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CASE AND COMMENT

FIXED AND FLOATING CHARGES: A QUESTION OF CONSENT OR CONTROL?

AVANTI Communications Ltd. is a satellite operator which owned orbiting payload, network and ground equipment on Earth, as well as various national and international filings and licences for orbital slots and related terrestrial activity. The company went into administration. The question arose as to whether those assets were subject to a fixed or floating charge. On an application for directions by administrators, Edwin Johnson J. agreed with secured creditors that fixed charges had been created: *Re Avanti Communications Ltd. (in administration)* [2023] EWHC 940 (Ch). The judge did not have the benefit of opposing argument from unsecured and preferential creditors. The administrators themselves adopted a neutral stance, going no further than to describe the merits as "finely balanced" (at [133]). It is suggested that the secured creditors' argument – as accepted by the court – was wrong in principle and against the grain of *Agnew v Commissioner of Inland Revenue* [2001] UKPC 28, [2001] 2 A.C. 710 (P.C.) and *Re Spectrum Plus (in liquidation)* [2005] UKHL 41, [2005] 2 A.C. 680.

Avanti's security debenture purported to create fixed charges over a range of company assets for the benefit of lenders, together with a negative pledge not to create any other security over the same assets and a covenant not to impair security interests. The debenture "irrevocably authorised" release of security for any so-called "Non-Distressed Disposal". A Non-Distressed Disposal required that the sale be at fair market value, for cash or cash equivalent, and that, if the proceeds of the sale were at or above $1 million, those proceeds be applied down a pre-determined "waterfall" for the repayment of various loans. The documentation also envisaged exceptions to these limitations on pre-authorised disposals including, in broad terms, disposals under a certain value; disposals for capacity reasons; disposals where assets were obsolete, damaged or worn-out; and disposals where property was no longer considered useful. Disposals falling within these exceptions not only did not require the prior consent of lenders but also did not require payment of proceeds down the waterfall structure.

The draftsperson, no doubt realistic about the recharacterisation risk, stipulated that the charge was floating to the extent it was not fixed. However, Edwin Johnson J. was satisfied that the charge was fixed (at [123]–[126]). The ability of Avanti to deal with the charged assets was strictly limited, and "importantly" the various exceptions set out above did not permit the company to dispose of those assets in the ordinary of course of trading. While the same could not be said of a Non-Distressed Disposal, "critically" the waterfall provisions made such a disposal over $1 million "commercially unattractive". The overall effect was to give the chargees "very significant control" and did not leave the chargors "free to deal" with the charged assets. The judge also considered it "important" that charged assets did not constitute "anything resembling the circulating capital or fluctuating assets of a company", but rather were part of the company's "infrastructure" for doing business, and also were "inherently difficult to transfer".

The security created by this arrangement should have been characterised as a floating charge. In *Agnew*, at [13] and [32], Lord Millett confirmed that the "hallmark" of a floating over a fixed charge was the intention that the company could be free to deal with charged assets and withdraw them from security without the specific consent of the charge holder. This was followed in *Spectrum*, such as at [111] (Lord Scott) and [138] (Lord Walker). The essential element of a floating charge is that the asset is not "permanently appropriated to the payment of the sum charged". In contrast, for a fixed charge there is such permanent appropriation, requiring the chargee to give specific approval at the time of disposal of the asset.

The function of specific consent is not merely part of an answer to a practical question of control over, or ability to deal with, assets in the course of trading; its conceptual role is to remove the fixed charge from the asset. If the chargor does not need to approach the chargee to obtain such approval, it means that there is no permanent appropriation of the asset to any charge and so, if there is a charge at all, it must be a floating charge. Thus a floating charge arises whenever – as within the debenture granted by Avanti – the chargor has *some* scope to dispose of the charged asset without obtaining specific consent even if limited or subject to conditions. The fact that the parties in Avanti used the language of fixed charge does not change that characterisation analysis. The court looks to the substance not the form (see e.g. *Agnew* at [16] and *Spectrum* at [80], [119] and [141]).

Why then did Edwin Johnson J. conclude that this arrangement constituted a fixed charge? The judge's reading of *Agnew* was that the distinction between the different type of charges turned not on a binary test about prior specific consent but rather a question about the relevant level of control (at [41]). Further, the high degree of requisite control for naturally fluctuating fungible assets such as stock and book debts could be lowered for specific assets that were to be held by the company for ongoing use (at [43], also at [119]). The latter point resuscitated the pre-*Agnew* and *Spectrum* decision of *Re Cimex Tissues Ltd.* [1994] B.C.C. 626 (Ch). It is not clear from the judgment whether the court in *Avanti* was addressed on whether *Cimex* remains good law. Although not formally overruled, the leading commentary (rightly) recognises that it is "very dubious" that *Cimex* "survives" *Agnew* and *Spectrum*: see *Goode and Gullifer on Legal Problems of Credit and Security* (7th edn), paragraph 4-12.

It is unclear, as a matter of principle, why the arrangements necessary to create a fixed charge security interest can vary depending on the type of asset being proffered as security. A distinction can of course be drawn between book debts and income-generating assets, such as a satellite. The security must be as robust over the proceeds of book debts as the book debts themselves given payment of the proceeds destroys the book debt: *Agnew* at [46]. In contrast, revenue generated by a satellite is independent of the satellite and so does not need to be secured in order to create fixed charge over the satellite itself: *Avanti* at [131]. But this distinction is about the scope of the security rather than the agreed level of control over the assets within its scope. It does not mean that something less than specific consent is required for assets once within the security arrangements.

Nonetheless, applying *Cimex*, Edwin Johnson J. disagreed with the prevailing academic view after *Agnew* and *Spectrum* that restrictions short of a total embargo on dealing would constitute a floating rather than a fixed charge. The judge considered that the statements relied upon by academics from those earlier cases were directed at book debts which are a necessarily fluctuating class of assets that required a higher level of control. At a higher level of generality, the "case law seems to me to support a more nuanced approach, which depends upon a combination of factors" (at [118]). It followed that the charge "was not necessarily a floating charge simply because the Company had some ability "under the terms of the Security Documents, to deal with the Relevant Assets or some of them. In order to determine whether the charge was fixed or floating, it is necessary to consider all the circumstances of the present case" (at [121]).

It is doubtful that *Agnew* and *Spectrum* can be read as restrictively as *Avanti* suggests. But whatever the proper interpretation of those earlier cases, a fundamental problem with the control test for distinguishing between fixed and floating charges is that it begs yet more questions.

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What level of control over the asset must be ceded by the chargor to the chargee before the charge becomes floating rather than fixed? How does the multi-factorial exercise envisaged by Edwin Johnson J. avoid becoming little more than a value judgement? Does the fixed charge now become one of those legal concepts that is impossible to describe but you know one when you see it? How does the "commercial unattractiveness" of a chargee complying with limitations on disposals constitute sufficient control by a chargor over assets?

Edwin Johnson J. himself did not answer those questions, saying that "I do not think that it is either sensible or appropriate for me to attempt my own description of the characteristics of a fixed charge and a floating charge. The case law provides ample guidance in this respect, upon which I cannot improve" (at [119]). Yet once the specific approval test developed in *Agnew* and *Spectrum* – albeit in the context of book debts – is put to one side, prior case law provides limited assistance. If *Avanti*'s treatment of *Agnew* and *Spectrum* becomes widely followed there is the unhappy prospect that the clarity and certainty achieved by those earlier decisions will be lost.

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