to take judicial notice of the petition filed by KCL on 17th August 2015 in SLUHCV2014/0383 to set aside or vary the Garnishment Order, which was subsequently discontinued by KCL by notice of discontinuance dated 15th August 2016.

Procedural History

- [12] This claim was filed on 3rd November 2016, and thereafter, an acknowledgement of service and defence were duly filed. On 3rd March 2017, KCL filed an application for the determination of certain preliminary questions on the basis that it would result in complete disposal of the claim. The matter was subsequently transferred to the Commercial Division, the Court heard KCL’s application on 8th June 2017, and a decision was given in favour of KCL on 12th September 2017.

- [13] The central issue on the application to determine the preliminary questions was whether the Garnishment Order impeded any contractual obligation owed by the Crown to remit payments due under the Project to KCL. The following sub-issues were identified and addressed: (i) who is the lawful owner of the accounts receivable payable under the Notices; (ii) did the Garnishment Order vitiate the Notices; and (iii) is the Crown liable for remitting to KCL the remaining payments under the Notices?
- [14] The learned judge concluded that KCL was the lawful owner of the receivables under the Project; the Garnishment Order did not vitiate the Notices; and the Crown continued to remain contractually liable to remit to KCL the remaining payments due under the Notices.
- [15] Dissatisfied with the decision, the Crown appealed to the Court of Appeal, which allowed the appeal; set aside the orders made by the learned judge on the application for determination of preliminary questions and remitted the matter to the High Court for determination of the case, on the pleadings of the parties, by a different judge.⁴
- [16] The reason for the Court of Appeal's decision was that, in light of the dispute of fact concerning ownership of the accounts receivable under the Project, which arose on the pleadings and which the learned judge felt it was necessary to determine, it was not a proper case for determination of the matter on the preliminary question posed by KCL. The Court of Appeal held that the proper course was for there to be full ventilation of the matter by trial at which the disputed questions of fact could be fully addressed by the Court.⁵

⁴ Certificate of Result of Appeal dated 8th April 2019.

⁵ SLUHCVP2017/0042 Digest of the Court of Appeal dated 8th April 2019.

[17] The matter, having been remitted, proceeded to trial on 15th and 21st January 2020.

Issues

[18] The issues for determination as agreed by the parties⁶ are as follows:

- (a) Whether KCL became the legal owner of all the accounts receivable assigned to it by A&M, by virtue of the Factoring Agreement and Purchase Confirmation Agreement?
- (b) Whether the Notices in which A&M directed the Crown to remit to KCL all monies emanating from the accounts receivable meant that the Crown was bound, whether in equity or by article 1479 of the **Civil Code**⁷, to remit to KCL all monies which were previously payable to A&M?
- (c) Whether the Garnishment Order in SLUHCV2014/0383 vitiated the Notices?
- (d) Whether the Crown is still liable to pay KCL the sums that were diverted to LCC by virtue of the Garnishment Order?

Issue 1 – Whether KCL was the legal owner of the accounts receivable? KCL’s Submissions

[19] Counsel for KCL, Mr. Leslie Prospere (“Mr. Prospere”) submits that the debt factoring arrangement between KCL and A&M constituted an assignment by A&M of its accounts receivable under the Project to KCL.

[20] He describes debt factoring as a debt finance arrangement in which a business sells and assigns its accounts receivable to a third party at a discounted price in order to meet its present and immediate cash needs. An assignment, he says, is an immediate transfer of a property right, vested or contingent, from an assignor to an assignee. Choses in action, which are capable of assignment, refer to all the personal rights of property which can only be claimed or enforced by an action and not by taking physical possession. Thus, he submits that the accounts receivable are choses in action that were assigned by the debt factoring arrangement.

⁶ Agreed Statement of Issues to be Decided at Trial filed on 9th January 2020.

⁷ Cap 4.01 of the Laws of Saint Lucia.

- [21] Mr. Prospere submits that the legal assignment of a chose in action is effected in accordance with article 1479 of the **Civil Code** which parallels section 136(1) of the Law of Property Act of England. According to **Halsbury's Laws of England**,⁸ that section requires that: (i) the assignment must be in writing under the hand of the assignor; (ii) the assignment must be absolute and not purporting to be by way of charge only; and (iii) express notice in writing of the assignment must be given to the debtor or trustee or other person from whom the assignor would have been entitled to claim the debt or thing in action.
- [22] Mr. Prospere noted that the standard documents A&M was required to execute under the debt factoring arrangement, which would have effected legal assignment, included (i) a master agreement for the purchase and sale of trade receivables; (ii) the seller's written offer to sell the trade receivables; (iii) the purchase confirmation; (iv) the assignment of contracts agreement executed by the seller; and (v) the debtor's/obligor's notice, acknowledgement, and irrevocable direction to pay. He submitted that, in any event, the notice of direction to pay, by itself, satisfies the mandatory requirements of article 1479 of the **Code**, thus creating the legal assignment of the accounts receivable. The Notices were in written form, under the hand of A&M, and expressly notified the Crown that the accounts receivable arising from the Project and due to A&M had been assigned to KCL.
- [23] He further points out that according to **Halsbury's Laws of England**,⁹ a legal assignment takes effect from the date of the notice with power to give good discharge for same and as from that date, the chose in action no longer belongs to the assignor and he cannot sue for it. Thus, the assignment of the accounts receivable to KCL took effect on 23rd February 2012 and 29th May 2013 when the Crown received the Notices, and KCL became the legal owner thereof and the only party capable of providing the Crown with a valid discharge for same.

⁸ Halsbury's Laws of England, (5th edition, 2017 LexisNexis) Vol. 13, para 72.

⁹ Halsbury's Laws of England, (5th edition, 2017, LexisNexis) Vol 13, para 81.

