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# INSOLVENCY BULLETIN

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## **SHARES ARE VALID CONSIDERATION FOR A FLOATING CHARGE**

A floating charge provides a lender with security over the short-term circulating assets of a company or a limited liability partnership. The company or LLP maintains control over its fluctuating assets unless there is a default or entry into liquidation, in which case the floating charge crystallises into a fixed charge. In those circumstances the charged assets can no longer be used or sold.

Section 245 of the Insolvency Act 1986 allows a liquidator scope for the avoidance of “certain” floating charges. At the heart of that provision is whether there has been an unfair advantage obtained over other creditors at a prescribed time prior to the “onset of insolvency”. Practitioners will note the resemblance with certain of the statutory provisions relating to preferences and transactions at an undervalue. A floating charge is invalid except to the extent of the aggregate of:

- the value of so much of the consideration for the creation of the charge as consists of money paid, or goods or services supplied, to the company at the same time as, or after, the creation of the charge.
- the value of so much of that consideration as consists of the discharge or reduction, at the same time as, or after, the creation of the charge, of any debt of the company, and
- the amount of such interest (if any) as is payable on the amount falling within either of the above in pursuance of any agreement under which the money was so paid, the goods or services were so supplied or the debt was so discharged or reduced.

For the purposes of s.245 the time of the creation of the charge is “relevant” if it is created in favour of a connected person within two years of the onset of insolvency. For an unconnected person it is 12 months but those times do not count unless at the time that the charge is created the company is unable to pay its debts or becomes unable to do so as a result of the charge.

In *Manning and Gunn v Neste AB and Farah [2022] EWHC 2578 (Ch)* there was an issue as to whether there could be a floating charge over shares since, at first glance, shares are neither “money paid, or goods or services supplied” to a company “at or after the creation of the charge” and so fall outside the scope of “consideration”. The administrators sought directions from the Court.

Mr Farah was the sole shareholder of a company which he sold for £2.3M to a connected Company in return for a floating charge over its assets to secure the monies due to him. The Company’s only asset was its newly acquired shareholding as holding company of its subsidiary company. The transaction took place within two years of the onset of the Company’s insolvency.

Does the word “goods” in s.245 extend to shares? It was accepted by the Court that the term “goods” had an ordinary legal meaning as defined in the Sale of Goods Act 1979 which, at first glance, did not extend to shares as constituting valid consideration. However, the Court stated that “*the application of the Sale of Goods Act meaning in this context seems to me to produce outcomes so bizarre that I find myself very unwilling to believe they can possibly represent the intention of the legislator*”. The Court determined that goods in the context of s.245 “*should encompass not only goods in the Sale of Goods sense but also things in action...which have a clear value...the shares (in the connected company) satisfy that criterion*”.

### **Editor’s Note**

This judgment therefore widens the scope for what may be considered valid consideration for a floating charge. It includes not only “goods” as defined in the Sales of Goods Act 1979, but also “things in action” such as receivables and “intangibles” such as IPR provided that (1) such assets are received by the company pursuant to its ordinary trading activity and (2) have a clear value, such that transfer of their ownership swells the assets of the company.



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