Neutral Citation Number: [2011] IEHC 113

THE HIGH COURT

2009 719/720/721 COS

IN THE MATTER OF J.D. BRIAN LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF J.D. BRIAN MOTORS LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF EAST COAST CAR PARTS LIMITED

(IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 TO 2009

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 25th day of March, 2011

1. In this application, brought pursuant to s. 280 of the Companies Act 1963 (as amended), the official liquidator of the companies named in the title ("the Companies") and other companies within the Belgard Group, seeks declarations and directions of the court arising out of the purported crystallisation of floating charges created by each of the Companies in favour of the Governor and Company of the Bank of Ireland ("the Bank"). The application raises important issues relating to the proper construction of s. 285(7) of the Companies Act 1963 (as amended) and the validity of so-called "automatic crystallisation" of a floating charge in this jurisdiction. Counsel for the applicant and notice parties made detailed submissions and referred me to a significant number of authorities from other common law jurisdictions and, in particular, England and Wales. Their research indicates that there is no written judgment in this jurisdiction on either issue. I am not aware of any such decision.

2. The background facts giving rise to the application are not in dispute. Whilst a number of the companies in liquidation granted similar debentures in favour of the Bank, I only propose referring to that given by J.D. Brian Motors Limited (in liquidation) ("the Company").

3. On 20th December, 2005, the Company executed a debenture ("the Debenture") in favour of the Bank as security for present and future borrowings. The debenture provided, *inter alia*:

> "4. The Company, as Beneficial Owner hereby charges in favour of the Bank all its undertaking, property and assets, whatsoever and wheresoever both present and future including goodwill and its uncalled capital for the time being with the payment of all moneys hereby secured including interest as aforesaid.
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> 5. The Charge hereby created shall as regards the lands described in the Schedule hereto (the "Scheduled Premises") and all estate or interest legal or equitable in all freehold and leasehold property, all profits a prendre, easements, rights of way, rights under covenants, agreements, undertakings and indemnities and rights to compensation, statutory or otherwise, attaching thereto which shall at any time hereafter during the continuance of this security become the property of the Company all present and future proceeds of insurance receivable by the Company, and its goodwill and uncalled capital for the time being be a specific charge and shall as regards the other property hereby charged be a floating security but so that the Company shall not be at liberty to create any mortgage or charge ranking in priority to or pari passu with these presents.
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> . . .
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> 10. The Bank, may, at any time, by notice in writing served on the Company, convert the floating charge contained in this Deed into a first fixed charge over all the property, assets and rights for the time being subject to the said floating charge or over so much of the same as is specified in the notice. A notice under this clause may be served by the Bank only if, in the sole judgment of the Bank, the Bank considers that the property, assets and rights described or referred to in the notice are in any way in jeopardy.
>
> 11. The floating charge contained in this Deed shall in any event stand converted into a fixed charge automatically upon:
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> (a) the filing of a petition for the winding up of the Company;
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> (b) the passing of a resolution for the winding up of the Company;
>
> (c) the appointment of a Receiver on behalf of the holders of any debentures of the Company secured by a floating charge;
>
> (d) possession being taken of any property by or on behalf of the holders of any debentures of the Company secured by a floating charge."

4. On 28th October, 2009, the Bank served a notice, pursuant to clause 10 of the debenture, on the Company, in which, having referred to the debenture, it stated, in the operative part:

> "We now give you ***NOTICE*** that we now consider the property, assets and rights which are subject to the floating charge contained in the Debenture are in jeopardy.

> We further give you ***NOTICE*** that, pursuant to clause 10 of the Debenture, we hereby convert the floating charge contained in the Debenture into a first fixed charge with respect to all property, assets and rights which are subject to such floating charge."

5. On 13th November, 2009, a petition was presented for the winding up of the Company and Mr. Tom Kavanagh was appointed provisional Liquidator. On 7th December, 2009, an order for the winding up of the Company was made and Mr. Kavanagh was appointed official Liquidator.

6. Similar notices were served by the Bank on the other companies within the group and petitions similarly presented and winding up orders made and Mr. Kavanagh appointed both provisional and official Liquidator thereof.

7. The total indebtedness of the Companies to the Bank at the date of commencement of the windings up was in the order of €16,250,000. The official Liquidator, in his grounding affidavit, anticipates realisations in the order of €12,500,000 to €14,500,000, of which approximately €2 million may relate to assets which are the subject of the floating charge provisions of the debentures ("Floating Charge Assets"). All of the assets of the Companies are charged in favour of the Bank and there are no unsecured assets available for distribution to the creditors of the Company. It is anticipated that there will be a shortfall in the monies due to the Bank.

8. The official Liquidator, on advice, contends that the floating charge created by the Company in the debenture of 20th December, 2005, was validly crystallised by the service of the notice of 28th October, 2009. Further, that by reason of the crystallisation of the floating charge prior to the date of commencement of the winding up, the Bank is entitled to all of the assets of the Company, and the preferential creditors have no entitlement to be paid in priority to the Bank out of any portion of the assets realised, pursuant to s. 285(7) of the Act of 1963. He seeks declarations and directions to that effect.