- [24] Mr. Prospere submits that even if the Notices had failed to establish a legal assignment of the accounts receivable under article 1479 of the **Code**, a defective legal assignment can operate as an equitable assignment. He cited a passage from **Halsbury's Laws of England**¹⁰ which states that no form of words is necessary for an equitable assignment; the only thing necessary is that the meaning be made plain. An equitable assignment may arise orally or by course of dealings but must evince an intention to transfer the chose in action from the assignor to the assignee. He submits that the series of meetings between KCL's representatives and A&M; the discussions between KCL's representatives and the then Deputy Prime Minister and Minister for Infrastructure; and the series of executed debt factoring documents together manifested the parties' clear knowledge and intention that the accounts receivable had been assigned to KCL.
- [25] Mr. Prospere cited the case of **Holt v Heatherfield Trust Ltd**¹¹ in relation to the effect of an equitable assignment, where it was held that absence of notice did not affect the efficacy of the transaction as between assignor and assignee. It established that notice became effective only when received, and until notice, it was merely an equitable assignment, but required nothing more from the assignor to become a legal assignment. In such case, the assignee can either give notice or bring an action before notice if he joins the assignor as plaintiff or defendant.
- [26] He submitted that as between an assignee and garnishee of the same debt, the cases of **Badeley v Consolidated Bank**¹² and **Re General Horticultural Society**¹³ establish that a garnishee order binds only so much of the debt owing to the debtor from a third party as the debtor can honestly deal with at the time the garnishee order is obtained and served. The debtor cannot honestly deal with the sum he has already assigned; the garnishor is in no better position than the debtor, and thus, he is postponed to a prior equitable assignee of the debt, even in the absence of notice.

¹⁰ Halsbury's Laws of England, (5th edition, 2017, LexisNexis) Vol 13, para 28.

¹¹ (1942) 2 K.B. 1.

¹² (1888) 38 Ca.D.238.

¹³ (1886) 32 Ch.D. 612.

- [27] Thus, he submits, whether on a legal or equitable assignment, KCL would still have a claim to ownership of the accounts receivable under the Project.

The AG's Submissions

- [28] Counsel representing the AG, Mr. Rene Williams ("Mr. Williams") submitted that it was for KCL to prove that there had been a valid absolute assignment of the accounts receivable by A&M. He relied on section 132 of the **Evidence Act**¹⁴ which places the burden of proof on KCL. He suggests that KCL failed to prove the assignment because most of the documents exhibited in support of the claim related to the Bocage-Sunbuilt and Entrepot-Independence City road construction/rehabilitation projects ("the Bocage Project"), and not the Project. He submits that the purchase confirmation agreements dated 1st March 2012 and 31st March 2011¹⁵ tendered into evidence on behalf of KCL refer to and incorporate the terms and conditions of a factoring agreement dated 15th March 2011. However, this factoring agreement was not put into evidence.
- [29] He too submits that the requirements to effect a legal assignment are contained in article 1479 of the **Code**. He however relies on **Roofman v Rayford Construction Co. et al**,¹⁶ in which the High Court of Trinidad and Tobago summarized additional conditions required to effect a valid legal assignment being that: (a) the assignor must have manifested an intention to transfer the chose; (b) the thing assigned must be a chose in action, in present existence, certain or capable of being ascertained; (c) the identity of the assignee must be clear; and (d) the appropriate forms and formalities must have been satisfied.
- [30] Mr. Williams submits that KCL's failure to tender into evidence the factoring agreement dated 15th March 2011 means that it is impossible to prove whether there had been compliance with article 1479 of the **Code**, in particular it is unknown whether the purported assignment was absolute or whether A&M retained any

¹⁴ Cap 4.15 of the Laws of Saint Lucia.

¹⁵ See Bundle 2 at page 121.

¹⁶ Trinidad and Tobago High Court Claim No. CV2009-03946, delivered 20th February 2014.

interest in the receivables; whether the purported assignment was by way of charge only; whether the agreement was signed by A&M; and whether all requisite forms and formalities had been complied with. He notes that in the **Roofman** case and another case **Alberta (Treasury Branches) v M.N.R.; Toronto Dominion Bank v M.N.R.**,¹⁷ the court examined the terms of the agreements in order to determine whether or not there had been an absolute assignment. He submits that KCL has not provided the evidence in order for this Court to make that assessment; accordingly, KCL's claim that it became the owner of the receivables under the Project must fail.

[31] Mr. Williams submits that KCL cannot rely on the documentation relating to other projects in order to establish that there had been a previous course of dealing between the parties because this differs significantly from what was pleaded in KCL's statement of claim, which refers to the Factoring Agreement and Purchase Confirmation Agreement. He relies on the case of **Shankiell Myland v Commissioner of Police et al**¹⁸ in which it was stated that litigation proceeds on the basis that the court is a court of pleadings and pleadings are critical in that they give fair notice of the case that has to be met so that the opposing party may direct its evidence to the issues disclosed. In the circumstances, KCL has failed to prove its claim in accordance with its statement of claim.

[32] In any event, Mr. Williams argues that alleging previous course of dealings would be of no assistance to KCL because the fact that the Crown paid all sums under other projects to A&M is no indication of its acceptance that there was an absolute assignment of the receivables under the Project. The general principle is that terms will not necessarily be incorporated into a contract due to the fact that the parties have, on previous occasions, dealt with each other subject to such conditions. Thus, exhibiting the documentation relating to the Bocage Project is not sufficient to show that the Project mirrored the same conditions. Furthermore, the evidence merely

¹⁷ [1996] 1 R.C.S 963.

¹⁸ GDAHCV2012/0045, delivered 9th May 2014, unreported.

indicates that there were dealings subsequent to the Project between KCL and A&M as the Bocage Project was subsequent to the Project.

- [33] Mr. Williams submits further that the affidavit of the then AG filed in support of the Vary/Discharge Application was opinion evidence only. The opinion therein was based on the language of the Notices, which indicated that the accounts receivable may have been assigned. However, the AG was not a signatory to the Notices and did not have the Factoring Agreement and other relevant documents in her possession at the material time. Therefore, she was expressing an opinion as to what appeared to be the effect of the Notices based on her legal training. It was based on incomplete evidence as to the nature of the dealings between A&M and KCL and in accordance with section 64 of the **Evidence Act**, evidence of an opinion is not admissible to prove the existence of a fact as to the existence of which the opinion is expressed.

