INSOLVENCY BULLETIN

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IF IT LOOKS AND SOUNDS LIKE A FIXED CHARGE...IT PROBABLY IS

For the first time since the House of Lord's decision in *Re Spectrum Plus [2005] UKHL 41*, the High Court has considered the criteria needed to determine whether a charge held over a company's assets is a fixed or floating charge. As office holders will be aware, that distinction can have a significant effect on recovering their costs and also on recoveries for certain creditors.

A fixed charge is a security held by a lender over specific assets where the charge holder controls any dealing or disposal of that asset. A fixed charge holder ranks ahead of preferential creditors, floating charge holders and unsecured creditors.

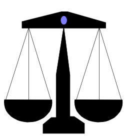
By contrast, a floating charge is a security held by a lender over the "circulating assets" of a borrowing company which are used by that company in the ordinary course of its business (for example raw materials). The company borrower (called a "chargor") loses the ability to utilise the charged assets in the course of its business when there is a crystallising event, such as failure to repay a loan or the company becoming insolvent. The floating charge then freezes and becomes "fixed" (albeit the realisation proceeds will still be treated as "floating").

There are a number of creditors which rank ahead of a floating charge holder in a formal insolvency, such as the office holders` costs, preferential creditors and the prescribed part.

In *Re Avanti Communications Ltd [2023] EWHC 940 (Ch)* the joint administrators sought a determination by the High Court as to whether certain assets sold in a pre-pack, namely a satellite, ground stations and orbital slots ("Relevant Assets"), were secured by fixed or floating charges.

The decision of the High Court was necessary as it would determine whether or not HMRC was entitled as a preferential creditor to any of the pre-pack proceeds of sale ahead of the secured lender.

In *Avanti* the High Court applied the two-stage test which was set out in *Agnew v IRC [2001].*



The First Stage Test - Contractual Interpretation

The High Court stated that it must consider the security documentation in accordance with established principles of contractual construction and discern the intentions of the parties. In this regard, the Relevant Assets were stated in the debenture as being subject to fixed charges. Further, and subject to limited exceptions, the Relevant Assets were also subject to substantial restrictions regarding their disposal.

The Second Stage Test - Categorisation

The High Court held that in order to qualify as a fixed charge, there did not have to be a total restriction on the usage of the Relevant Assets without the charge holder`s consent. Instead, there was a "sliding scale" between total control of the asset by the charge holder as against the total freedom of the company charger borrower to utilise the assets. In *Avanti* that freedom was only in respect of limited exceptions. The Relevant Assets were complex and highly technical infrastructure used as income generating assets and were difficult to sell. The Relevant Assets did not therefore have the features of "circulating assets".

Applying the two-stage test, the High Court held that the Relevant Assets were fixed assets subject to fixed charges.

Editor's Note

What does *Avanti* tell us? That fixed charge security does not require absolute control over an asset but depends on all the circumstances to determine where it lies within the "sliding scale". Clearly, the nature of the assets charged, the wording of the relevant debenture and the intentions of the parties will come into play. It will also be significant as to whether or not the borrower had "significant commercial freedom" over the asset. However, where there is any doubt, office holders should use the statutory powers available to them to seek directions from the High Court and so obtain full protection for their actions.

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