9. The application is on notice to the Revenue Commissioners. There are preferential debts due to the Revenue Commissioners by some or all of the Companies. The Revenue Commissioners submit that on a proper construction of s. 285(7), priority is given to its preferential claim over the claim of the Bank to the monies realised from the assets the subject matter of the floating charge in the Debenture, regardless of whether or not the floating charge crystallised prior to the commencement of the winding up. The Revenue Commissioners also submit that there has not been a valid crystallisation of the floating charges created in favour of the Bank so as to convert the charges into fixed charges.

10. By agreement of the official Liquidator and the Revenue Commissioners, the Governor and Company of the Bank of Ireland. was also represented at the hearing. Submissions were made on its behalf to the same effect as those of the official Liquidator. Insofar as I refer in this judgment to submissions made on behalf of the official Liquidator, I am also including submissions made on behalf of the Governor and Company of the Bank of Ireland.

Section 285 of the Companies Act 1963

11. Section 285, insofar as is relevant, provides that in a winding up, there shall be paid in priority to all other debts, certain rates, taxes and debts to employees due at the "relevant date". The relevant date is defined in ss.(1) as meaning:

> "(i) where the company is ordered to be wound up compulsorily, the date of the appointment (or first appointment) of a provisional liquidator or, if no such appointment was made, the date of the winding-up order, unless in either case the company had commenced to be wound up voluntarily before that date."

The relevant date for the purposes of s. 285 is, accordingly, not necessarily the same date as the date of commencement of the winding up in accordance with section 220. Section 220 provides:

> "(1) Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit to direct otherwise, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.
>
> (2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding up."

As appears, in most instances, the date of commencement of a winding up by the court is the date of presentation of the petition. The relevant date, in accordance with s. 285(1) for preferential debts may also be that date where a provisional liquidator is appointed on the same date as the petition is presented, but may also be one or more later dates, including a subsequent appointment of a provisional liquidator or, where no appointment was made, the date of the winding up order.

12. Section 285(7) provides:

> (7) The foregoing debts shall—
>
> > (a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and
> >
> > (b) so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge."

13. On the facts herein, there are no assets available for payment to the general creditors of the Company. There is a fund likely to be in the order of €2 million, realised from the assets which were the subject matter of the floating charge created by the Company in the debenture of December 2005. There are preferential debts. The construction issue on s. 285(7) is whether it should be construed as meaning that the preferential debts rank in priority to the claim of the Bank, as debenture holder, to the funds realised from the assets subject to the floating charge in the debenture, irrespective of whether that floating charge crystallised prior to the commencement of winding up, or whether such a priority only exists if the floating charge has not yet crystallised at the date of commencement of the winding up.

14. It is not in dispute that the court must construe s. 285(7) in accordance with the intention expressed by the Oireachtas by

construing the words used in their ordinary and natural sense (and any statutory definition). See, *inter alia*, *Howard v. Commissioners of Public Works* [1994] 1 I.R. 101, and *Crilly v. T&J Farrington Limited* [2001] 3 I.R. 251. Counsel for the Revenue Commissioners submitted that if the court considered there to be an ambiguity or, as she submitted, an absurdity on the literal interpretation contended for by the official Liquidator, then, in accordance with s. 5 of the Interpretation Act 2005, the court should give s. 285(7) a construction which reflects the plain intention of the Oireachtas, as ascertained from the Act of 1963 as a whole.

15. The only word or term in s. 285(7)(b) which is defined in s. 2 of the Act of 1963, is 'debenture', which is defined to include "debenture stock, bonds and any other securities of a company, whether constituting a charge on the assets of the company or not".

16. A floating charge is not defined for the purposes of the Companies Act. It appears probable that there is no one definition of a floating charge. Rather, judicial decisions have referred to the "normal characteristics" of a floating charge, as was done by Blayney J. *In Re Holidair* [1994] 1 I.R. 416, where at p. 445, he referred with approval to the well known passage from the judgment of Romer L.J. in the Court of Appeal in the case of *In Re Yorkshire Woolcombers' Association Limited* [1903] 2 Ch. 284, at p. 295:-

> "I certainly do not intend to attempt to give an exact definition of the term 'floating charge', nor am I prepared to say that there will not be a floating charge within the meaning of the Act which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge.
>
> (1) If it is a charge on a class of assets of the company present and future;
>
> (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and
>
> (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

17. Goode on '*Legal Problems and Security'*, 4th Ed. (Sweet and Maxwell, 2008), in considering the nature and characteristics of a floating charge, at p. 126, asserts that it "is now established that a floating charge creates an immediate, albeit, unattached security interest". The authors state that this idea is most clearly expressed by Buckley L.J. in *Evans v. Rival Granite Quarries Ltd*. [1910] 2 K.B. 979:

> "A floating charge is not a future security; it is a present security which presently affects all the assets of the company expressed to be included in it . . . A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some act or event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security."

In my judgment, it is of some importance to the construction of s. 285(7) that it was well established, prior to 1963, that a floating charge creates an immediate, albeit unattached security interest, as explained by Buckley L.J. in the passage cited above. In *In Re Interview Limited* [1975] I.R. 382, Kenny J., at p. 395, stated:

> "The charge floats over the assets of the company until some act is done which causes it to fasten on to the property and goods of the company."