Discussion

- [34] The case of **Roofman v Rayford Construction Co.** does not in any way depart from or contradict the requirements for effecting a legal assignment stipulated by article 1479 of the Code and as set out in **Halsbury's Laws of England**. The 'additional conditions' mentioned by the master therein merely expound those requirements and the AG has not, in any event, shown that the conditions have not been satisfied. The **Roofman** case turns on its specific facts, as the master found that the memorandum from the judgment debtor/assignor to the garnishee, purporting to effect the assignment, did not show a clear intention to irrevocably transfer the debt to the assignee; it was not clear that the instructions could not be cancelled without the assignee's consent. She held that the memorandum constituted mere instructions on how future invoices were to be settled; it was an informal direction to pay the assignee with the implication that it could be superseded or overridden by a further authorization letter to pay another third party without any release by the assignee. In coming to this conclusion, she considered

that the memorandum stated that the invoice will continue to be submitted under the judgment debtor/assignor's name.

- [35] In considering whether the sub-contracting agreement between the judgment debtor/assignor and the assignee effected an assignment, the master rejected the argument that the sums owed from the garnishee were due to both the judgment debtor and the assignee who were contractor and sub-contractor respectively. She also rejected the argument that the judgment debtor/contractor became trustee of the funds received for work executed by the assignee/subcontractor. She also noted that there was no enforceable legal relationship between the garnishee and the assignee, there being no privity of contract between them as the latter was not a party to the subcontracting agreement. The assignee also had no proprietary right in the funds payable.
- [36] The master found that the language of the agreement indicated that payment to the assignee was contingent on appropriation, allocation and availability of funds. Similar to the memorandum, she held that it was a mere agreement between contractor and sub-contractor directing the garnishee to pay the sub-contractor for works done, and not a valid assignment. The sub-contractor was paid on the direction of the contractor who remained the contractual partner of the garnishee, who was required to submit the invoices in the contractor's name.
- [37] Relying on the case of **Retskin v. Severe Gosudastvenoe Akcionernoe Obschestvo Komerseverputj**,¹⁹ the master held, having found that both instruments in issue did not satisfy the requirements for a proper assignment, that the authorization to the garnishee was cancelled as soon as service of the garnishee order nisi was effected. I am of the view that the **Roofman** case is distinguishable from the present as discussed below.

¹⁹ [1933] 1 KB 47.

- [38] The documents that KCL alleges effected the assignment were exhibited to the witness statements of Kerwyn Valley, Chief Executive Officer of KCL. As Mr. Williams points out, several of the documents exhibited refer to the Bocage Project and not the Project. The documents exhibited that refer specifically to the Project are (i) a copy of the contract between the Crown and A&M to undertake the Project dated 24th March 2010; (ii) the Purchase Confirmation Agreement dated 1st March 2012; (iii) an additional Purchase Confirmation Agreement dated 31st March 2011²⁰ (iii) the Notice to Pay dated 20th February 2012; (iv) the Notice to Pay dated 6th March 2013; and (v) an additional Notice to Pay dated 31st March 2011 from A&M directing payment of the receivables to KCL.²¹
- [39] Mr. Calvin Lee, Acting Deputy Permanent Secretary of the Ministry of Infrastructure, who gave evidence on behalf of the Crown, exhibited to his witness statement a Notice to Pay dated 15th September 2011 from A&M directing the Crown to pay KCL accounts receivable under the Project.
- [40] The other documents exhibited by Mr. Valley and which do not relate to the Project are (i) the Subscription Agreement, undated, that relates specifically to the Bocage Project and is stated as being pursuant to a Factoring Agreement dated 15th September 2011; (ii) the Factoring Agreement dated 15th September 2011 which does not specify any project in particular; (iii) an Assignment Contract, undated that relates specifically to the Bocage Project and includes a Notice to Pay which also relates to the Bocage Project; and (iv) a Purchase Confirmation Agreement dated 23rd May 2012 which also relates specifically to the Bocage Project. These documents are therefore of no assistance to KCL.

²⁰ Exhibited to Supplemental Witness Statement of Kerwyn Valley dated 26th November 2019 and is stated to have come into KCL's possession subsequent to the filing of his Witness Statement dated 30th September 2019 and for which the defendant requested specific disclosure and is disclosed in a Further Further Further Supplemental List of Documents dated 25th November 2019.

²¹ Exhibited to Supplemental Witness Statement of Kerwyn Valley dated 20th November 2019 and is stated to have come into KCL's possession subsequent to the filing of his Witness Statement dated 30th September 2019 and disclosed in a Further Supplemental List of Documents dated 16th October 2019.

- [41] On reading Mr. Valley's three witness statements, it appears that there are some errors or at least confusion between the Project and the Bocage Project certainly as it relates to the documents evidencing them and as to which Project came first. Whilst Mr. Valley repeatedly suggests that the Bocage Project was first in time, the date of the contracts between A&M and the Crown reveal that the Project was first. This observation, however, does not exclude the possibility that the request for financing from KCL was first made in respect of the Bocage Project, especially as the entire sum due under the Project was not factored but only certain invoices. Mr. Valley, however, does not make this distinction and the Court is left to wonder.
- [42] The difficulty is that there is no Assignment Contract exhibited in respect of the Project as there is in relation to the Bocage Project, which details the assignment of the accounts receivable and the terms and conditions thereof. In fact, as Mr. Valley admitted in cross examination at least two of the five documents that he stated comprised the standard package for KCL's Trade Finance Programme were not exhibited in respect of the Project – the Master Agreement for the Purchase and Sale of Accounts Receivable (also called the Factoring Agreement) and the Assignment of Contract Agreement.
- [43] Whilst the Master Agreement for the Purchase and Sale of Accounts Receivable dated 15th September 2011 does not state that it pertains to any project in particular and is general in scope, it post-dates the first Notice to Pay dated 31st March 2011 issued by A&M in respect of the Project, which cannot then be said to have been made pursuant to it. Mr. Valley admitted in cross examination that it also post-dates the first payment actually made pursuant to the notice of direction to pay dated 6th April 2011. Further, the Purchase Confirmation Agreement in relation to the Project refers to a Factoring Agreement for the Purchase and Sale of Accounts Receivable dated 15th March 2011. Mr. Valley under cross examination suggests that the Master Factoring Agreement of 15th March 2011 would have been the same as the one dated 15th September 2011 save for the name change from AIC to KCL. I also note for what it is worth that a Notice to Pay in respect of the Project was issued on

the same date as the 15th September 2011 Factoring Agreement. However, it remains the case that the 15th March 2011 Factoring Agreement has not been adduced.