18. The second relevant concept is that of crystallisation of a floating charge. Upon crystallisation, the charge ceases to float over the assets which are subject to it, and attaches to or becomes fixed on those assets. As is sometimes said, the floating charge upon crystallisation becomes a fixed charge. However, no new charge is created by the company. The existing charge, the floating charge created by the company, changes in nature and becomes a fixed charge. The nature of the security held by the debenture holder under the floating charge created by the company upon crystallisation changes; it ceases to float, and becomes a fixed charge over the charged property. In accordance with the general principles relating to fixed charges, upon the charge becoming fixed, there is an equitable assignment of the relevant assets to the debenture holder. Nevertheless, the right of the debenture holder to the charged assets derives from the floating charge created by the Company. It is the nature of the right which is changed by the crystallisation.

19. If there were no relevant judicial authority on the construction of s. 285(7) or a predecessor or similar section in the UK Companies Acts, I would have no hesitation in construing the section as giving priority to preferential debts over the claims of holders of debentures under floating charges which crystallise prior to the commencement of winding up. Further, I would construe the section as meaning that the preferential debts were entitled to be paid out of the realisation of assets subject to a floating charge in the Debenture, notwithstanding that such floating charge crystallised prior to the commencement of winding up. My reasons for so construing the section, in accordance with the ordinary and plain meaning of the words used, and the definition of debenture in s. 2 of the Act of 1963, are as follows.

20. The priority given to preferential debts by s. 285(7) is "over the claims of holders of debentures under any floating charge created by the company". How does the Bank claim an entitlement to the Floating Charge Assets herein? It appears to me the answer is self-evident. The only entitlement of the Bank to make a claim to such assets is as the holder of a debenture or security under the floating charge created by the Company. It has no other right to such assets. The only charge created by the Company over the assets is a floating charge. It is of the essence of a floating charge that it is a charge which will change in nature prior to realisation. It is a charge which 'floats' over the assets until the happening of an event which, in accordance with the terms of the debenture, and by law, causes it to attach to or become fixed on the relevant assets. Of course, the nature of the security, which the Bank holds, post-crystallisation, is a fixed charge. It is important to note that the section, by its words, gives priority "over the claims of holders <u>of debentures under any floating charge</u> created by the company", and not over the claims of holders <u>of any floating charge</u> created by the Company. Debentures, as already stated, is defined in s. 2 to include "any other securities of a company, whether constituting a charge on the assets of the company or not". It appears to me that the phrase "holders of debentures under any floating charge created by the company" is deliberately worded, having regard to the potentiality for a floating charge to crystallise and become a fixed charge so as to include persons who hold security of whatever nature, provided it is held under or by reason of a floating charge created by the company. It is the floating charge created by the Company which gives the Bank the right to make a claim to the assets. It is only the nature of the claim which changes post-crystallisation. The Bank's claim to the charged assets remains a claim as the holder of a debenture or security under the floating charge created by the company.

21. Similarly, in my judgment, the word 'charge' in the phrase "property comprised in or subject to that charge" refers to the floating

charge created by the company, notwithstanding that by reason of crystallisation, such floating charge may have become fixed on such property prior to the commencement of winding up.

22. A further subsidiary reason on the wording which, in my judgment, supports the above construction, is the absence in subsection 285(7) of any specification by the Oireachtas as to the date upon which the nature of the claims of "holders of debentures under any floating charge" is to be ascertained. If it was intended by the Oireachtas that this should be ascertained at the date of commencement of the winding up, as is suggested by certain judicial authorities from other jurisdictions, then it appears to me that such date would have been specified by the Oireachtas, given that in s. 285(1), they have clearly specified a date which is potentially a date other than the commencement of the winding up as the relevant date for the ascertainment of preferential claims. This is not a point which appears to have been adverted to in the decisions of other jurisdictions to which I was referred.

Relevant Authorities

23. There are relevant authorities from other jurisdictions upon which counsel for the official Liquidator has relied. He submits that they are persuasive authorities as to the proper construction of s. 285(7) and that I should follow them and give to the section the meaning for which he contends.

24. The principal decision is that of Bennett J. in the Chancery Division in England in *In re Griffin Hotel Company Limited* [1940] 1 Ch. 129. Insofar as relevant, that decision concerned the construction of sections 78 and 264 of the UK Companies Act 1929. Those sections replaced sections 107 and 209 of the Companies (Consolidation) Act 1908, as do sections 98 and 285 of the Companies Act 1963, in this jurisdiction.

25. The essential facts of the case were that a company owned two hotels, one at Leeds and the other at Buxton. In 1937, it issued a debenture creating a floating charge over all its assets to secure £45,000. In December 1938, an order was made in a debenture holder's action, appointing a receiver over all the company's property except the Buxton Hotel which was subject to a prior mortgage and of no value to the debenture holder. The company continued to operate the Buxton Hotel. In March 1939, an order was made for the winding up of the company. In the meantime, in operating the Buxton Hotel, the company incurred certain preferential debts within the meaning of s. 264 of the Companies Act 1929. One of the issues in the application was whether those preferential debts were payable in priority to the plaintiff (the debenture holder) out of the proceeds of sales of the assets over which the receiver was appointed in 1938. There were no other assets out of which the preferential debts could be discharged. The first issue related to the relationship between sections 78 and 264(4)(b) which is not of relevance. The second issue is the same construction issue arising in these proceedings, albeit in relation to s. 264(4)(b). This provided:

> "The foregoing [preferential] debts shall:
>
> > (a) rank equally among themselves and be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions; and
> >
> > (b) in the case of a company registered in England, so far as the assets of the company available for payment of general creditors are insufficient to meet them, have priority over the claims of holders of debentures under any floating charge created by the company, and be paid accordingly out of any property comprised in or subject to that charge."

26. Bennett J., having expressed his conclusion that s. 78 of the Act of 1929 did not exclude or prevent the operation of sub-section 4(b) of s. 264, then continued at p. 135:

> "But that conclusion on the construction and effect of the statutory provisions leaves open the question whether in the supposed events there is, when the winding up take place, any floating charge or any property subject to that charge. In my judgment, sub-s. 4(b) of s. 264 only operates if at the moment of the winding up there is still a floating charge created by the company and it only gives the preferential creditors a priority over the claims of the debenture holders in any property which at that moment of time is comprised in or subject to that charge.
>
> In the present case, the debenture held by the plaintiffs contained a floating charge over all the borrowers' property. On December 9, 1938, that charge ceased to float on the property and assets of which Mr. Veale was appointed receiver. The charge on that day crystallised and became fixed on that property and those assets. It remained a floating charge on any other assets of the borrowers. At the moment before the winding up order was made, the charge still floated over any other assets of the borrowers and over those other assets, if any, the preferential creditors as defined by sub-s. I of s. 264 have a priority over the claims of the plaintiffs by force of the provisions of sub-s.4 of the same section. This seems to be a corollary of the proposition established by In re Lewis Merthyr Consolidated Collieries, Ld. (I) [1929] 1 Ch. 498."

27. The wording of sub-section 264(4)(b) is identical in all material respects to s. 285(7)(b). Respectfully, it appears to me that Bennett J. reached a conclusion on the wording without any consideration of the phrase "the claims of holders of debentures under any floating charge created by the company". He does not explain why he considered that the section only operated "if, at the moment of the winding up, there is still a floating charge created by the company" save the statement "this seems to be a corollary of the proposition established *In re Lewis Merthyr Consolidated Collieries Limited*".

28. I have read carefully the judgments in the Court of Appeal and in the Chancery Division *In Re Lewis Merthyr Consolidated Collieries Limited*, and I have some difficulty in understanding the above view taken by Bennett J. Those decisions concerned the proper construction of s. 107 of the Companies Consolidation Act 1908 (equivalent to s. 98 of the 1963 Act). The facts were that a receiver was appointed under a debenture which created both a first fixed charge over certain property and a floating charge over other property. Section 107 applied when a receiver "is appointed on behalf of the holders of any debentures of the company secured by a floating charge . . ." and then provides that if the company is not at the time being wound up, that preferential debts in a winding up are to be "paid forthwith out of any assets coming into the hands of the receiver". The construction issue identified by Tomlin J. at p. 504, was whether:

> ". . . the priority given to this particular category of debts is a priority in respect of the assets subject to the floating charge only, or whether, where the debenture also contains a fixed charge, the creditors are entitled to claim priority in respect of assets subject to either a fixed charge or a floating charge . . ."

Tomlin J. initially examined s. 107 without regard to s. 209 of the Act of 1908, to which he had also been referred, and, having done so, stated his conclusion at p. 507:

> ". . . upon the language of this section, read in vacuo, that on its true construction, the priority given is a priority given in respect of assets derived from the subject of the floating charge, and not in respect of assets which are subject to the fixed charge."

It must be recalled that this conclusion is expressed in a factual context where the fixed charge and the floating charge were each created by the same debenture and no issue arose about the prior crystallisation of the floating charge.

29. Tomlin J., following that conclusion, then looked at s. 209 for the purpose, as he put it, of deriving comfort. He concluded that he did derive comfort and, having quoted s. 209, stated, at p. 507:

> "So that it is plain in terms in s. 209, that in the case of winding up, the priority is only given in relation to assets which are subject to the floating charge. In the view I take the same result follows in the case of a debenture holders' action where there is no winding up. Mr. Grant says there are reasons why it should be otherwise. I am not sure that I am satisfied that any such reasons exist at all. I quite understand that in regard to a floating charge there may be a reason for giving the priority, because until the receiver is appointed or possession is taken, the charge does not crystallise, and it may well be said that this particular class of debts, which may perhaps have contributed to produce the very assets upon which the floating charge will crystallise, are proper to be paid out of those assets before the debenture holder takes his principal and interest out of them. That deems to me to be a perfectly intelligible reason for the legislation, and is in accord with the view which I take of the section."

Again, it must be recalled, Tomlin J. was considering the issue in a context where the claim being made was that the preferential debts were to be paid out of assets coming into the hands of the receiver under a first fixed charge created by the same debenture as created the floating charge.

30. In the Court of Appeal, three judgments were given and Tomlin J. upheld. Lord Hanworth M.R. preferred to decide the matter by the interpretation of s. 107 in accordance with its terms and without its being affected by the terms of section 209. Whilst Lawrence L.J. made fleeting reference to s. 209, he does not rely on it. Russell. L.J. simply agreed and indicated he did not desire to add anything to the judgment of Tomlin J.