[44] In these circumstances, the Court is left to consider whether the requirements for a valid assignment are satisfied by the two purchase confirmation agreements and the four notices of direction to pay. Despite the inadequacy of the documentary evidence provided by KCL, the Court must take into account the totality of the evidence, which includes the conduct of the parties throughout.

[45] I am persuaded on a balance of probabilities that the purchase confirmation agreements and notices of direction to pay effect a valid legal assignment of the accounts receivable under the Project from A&M to KCL. The said purchase confirmation agreements state that KCL confirms the terms and conditions under which it will purchase and acquire from A&M an undivided interest in the asset, on the terms and conditions set forth in the Factoring Agreement dated 15th March 2011 between A&M and AIC. It contains further details of the transaction, describing the obligor, the seller, the project, the asset, the purchase price and other fees, and is thereafter signed by a representative of KCL as well as a representative of A&M. The notices of direction to pay all require the Crown to take notice that: (i) for valuable consideration A&M had assigned all receivables owing pursuant to the Project to KCL (in some cases AIC); (ii) A&M authorises and directs the Crown to pay directly to First Citizens, as agent for KCL, all monies now payable or that may become payable to KCL under the agreement; (iii) payments to First Citizens of amounts due under the contract shall be deemed to be payments to KCL and shall satisfy in whole or in part, as the case may be, the Crown's indebtedness under the contract; (iv) the direction is irrevocable except with the consent of KCL and First Citizens; (v) the Crown shall sign and return the attached copy of the notice as acknowledgement of the irrevocable direction to pay. All four notices are duly signed by A&M and countersigned by a representative of the Crown.

[46] To my mind this meets the requirements of article 1479 of the **Code**. The assignment was in writing under the hand of assignor by virtue of the written purchase confirmation agreements setting out the essential terms of the sale and signed by A&M. The assignment was absolute and not purporting to be way of charge only. There is nothing in the purchase confirmation agreements which would suggest that the sale and assignment was in any way not absolute or by way of charge or that the agreement or transaction could be revoked. Express notice in writing of the assignment was given to the debtor – the Crown by virtue of the notices of direction to pay. The notices confirm that the sale constituted an assignment and that it was absolute and irrevocable without the consent of KCL. Thus, together, the purchase confirmation agreements and the notices of direction to pay satisfy even the additional conditions for which counsel for the AG advocates in accordance with the **Roofman** case.

[47] Unlike the factual scenario in the **Roofman** case, the purchase confirmation agreements and the notices of direction to pay together show a clear intention to absolutely and irrevocably transfer the debt to KCL and satisfy the formalities.

[48] Though the purchase confirmation agreements do not use the word ‘assign’ or ‘assignment’, this must be taken to have been the effect. I accept Mr. Prospere’s definition of debt factoring, which must necessarily involve assignment to be effective and operational. The debt must be sold along with all rights attached to it, in order for the sums factored to be recovered, which is, in essence, the consideration for the sale. This is the only way that debt factoring could be financially and commercially viable. The notices confirm that the sale involved assignment, if there was any doubt.

[49] There is also no issue of KCL not having notice of or agreeing to the assignment as was the issue in the **Curran** case discussed below. The evidence reveals that from the date KCL became aware of the Garnishment Order on 30th January 2015, it has maintained its position that the accounts receivable under the Project had been

absolutely and irrevocably assigned to it by A&M and that it is the legal owner of the accounts.

- [50] The conduct of the AG's Chambers would also suggest its belief and acceptance that the accounts receivable had been assigned to KCL, evidenced by its unilateral decision to file the Vary/Discharge Application and the affidavit filed in support, which clearly states that the Attorney General was of the considered legal position that the accounts had been assigned. It speaks clearly to an assignment although the AG's Chambers has sought to resile from that position in these proceedings. Further the Crown's unequivocal action in making payment of the receivables to the KCL without question or concern from the date of the Notices until November 2015 suggests that it accepted that the accounts had been assigned to KCL. Mr. Lee sought in cross examination to distinguish between an assignment which signified a transfer of ownership and a mere instruction from a supplier to make payment to it through a conduit. However, I place little weight on this assertion, as the question of whether the receivables had been assigned is a legal question and his interpretation of the notices of direction to pay without more is therefore of little moment.

Issue 2 – Whether the Notices bound the Crown to pay KCL the accounts receivable under article 1479 of the Civil Code or in equity?
KCL's Submissions

- [51] Mr. Prospere submits, relying on **Halsbury's Laws of England**,²² that article 1479 of the **Code** transferred to the assignee all the legal remedies of the assignor, including the right to sue in his own name. Article 1479 also preserved the efficacy of the panoply of equitable remedies that were previously available.
- [52] Mr. Prospere submits that in the absence of express notification of the assignment, the Crown would have been entitled to discharge its obligations by payment to A&M or a third party. However, KCL discharged its duty to notify the Crown of the

²² Halsbury's Laws of England, (5th edition, 2017, LexisNexis) Vol 13, para 73.

assignment to it of the accounts receivable under the Project. Having express notification thereof, the Crown was not entitled to act inconsistently with the assignment. Mr. Prospere relied upon a number of cases and textbooks on this point. The principle was comprehensively enunciated in **Deposit Protection Board v Dalia**²³ where Simon Brown LJ stated:

“Once notice of an equitable assignment is given to the debtor, he cannot thereafter deal inconsistently with the assigned interest, for instance by making payment to the assignor... if the debtor in such a case ignores the notice and pays the assignor he is not discharged and will have to make a second payment to the assignee... there remains a legal liability to the assignor, albeit true, one which the debtor meets only at his peril.”