31. Respectfully, it does not appear to me, on my reading of the judgments in *In Re Lewis Merthyr Consolidated Collieries Limited,* that the decision therein on the construction of s. 107 is such that the conclusion of Bennett J. in *In Re Griffin Hotel Company Limited* may be considered a corollary. The corollary would be whether s. 209 of the 1908 Act, or s. 284, sub-section (4) of the 1929 Act, granted priority over the claim of a debenture holder to assets the subject of a fixed charge created by a debenture, simply because the company also created a floating charge in the same debenture over different property.

32. In *In Re Griffin Hotel Company Limited* was subsequently referred to and relied upon by Vinelott J. in *In Re Christonette International Limited* 1 W.L.R. 1245. That case related to the proper construction of sections 94(1) and 319(5) of the Companies Act 1948 (equivalent to sections 98 and 285(8) of the Companies Act 1963). The earlier decision appears to have been relied upon without question and without argument against it by Vinelott J. In the UK, the Insolvency Act 1985 implemented a recommendation of the 1982 Cork Report referred to below, and defined a "floating charge" as "a charge which, as created, was a floating charge". This has the effect of altering the construction placed upon the equivalent of s. 285(7) in *In Re Griffin Hotel Company Limited*.

33. Hoffmann J. in the High Court in *In Re Brightlife Limited* [1987] Ch. 200, referred to the decision in *In Re Griffin Hotel Company Limited* in the course of considering the validity of a so-called automatic crystallisation of a floating charge. His observations are relevant. In that case, the facts were that the alleged crystallisation of the floating charge occurred on 13th December, 1984, and a resolution to wind up was passed on 20th December, 1984. Hoffmann J. stated at p. 211:

> "The importance of the dates lies in the construction given to what is now section 614(2)(b) of the Companies Act 1985 by Bennett J. in *In re Griffin Hotel Co. Ltd*. [1941] Ch. 129. He decided in that case that the priority given by the statute to preferential debts applied only if there was a charge still floating at the moment of the winding up and gave the preferential creditors priority in property which at that moment was comprised in the floating charge.
>
> It follows that if the debenture-holder can manage to crystallise his floating charge before the moment of winding up, section 614(2)(b) gives the preferential creditors no priority. On the other hand, in the usual case of crystallisation before winding up, namely by appointment of a receiver, they may still be entitled to priority under another section of the Companies Act 1985. This is section 196, which applies:
>
> > 'whether either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture-holders of any property comprised in or subject to the charge'.
>
> In such a case, subsection (2) provides:
>
> > 'If the company is not at the time in course of being wound up, the . . . [preferential debts] . . . shall be paid out of assets coming to the hands of the receiver or other person taking possession, in priority to any claims for principal or interest in respect of the debentures'.
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> Both section 614(2)(b) and section 196 originate in the Preferential Payments in Bankruptcy Amendment Act 1897. One imagines that they were intended to ensure that in all cases preferential debts had priority over the holder of a charge originally created as a floating charge. It would be difficult to think of any reason for making distinctions according to the moment at which the charge crystallised or the event which brought this about. But in *In re Griffin Hotel Co. Ltd*. [1941] Ch. 129 revealed a defect in the drafting. It meant, for example, that if the floating charge crystallised before winding up, but otherwise than by the appointment of a receiver, the preferential debts would have no priority under either section. For example, if crystallisation occurred simply because the company ceased to carry on business before it was wound up, as in *In re Woodroffes (Musical Instruments) Ltd*. [1986] Ch. 366, the preferential debts would have no priority. One could construct other examples of cases which would slip through the net. Mr. Sheldon submits that this is such a case."

Counsel in that case conceded, for the purpose of the hearing in the High Court before Hoffmann J., that preferential debts would have no priority in respect of assets over which the floating charge had crystallised before the resolution for winding up, but reserved the point for a higher court. There does not appear to have been an appeal.

34. I respectfully agree with the observations of Hoffmann J. as to the intent of the legislation, but would question whether or not there was a defect in the drafting. This may have been politeness on the part of Hoffmann J. as the correctness of the earlier decision was not put in issue before him and considering the views expressed in the next case to which I refer.

35. In *Re Permanent Houses (Holdings) Limited* [1988] B.C.L.C. 563, Hoffmann J., in the Chancery Division, made clear his personal disagreement with the decision in *In Re. Griffin Hotel Company Limited,* but considered himself bound by it and that he would be failing in his duty to uphold the integrity of the law if he did not apply its reasoning to s. 196 of the Companies Act 1985 (the equivalent of s. 98 of the Act of 1963). Hoffmann J. expressed a personal preference for what he described as "the powerful reasoning of Barwick C.J." in his dissenting judgment in the High Court of Australia in *Stein v. Saywell* [1969] 121 C.L.R. 529. In that decision, the majority of the High Court followed in *In Re Griffin Hotel Company Limited* and applied it to the Australian equivalent of section 285(7). I respectfully agree with Hoffmann J. My preference is for the reasoning and conclusion of Barwick C.J. in his dissenting judgment. Of the four judgments given in the majority, two simply apply the decision in *In Griffin Hotel Company Limited* (joint judgment McTiernan and Menzes); that of Owen J. both applied in *In Re Griffin Hotel Company Limited* and expressed the view that it would be improbable that the draughtsmen of s. 292(4) of the New South Wales Act would have been unaware of the decision which had stood for many years and had been cited in a number of books dealing with company law. Kitto J. similarly took the view that since *In Re Griffin Hotel Company Limited* there had been amending and consolidating company legislation in New South Wales, and as no opportunity to displace the decision had been taken, some strong reason would need to be found to justify placing a different construction upon it now, and expressed the view that the decision appeared to be correct. His essential reasoning was that s. 292(4) must be applied as at the date of the winding up order so that a charge, to be affected by the grant of priority to the preferential debts there referred to, must be, at that date, within the description of "floating charge".

36. The facts upon which the appeal to the High Court was based required consideration of ss. 196 and 292(4) of the Companies Act 1961 (N.S.W.) (equivalent to ss. 98 and 285(7) of the 1963 Act). Barwick C.J., at p. 543, stated:

> "This Court is not bound by the decision in that case [*In Re Griffin Hotel Company Limited*]. In my opinion, the proposition that s. 292(4) does not defer the claim of the debenture holder if in any case before the making of the winding-up order, or the commencement of the liquidation, the charge over the assets of the company has crystallised is, in my opinion, insupportable. I can derive neither assistance nor find compulsion from or in the circumstances that subsequent to that decision a legislature has enacted ss. 196 and 292(4). It is quite clear to my mind that the legislature in enacting these sections did not intend that the priority which it accorded to such debts as those due to employees for wages or accrued leave should be defeated by the circumstance that the floating charge had become crystallized before the time had arrived for determining and giving effect to that priority. The policy behind s. 196 and s. 292(4) is, I think, quite plain. A creditor who accepts a floating charge over a company's assets allows the business of the company to be carried on and the assets of the company which are subject to the floating charge to be altered, perhaps augmented, by the efforts of the company and its employees. The holder of the floating charge is not to be able to displace the priorities which the legislation accords certain debts which accrue during the carrying on of the business; amongst those priorities is certain remuneration of employees of the company. The method of ensuring that the holder of such a charge does not compete with those creditors to whose debts priority of payment is given is best seen, I think, in s. 196. Under that section, in the period prior to the actual commencement of the liquidation of a company, a receiver for the debenture holder, with funds in hand which are the produce of the realization of the charge created initially as a floating charge is bound to pay out of those funds the debts of the preferred creditors. Of course, there will be occasions when the appointment of the receiver is the event which crystallizes the floating charge. Quite clearly the fact that the charge then becomes specific is irrelevant to the operation of the section. But in general the appointment of a receiver follows upon the falling due of the sum charged and the consequential crystallization of the floating charge. This was so in the present case. The description in the section "on behalf of the holders of any debentures secured by a floating charge" ought to be read as wide enough to include the charges whose rights derive from a floating charge which had become specific. It would be, in my opinion, far too narrow and an unduly literal construction to confine that description to those chargees only so long as the charge remained floating. Indeed, it would in a practical sense denude the section of much, if not the greater part, of its utility. I can find no reason, connected with the evident policy the section is designed to effect, which would support such a construction. Further, the alternative in the section, namely, the taking of possession of any property comprised in or subject to a floating charge, in my opinion, tends against such an interpretation of the section. Possession could only be taken if the amount charged had become due in which event in general the charge becomes specific. I would think it would in every case be specific before the actual taking of possession of a particular asset.
>
> In my opinion, s. 292(4) must be construed in the same sense. It seems to me that the expression 'the claims of the holders of debentures' has been chosen to describe the right of the chargee whose charge originated as a floating charge to be paid out of any of the assets or the proceeds of any assets or the proceeds of any assets which in the event come within the charge by reason of the terms of the charge initially created by the company. The two sections are complementary."

37. Subsequent to that decision, there was legislative amendment in 1971 in Australia. 'Floating charge' was defined for the purposes of the relevant sections as including a charge which was 'a floating charge at the date of its creation which has since become a fixed or specific charge'.

38. It is interesting to note that the 1982 Cork Report on Insolvency Law and Practice in the United Kingdom in the context of considering automatic crystallisation stated, at paragraph 1578:

> "Automatic crystallisation, however, is not merely inconvenient. In Australia, where it has become firmly established, it has disclosed an unfortunate loophole in the statutory provisions which give priority to preferential creditors. This has been partially corrected by amending legislation, which defines the expression 'floating charge' for the purposes of the statutory provisions corresponding to section 94 of the Act of 1948 as including a charge which was 'a floating charge at the date of its creation which has since become a fixed or specific charge'. This is probably the test in England [emphasis added] but it would be prudent to add a definition to both sections 94 and 319(5) of the Act of 1948 on the lines of the Australian legislation."

The reference to "unfortunate loophole" appears to be an allusion to the decision in *Stein v. Saywell*. However, what is of particular interest to the present consideration is the observation that the subsequent Australian legislative definition "is probably the test in

England". It appears that the distinguished Cork Review Committee was unaware of the decision in *In Re Griffin Hotel Company Limited* to the contrary effect. Nevertheless, the recommendation that it would be prudent to add a similar definition in England was followed in the Insolvency Act 1986. This now defines a floating charge for the purposes of the relevant sections as meaning "a charge which, as created, was a floating charge".