- [53] Mr. Prospere therefore submits that the Crown, by the Notices dated 20th February 2012 and 6th March 2013 were made aware of the fact of A&M’s assignment of the accounts receivable under the Project to KCL. The Crown provided express acknowledgement of the Notices on 23rd February 2012 and 29th May 2013. The Crown, therefore, made payments to LCC at its own peril and as such was not discharged from its liability to KCL for the payments.

The AG’s Submissions

- [54] Mr. Williams reiterates that in the absence of the factoring agreement dated 15th March 2011, it is impossible to prove that there was an absolute assignment of the receivables as required by article 1479 of the **Civil Code**.
- [55] He submits further that the Notices themselves are insufficient to be considered absolute assignments of the receivables. He relies on the case of **Curran v New Pack Cinemas Ltd**²⁴ where Jenkins LJ accepted the submission that a direction to pay did not amount to an absolute assignment, unless and until communicated to the assignee because until communicated, it was revocable by the assignor at any time and therefore not absolute. His Lordship also accepted that a direction to pay that had not been communicated to the assignee at the date of service of a

²³ [1994] 2 AC 367 at 381-382.

²⁴ [1951] 1 All ER 295.

garnishee order nisi was revoked by service of such order. Mr. Williams points out that Jenkins LJ therefore held that on the footing that there had been no prior agreement with the bank (the assignee) to give such a direction, and the bank had not been notified of the fact that such a direction had been given, the direction and authority, though expressed to be irrevocable except with the consent of the bank, could in fact have been revoked by the judgment debtor (the assignor) at any time as amounting to no more than an arrangement between the judgment debtor and the garnishee in which they alone were concerned, which in the absence of any agreement or notification, conferred no interest in the debt to the bank. Mr. Williams submits that the same principle should be applied to the instant case.

- [56] Mr. Williams submits that although an assignment may be binding in equity even where the formalities of article 1479 of the **Code** have not been met, the assignment must be absolute, such that the assertion of an equitable assignment does not assist KCL. He submits therefore that the Notices did not bind the Crown, neither pursuant to article 1479 of the **Code** nor in equity.

Discussion

- [57] Mr. Williams' submission in respect of the **Curran** case has the potential to mislead. It is correct that the Court took the view that the document in question did not suffice to establish an absolute assignment of which express notice had been given to the garnishee, and accordingly, a legal assignment under the Law of Property Act, 1925, s 136(1). The court took this position because it found there was an absence of evidence of agreement of or notice to the bank. Mr. Williams, however, omitted to present the Court's holding that as there was no evidence that the bank had not been given notice of the direction and authority, in view of the recital therein of the prior arrangements with the bank in the form of an admission by the judgment debtors that the directions thereby given were given pursuant to "arrangements for valuable consideration", the document afforded prima facie evidence of an assignment, or, the notice and direction to pay afforded at least substantial grounds for supposing that there might have been an assignment. The Court of Appeal

therefore held that the learned county court judge was wrong to make the garnishee order in the face of that document. It was in this context that Jenkins LJ then made the statement referred to by Mr. Williams below that:

“It must be remembered that a garnishee is in a difficult position. He has to obey any order made against him, yet, if he has had notice of a prior assignment, the order is no protection to him, and, if he pays in compliance with the order, he nevertheless remains liable to the assignee to pay the debt over again: see *Yates v Terry*. This being so, we think it is clearly wrong, where the garnishee shows that he has notice of a prior assignment, to make an order against him unless he is able to prove strictly and conclusively that the assignment of which he has notice is a valid assignment.”

[58] The clear meaning of Jenkins’ LJ statement is that it is wrong for the court to place the burden of proving a valid assignment on a garnishee, failing which a garnishment order would be made against him in circumstances where he presents notice of such an assignment. My understanding is that this would be too onerous a burden given his precarious position; and not as counsel for the AG suggests – that a garnishee is required to prove a valid assignment failing which a garnishee order must be made. The result was that the Court of Appeal held that the court should not make a garnishee order but should order the bank to appear and state the nature and particulars of its claim to the debt, in accordance with the practice indicated in the County Court Rules, 1936, Ord 27, r 11.

[59] The present case is unlike **Curran**. There is no issue here of KCL not having had notice of the assignment or agreeing to it. Though the four notices were not signed by KCL, the Crown, from the date of its acknowledgement of the notices, began paying KCL pursuant to them and the payments have always been accepted by KCL or its agent. The evidence does not reveal that A&M or any third party objected or made a claim to the receivables until LCC’s application for the Garnishment Order. Further KCL, since becoming aware of the Garnishment Order, has maintained that it is the legal owner of the accounts receivable under the Project by virtue of assignment of the receivable to it from A&M. Thus, the Crown is bound to pay KCL in accordance with the Notices.

Issue 3 – Whether the Garnishment Order vitiated the Notices?

Issue 4 – Whether the Crown is still liable to pay KCL the accounts receivable?

KCL's Submissions

[60] Mr. Prospere submits that the Garnishment Order was plainly wrong as it sought to enjoin payment from the garnishee, the Crown, which was at the material time no longer obligated to A&M, the judgment debtor.

[61] He relies on rule 50.2(4) of the **Civil Procedure Rules 2000** ("the CPR") which stipulates that "a debt may be attached if it is (a) due or accruing to the judgment debtor from the garnishee on the date that the provisional order ... is made and served on the garnishee; or (b) becomes due or accrues to the judgment debtor at any time between the service of the provisional order... and the date of hearing." He also relies on several authorities which establish that the sum that is subject of the order must be recognized as a debt,²⁵ garnishee proceedings only apply where there is a debt which is due or accruing due, though it may not be immediately payable,²⁶ and that the debt is due from the garnishee to the judgment debtor.²⁷

[62] Mr. Prospere submits that KCL has established that its ownership of the accounts receivable crystallised on 23rd February 2012 and 29th May 2013 when the Crown acknowledged receipt of the Notices. The accounts receivable were therefore assigned to KCL well before LCC's notice of application for the Garnishment Order on 11th August 2014.