39. I have concluded that I should not construe s. 285(7) in accordance with the decision in *In Re Griffin Hotel Company Limited*. It is not binding on me. The primary obligation of this court is to construe the intention of the Oireachtas from the words used in the section. The fact that the section at issue in *In Re Griffin Hotel Company Limited* and s. 295(7) both have their legislative origin in similar provisions and most recently s. 209 of the Companies (Consolidation) Act 1908, means that this court should give it careful consideration, which I have done. Nevertheless, I have concluded that I must respectfully decline to follow the decision. In my judgment, s. 287(5) cannot be construed in accordance with the plain meaning of the words used so as to give it the meaning given in *In Re Griffin Hotel Company Limited*. I do not consider the reasoning of the decision persuasive. Insofar as it was followed in England in the decisions to which I have been referred, it appears to have been done so either by reason of precedent or without opposing submission. Hoffman J. was critical of it. Insofar as the High Court of Australia followed the decision for the reasons already explained, I do not find the majority judgments persuasive and prefer the reasoning of the dissenting judgment of Barwick C.J.

40. I have further concluded that even having regard to the English and Australian decisions, s. 285(7) of the Act of 1963 is not ambiguous in the meaning of s. 5 of the Interpretation Act of 2005, and thus, it is not necessary to consider further a construction in accordance with the provisions of that Act.

41. Accordingly, in my judgment the proper meaning of s. 285(7) is that the preferential debts rank in priority to the claim of the Bank, as debenture holder, to the funds realised from the assets subject to the floating charge pursuant to clause 5 of the Debenture, irrespective of whether the floating charge crystallised prior to the commencement of winding up.

Automatic Crystallisation

42. Having regard to this conclusion, it is not strictly necessary for me to consider the second issue as to the validity of so-called "automatic crystallisation" of the floating charge in this jurisdiction. However having received detailed submissions and considered the matter in some depth, it appears to me desirable that I should set out, in brief, my conclusions. This is particularly so as there is a further matter which may need to be addressed if this were to become a determinative issue.

43. Terminology is important to this issue. Gough, in '*Company Charges'*, 2nd Ed. (Butterworths,1996) at p. 232, criticises judicial treatment of the expression 'automatic crystallisation' as not being consistent. He states:

> "Sometimes, the court has used the expression clearly referring to an event specifically agreed in the charge contract as causing crystallisation. In other instances, the expression has been used to describe implicit crystallisation events of the traditional kind developed in the older case law."

Gough identifies such implicit crystallisation events of the traditional kind from the prior case law as being:

> (i) A business cessation event, including winding up and ceasing business operations as a going concern prior to winding up; and
>
> (ii) a chargee intervention event, including appointment of a receiver or manager, taking possession as mortgagee, and obtaining an injunction against company dealings with the charged assets generally.

44. At issue in this application is an explicitly agreed crystallisation event which requires intervention by the chargee, *i.e*. the service by the Bank of a notice, pursuant to clause 10 of the Debenture. It appears preferable to refer to such crystallisation as "express crystallisation". It is not truly automatic, in the sense that it does require chargee action or intervention *i.e.* the service of a notice. It does, however, come within the type of crystallisation which, in some of the judicial decisions, has been referred to as 'automatic' and is not a traditional implicit crystallisation event.

45. There is no decision on the validity of a crystallisation effected by such a notice in this jurisdiction. I have been referred to a number of English, New Zealand and Canadian decisions and leading academic texts. The Supreme Court decisions in *In re Keenan Brothers* [1985] IR 401 and *In Re Wogan's (Drogheda)* [1993] 1 IR 157 are also relevant. These lead me to an initial conclusion that there are two separate issues which need to be addressed. They are:

> (i) Whether, as a matter of principle, Irish law recognises that a chargee may, pursuant to an express contractual term, validly effect crystallisation by or on the occurrence of an expressly specified non-traditional event, and thereby cause the floating charge to become fixed on all or specified assets of the company; and
>
> (ii) If, as a matter of principle, crystallisation may be so effected, whether, on the facts herein, the service by the Bank of the notice of 28th October, 2009, was effective to crystallise the floating charge created by the Debenture such that it then became a fixed charge on all the property assets and rights then subject to the floating charge in the Debenture.

46. On the first issue there are essentially two schools of thought see: Sealy *'Company Law'*, 7th Ed. (Oxford University Press, 2007) at 422. One is based on the fact that a floating charge is not a legally defined phenomenon but rather has certain characteristics and the freedom of the parties to the contract to agree specific terms. The other looks at the effect of such an arrangement on third parties and contends that it must be against public policy to have a charge crystallised in circumstances which may be unknown to other creditors.

47. Keane C.J., writing extra-judicially in his '*Company Law'*, 4th Ed. (Tottel, 2007), at p. 251, states:

> "The proposition that there can be an automatic crystallisation on the default of the company if the debenture is in sufficiently explicit terms to permit of such a construction rests on some *dicta* in earlier English cases and an express decision to that effect in New Zealand [*Re Manurowi Transport Ltd*. [1971] NZLR 909]. It is thought, however, that this line of authority is unlikely to be followed in Ireland. The courts here will probably incline to the view that such automatic crystallisation would present problems for other creditors who would have no actual notice of the terms of the debenture and that any such doctrine would need to be the subject of considered legislation and regulation.

. . .