The AG's Submissions

[63] Mr. Williams submits that in order to ascertain whether the Garnishment Order vitiated the Notices, the Court must consider whether it is a judgment in rem or in personam. He relies on the definition by Lord Mance in **Pattni v Ali and another**,²⁸

²⁵ *Israelson v Dawson, Port of Manchester Insurance Co., Garnishees* (1993) 1 K.B. 301.

²⁶ *Dunlop and Rankin Ltd. v Hendall Steel Structure Pitchers (Garnishees)* (1957) 1 W.L.R. 1102.

²⁷ *Ibid.*

²⁸ [2007] 2 WLR 102.

where he said ‘...a judgment in rem is judgment by a court where the relevant property is situate, adjudicating on its title or disposition as against the whole world and not merely as between the parties in the litigation before it.’ He submits that in **Societe Eram Shipping Co Ltd. et al v Compagnie Internationale de Navigation**,²⁹ the House of Lords described the equivalent proceedings under the UK CPR, Third Party Debt Orders, as being in rem. Mr. Williams submits that similarly, the Garnishment Order is an order in rem that binds not only the Crown and A&M but all persons having an interest in the receivables under the Project, including KCL. To the extent that the Garnishment Order determined title to the proceeds under the Project, it superseded any obligations to KCL pursuant to the Notices.

- [64] Mr. Williams states it is undisputed that the AG’s application to vary/discharge the Garnishment Order was served on KCL prior to the initial scheduled hearing date. KCL therefore had knowledge of the Garnishment Order and it was incumbent on KCL to have taken steps in SLUHCV2014/0383 (the Garnishment proceedings) to protect its interests, which it failed to do. He submits that the evidence reveals that Ms. Jan Drysdale, then Senior Crown Counsel in the AG’s Chambers advised KCL to retain counsel to represent its interests, however KCL’s external counsel, Mr. Dave Williams, having taken the view that the Garnishment Order required the Crown to act in a manner that was illegal, chose to rely on the AG’s application to vary/discharge the Garnishment Order. Even after the AG’s application to vary/discharge the Garnishment Order was refused, Ms. Drysdale reiterated that KCL should make an urgent application to set aside the Garnishment Order. KCL was entitled to do so from the date it was served with the Garnishment Order pursuant to either CPR 42.12 or article 381 of the **Code of Civil Procedure**.³⁰ KCL only belatedly sought to do so by filing a petition in SLUHCV2014/0383 in August 2015, some three months after the AG’s application to vary/discharge the

²⁹ [2003] 3 All ER 465.

³⁰ Cap 4.01A of the Revised Laws of Saint Lucia.

Garnishment Order was dismissed and 6 weeks after payment to LCC was made. KCL, thereafter, of its own volition, discontinued the petition.

[65] Mr. Williams concludes that the Garnishment Order remains valid, having not been set aside. If KCL wished to advance the argument that it was the owner of the accounts receivable, which the Crown does not accept, it was KCL's duty to approach the court to vary the Garnishment Order, and not that of the Crown. KCL elected not to take part in SLUHCV2014/0383. Thus, the Crown is bound by the Garnishment Order, being a judgment in rem, which therefore vitiated the Notices.

[66] Mr. Williams urges the Court to take notice of dicta of Jenkins LJ in **Curran** where he noted the difficult position in which a garnishee finds himself and stated: “[t]his being so, we think it is clearly wrong, where the garnishee shows that he has notice of a prior assignment, to make an order against him unless he is able to prove strictly and conclusively that the assignment of which he has notice is a valid assignment...” Mr. Williams submits that **Curran** is distinguishable from the present case because KCL was given notice of the Garnishment Order yet failed to appear and establish its claim to the sums garnished. He contends that this position is consistent with further dicta in **Curran** where the court stated: “if the bank fails to appear or fails to establish its claim as assignee, a fresh garnishee order binding the bank and protecting the garnishees in their compliance with it can be made.”

[67] Mr. Williams therefore concludes that the Garnishment Order was binding on the Crown and the Crown is no longer liable to pay KCL monies which were diverted to LCC by virtue of the Garnishment Order.

KCL’s Submissions in Reply

Judgment in Rem

[68] Mr. Prospere submits that the AG’s contention that the Garnishment Order is binding as it operated as an order in rem, having been made against the Crown pursuant to

CPR 59.7(3) and (4) or section 22 of the **Crown Proceedings Act**³¹ and being absolute in its effect, is misguided. Mr. Prospere submits that the **Societe Eram Shipping Co. Ltd.** case relied upon by the AG is distinguishable as, in that case, the garnishment proceedings were in respect of property which in fact belonged to the judgment debtor. That is not the case in the present proceedings.

KCL's Failure to Challenge the Garnishment Order

[69] Mr. Prospere submits that KCL took very robust and proactive steps to safeguard its interest in the accounts receivable immediately upon becoming aware of the proceedings in SLUHCV2014/0383 on 30th January 2015. Such steps included: seeking immediate legal advice from its external counsel in Trinidad and Tobago; engaging the AG's Chambers in discussions regarding prosecution of the Vary/Discharge Application; making arrangements for its representatives to attend the hearing of the Vary/Discharge Application and to meet with counsel in advance of the scheduled hearing date; seeking legal representation in Saint Lucia on 17th April 2015; its representatives travelling to Saint Lucia despite receiving notification that it had been given an erroneous rescheduled hearing date and that the Vary/Discharge Application had been dismissed; writing to the Ministry of Infrastructure on 8th May and 5th June 2015 reasserting its ownership of the accounts receivable and warning against paying LCC under the terms of the Garnishment Order; filing of a petition on 17th August 2015 to be joined in the proceedings in SLUHCV2014/0383 for the purpose of seeking consequential relief; and subsequently filing this claim when it failed to gain traction in SLUHCV2014/0383. Mr. Prospere submits therefore that it would be wholly wrong for the Court to find that it had failed to act timeously to safeguard its interests, even if that were a defence to the claim.

[70] Mr. Prospere further submits that the AG's Chambers and the Ministry of Infrastructure, on the other hand, made grave missteps in SLUHCV2014/0383 for which it would be unjust for KCL to be made worse off, including: (a) failing to inform

³¹ Cap 2.05 of the Revised Laws of Saint Lucia.

KCL of the pre-litigation letter dated 15th July 2014 from LCC; (b) failing to seek an adjournment of the hearing of LCC's application for the Garnishment Order despite (i) having received LCC's notice of application very late, (ii) not having an opportunity to take instructions from the Ministry of Infrastructure in relation thereto, and (iii) having failed to inform KCL of the said application and hearing; (c) having failed to timeously serve the Vary/Discharge Application on KCL, which was only served some five months after it was filed; (d) giving KCL the wrong rescheduled hearing date for the Vary/Discharge Application; (e) failing to seek an adjournment of the rescheduled hearing date in light of giving KCL's representatives the wrong hearing date and knowing their intention to have attended same; (f) taking a deliberate decision not to appeal the order refusing to set aside or vary the Garnishment Order; failing to seek a stay of the Garnishment Order; (g) failing to take interpleader proceedings involving KCL and LCC given their competing interests in the accounts receivable; (h) failing to seek an opinion of the High Court on the proper interpretation of the Garnishment Order; (i) advising the Ministry of Infrastructure to pay the accounts receivable to LCC despite being satisfied that the Garnishment Order was wrong; and (j) failing to inform KCL that the Ministry of Infrastructure made payment of the accounts receivable to LCC on 26th June 2015.

Discussion

- [71] Having established that at the time the Garnishment Order was made, the accounts receivable did not belong to A&M, the judgment debtor, and the Crown was no longer indebted to A&M, the Garnishment Order was wrongly made and could not have vitiated the Notices. The cases are clear that the garnishee is in no better position than the judgment debtor and could only deal with sums that the judgment debtor could honestly have dealt with. A sum can only be garnished if it is due or accruing due from the garnishee to the judgment debtor.
- [72] There is no need to rely on CPR 50.2(4), which is in any event inapplicable. Rule 50.2(3) states that "an attachment of debts order may not be made to attach debts due from the Crown" and contains a footnote which indicates that rule 59.7(3) is

applicable. Rule 59.7(3) does not stipulate the same or similar procedure as in rule 50 but directs attention to the **Crown Proceedings Act**³². However, the cases cited by Mr. Prospere speak to the substantive law that is applicable to all debts regardless from whom it is owed. Whilst there is no dispute that the Garnishment Order is an order in rem, I agree with Mr. Prospere that the order must nonetheless have been properly granted and the cases cited by the Mr. Williams do not support his position as the orders in those cases were granted in respect of sums belonging to the judgment debtor, which is not the case here.

[73] I cannot accept Mr. Williams' submission that KCL was entitled to apply to set aside the Garnishment Order pursuant to CPR 42.12. CPR 42.12 provides that the Court, may, if it makes an order or judgment that might affect the rights of a person who is not a party to the claim, order that the person be served with a copy of the order or judgment and that such person may apply to have same varied or discharged. The court never ordered that the Garnishment Order be served on KCL. In fact, KCL does not appear to have been in the court's contemplation as it would have been unaware of the assignment at the time the order was made and therefore there would not have been an opportunity for KCL to have engaged CPR 42.12. I accept that KCL could have engaged article 381 of the **Code of Civil Procedure** to oppose the order made, which the evidence reveals they did seek to do. However, I am of the view that this does not impact in any significant way the issues to be decided in this case.

[74] Counsel for the AG makes much ado about the alleged failure of KCL to intervene in SLUHCV2014/0383 and make its own application to vary or discharge the Garnishment Order, or otherwise file a claim to protect its interest in the accounts receivable. The majority of the evidence centered on the events which took place after KCL was served with notice of the Vary/Discharge Application, including the fact that Ms. Drysdale advised KCL to obtain legal representation and make its own

³² Cap 2.05 of the Revised Laws of Saint Lucia.

application; and KCL's deliberate decision to rely on the Vary/Discharge Application and not file anything in SLUHCV2014/0383 prior to its belated petition.

[75] On more than one occasion Ms. Drysdale emphasized that she was not retained by and did not represent KCL, it was not her responsibility to protect their interest in the accounts receivable and that it was their own responsibility to do so. Her evidence was that the reason for the Vary/Discharge Application was to put before the court information in the AG's possession which the court would not have had, and which may have affected whether or not the Garnishment Order was made; and not because she was of the view that the accounts had been assigned. Once the Vary/Discharge Application was dismissed, the Garnishment Order remained a valid, binding order of the court with which the Crown was obliged to comply.

[76] It is true that all the necessary information was not before the Court when the Garnishment Order was made, and the circumstances surrounding the dismissal of the Vary/Discharge Application are unclear. But given the precarious position of a garnishee that Mr. Williams highlights, it was incumbent on the AG's Chambers to bring the relevant matters to the attention of the court diligently and in a timely manner. It is apparent that this was not done. For this, the AG's Chambers must take some responsibility.

[77] As noted above, the Part 52 procedure for attachment of debts does not apply to debts due from the Crown and the procedure stipulated in CPR 59.7 is scant. However, CPR 59.7(3) requires the application for the Garnishment Order to be served on the Crown at least 14 days before the date of hearing. Ms. Drysdale complained of the short period of notice between being served with that application on 11th August 2014 and the hearing date which was set for 18th August 2014. This short notice, she says, impacted her ability to obtain information and instructions from the Ministry. Given that the AG's Chambers had been short served, she would have been well within her right to seek an adjournment in order to obtain

instructions. This she did not do and was content to merely observe the proceedings, per her instructions.

[78] Whilst rule 59.7 does not stipulate that the AG's Chambers, as representative of the garnishee must be heard on such an application, given the nature of the order, it is unlikely that any court would have refused hearing Counsel. Though there is clearly a lacuna in the procedure set out in the CPR in respect of attachment of debts due from the Crown, it is unlikely that it was intended that the Crown, as a garnishee, should be in any worse a position than a private person. If the AG could only appear as a mere observer, there would be little purpose in mandating that the application be supported by affidavit evidence providing details about the debt to be attached and that the application and affidavit in support be served. The contemplation must necessarily have been that the AG would have the opportunity to make representation in response to the application and affidavit, especially to bring a matter as significant as the assignment of the debt in question to the attention of the court. This information would have been peculiarly within the knowledge of the garnishee.

[79] Ms. Drysdale in her witness statement also says that at the time of the hearing of the application for the Garnishment Order, she had no information from the Ministry, which is why she merely observed the application for the Garnishment Order. She was not sure whether the Ministry had been served with the application but as the Government had not been sued, there was no need for the Ministry to give the AG's Chambers instructions. This approach demonstrates a lack of appreciation of the nature of a Garnishment Order and the consequence to the Crown in the event that it paid over the debt to the wrong party. It is also worthy of note that it took the AG's Chambers about five months to bring the application for the Garnishment Order to KCL's attention, a fact acknowledged by Ms. Drysdale. An explanation was given for this by Ms. Drysdale in cross-examination where she said that the delay in the service on KCL was not deliberate and was a result of her instructions not being complied with, which she only discovered on reviewing the file.

[80] On the other hand, Mr. Lee says in his witness statement that the Ministry was served with the application for the Garnishment Order on 11th August 2014 and that on the same day, he contacted Ms. Drysdale who explained to him the nature of the application. He was next contacted by her in September 2014, informing him that LCC's application had been granted. He does not mention any request for information from the AG's Chambers. He does not mention offering relevant information which would have been in his possession regarding the four notices of direction to pay KCL and the pre-litigation letter from LCC's legal representatives advising of the intention to garnish the accounts under the Project. This is certainly a lapse on the part of the Ministry and the AG's Chambers for which they must bear responsibility. Had Ms. Drysdale made representation at the hearing of LCC's application and/or sought an adjournment of the proceedings, the Garnishment Order would not have been made on that date and the AG's Chambers would have had the opportunity to place before the Court the relevant information for consideration. It is also likely that KCL would have been served with notice of the application and given an opportunity to be heard as a third party claiming an interest in the debts to be garnished and therefore affected by the Order.

[81] Even on the adjourned hearing date for the Application – 4th May 2015, Ms. Drysdale ought to have sought an adjournment, given KCL's absence, knowing that it was KCL's intention for its representatives to travel from Trinidad to attend the hearing, being aware of their reliance on the Vary/Discharge Application and given her own evidence that one of the reasons given by the judge for dismissing that Application is that KCL was not represented at the hearing thus were not interested in the proceedings. This was after communication with KCL in which they made clear their position that they were the owners of the accounts which had been assigned to them and that the Garnishment Order was wrongly made.

Ancillary Issues
Frustration
KCL's Submissions

[82] Mr. Prospere submits that the AG cannot avail itself of the defence that the Crown's performance of its obligations under the Notices had been frustrated by the Garnishment Order. The authorities establish that where the frustrating event arose from the defendant's own election, the doctrine of frustration fails.³³ Mr. Prospere contends that the evidence shows that the Crown was aware of the assignment of the accounts receivable to KCL and that they had concerns with the correctness of the Garnishment Order and accordingly took steps to have the order set aside. Therefore, in paying the accounts receivable to LCC, the Crown took a deliberate decision to do so, knowing it to be wrong, and in the circumstances, the 'frustration' was self-induced.

[83] Mr. Prospere further contends that the doctrine of frustration is inapplicable being a contractual defence, there being no contract between KCL and the Crown. The Crown's obligations arose under the Notices and are grounded in statute and equity rather than in the common law of contract.

Discussion

[84] I agree with Mr. Prospere's submission that the defence of frustration is inapplicable. As Mr. Williams acknowledges, there is no contract between KCL and the Crown. The obligation to pay KCL arose from there being a legal assignment of the accounts receivable of which the Crown had notice and is grounded therefore in statute and common law. In any event, it could not be said that the Garnishment Order frustrated the performance of their obligations when there were options for performance open to the Crown of which it did not avail itself and acted in a manner that contributed to the alleged frustrating event – the grant of the Garnishment Order.

³³ *Maritime National Fish Ltd. v Ocean Travelers Ltd.* (1935) A.C. 524; *Bunge SA v Kyla Shipping Company Ltd.*

Res Judicata and Abuse of Process

KCL's Submissions

- [85] Mr. Prospere submits that the AG's contention that the instant proceedings are res judicata and an abuse of process cannot be entertained. The basis of the AG's contention is that prior to filing this claim, KCL had filed a petition on 17th August 2015 in SLUHCV2014/0383 which has since been completed. However, Mr. Prospere noted that the AG argued this issue before the Court on 18th May 2017 and it was rejected. He states that the AG never appealed that ruling and as such cannot raise the same plea in these proceedings, which is therefore, res judicata.

Discussion

- [86] The question of whether the filing of this claim is res judicata was conclusively dealt with by the learned judge in her decision of 18th May 2017 which has not been appealed and therefore cannot be raised again for this Court's consideration.

Conclusion

- [87] Based on all of the foregoing, I find that
- (i) KCL is the legal owner of the accounts receivable under the Project, the said accounts having been transferred to KCL absolutely and irrevocably by virtue of a legal assignment in accordance with article 1479 of the **Civil Code**, evidenced by the cumulative effect of the purchase confirmation agreements and notices of direction to pay;
 - (ii) the notices of direction to pay bound the Crown to remit payment of the said accounts to KCL which said notices were not vitiated by the Garnishment Order; and
 - (iii) thus the Crown remains liable to pay KCL the balance of the accounts receivable under the Project.

Order

[88] I hereby order as follows:

- (1) The Government of Saint Lucia shall pay KCL Capital Market Brokers Limited the sum of EC\$1,335,562.78 together with interest thereon at the rate of 6% per annum from 5th November 2015 to the date of payment.
- (2) The Government of Saint Lucia shall pay KCL prescribed costs in accordance CPR Part 65.5 on the sum awarded in paragraph 1 hereof.

**Kimberly Cenac-Phulgence
High Court Judge**

By the Court

Registrar