> It has been held by the Supreme Court in *Re Holidair Ltd*. that a floating charge which has crystallised will decrystallise on the appointment of an examiner to the company, so that it ceases to be a fixed charge and reverts to being a floating charge. The validity of the concept of 'decrystallisation', which emerged for the first time in Ireland in this judgment, has been questioned, but the law appears to have been left unchanged by the 1999 Act."

48. As pointed out by Keane C.J. in a footnote to the above passage, Courtney in '*The Law of Private Companies*' (2nd Ed.) (Tottel Publishing, 2002), pp. 1212/3, takes an opposing point of view. He does so, mainly in reliance upon the decisions of Hoffmann J. in *Re Brightlife Ltd.* [1987] Ch. 200 and in *Re Permanent Houses (Holdings) Ltd*. [1988] B.C.L.C. 563.

49. The facts in *In Re Brightlife Ltd*. were somewhat similar to the facts in the present application insofar as the crystallisation event contended for was the service by the debenture holder, Norandex Inc., of a notice pursuant to an express clause 3(B) of the debenture. Clause 3(B) provided:

> "Norandex may at any time by notice to Brightlife convert the floating charge into a specific charge as regards any assets specified in the notice which Norandex shall consider to be in danger of being seized or sold under any form of distress or execution levied or threatened or to be otherwise in jeopardy and may appoint a receiver thereof."

The relevant facts were that on 4th December, 1984, Brightlife sent out notices of a creditors meeting to be held on 20th December, 1984, for the purposes of considering a resolution to wind up the company. Norandex sent Brightlife four separate notices dated 10th December, 1984. The first was a demand for payment. The second was a notice pursuant to clause 3(B):

> "Of the conversion with immediate effect of the floating charge created [by the debenture] into a specific charge over all the assets of Brightlife Ltd. the subject of the said floating charge."

The third was a demand pursuant to clause 13 of the debenture for the execution forthwith of "a legal assignment of all book and other debts currently due to Brightlife Ltd. specifying full details of the said debts therein". The fourth is not relevant to the issues.

50. The dispute before Hoffmann J. concerned the competing claims of the Customs and Excise Commissioners for VAT as a preferential creditor, and Norandex as debenture holder, to approximately £40,000, which comprised realisation of book debts, credit at the bank and sale of stock.

51. The first issue related to whether the debenture had created a fixed charge over the book debts. This is not relevant to the present issues, save that it is of interest to note that Hoffmann J. was referred to the decision of the Supreme Court in *In Re Keenan Brothers Ltd.* and distinguished it only on the facts, having regard to the terms of the respective debentures. I only refer to this as it appears to me to confirm my understanding that the law relating to floating charges (and fixed charges) by the Supreme Court in *In Re Keenan Brothers* in reliance, in particular, on older decisions, is fundamentally the same law as that considered by Hoffmann J. in his consideration of the validity of the crystallisation effected by notice given by the debenture holder in *In Re Brightlife Limited.*

52. The objection to the validity, in principle, of the crystallisation effected in *In Re Brightlife* was fundamental. The primary submission was that events of crystallisation were fixed by law and not by agreement of the parties. Those events were confined to (i) winding up; (ii) appointment of a receiver and (iii) ceasing to carry on business. It was submitted that only those three events would cause crystallisation, notwithstanding any agreement to the contrary. The common features of the events were that, in each case, the business of the company would cease, or at any rate, cease to be conducted by the directors.

53. Hoffmann J. gave detailed consideration to what he identifies as five distinct submissions in support of the above contention and rejected all five.

54. I respectfully agree with the analysis by Hoffmann J. of the earlier caselaw and his conclusion at p. 213,:

> "It is true that the commercial inconvenience of automatic crystallisation give rise to a strong presumption that it was not intended by the parties. Very clear language will be required. But that does not mean that it is excluded by a rule of law."

55. As I have already indicated above, it appears probable that there is no one definition of a floating charge. Rather, the earlier judicial decisions have referred to characteristics or offered a description of a floating charge. In addition to the authorities already referred to, these include the well-known speech of Lord MacNaghten in *Illingsworth v. Houldsworth* [1904] A.C. 355 at 358, referred to with approval, *inter alia*, by McCarthy J. in *In Re Keenan Brothers Limited*.

56. On the public policy argument, the position, simply put, is that it is a matter for the Oireachtas and not the courts to intervene in order to avoid an unfair adverse impact on third party creditors from contractual arrangements which may be entered into between a debenture holder and a company. The Oireachtas has, of course, done so by enacting s. 98 (in relation to receivers), s. 99 (in relation to registration of certain charges) and s. 285(7) (in relation to priority for certain debts on a winding up) referred to extensively above. I, again, respectfully agree with Hoffmann J. that, having regard in particular to those interventions by the legislature, it is inappropriate for the courts to impose additional restrictive rules on grounds of public policy. Accordingly, on the first issue, for the very same reason set out by Hoffmann J., I am of the view that there is no rule of law which precludes parties to a debenture creating a floating charge agreeing, as a matter of contract, that the floating charge will crystallise upon the happening of an event or a particular step taken by the chargee. Whether the parties actually achieve their intention is a separate issue by reason *inter alia* of the Supreme Court decision in *In re Keenan Brothers* [1985] I.R. 401.

57. In *In Re Keenan Brothers*, the issue was whether or not the charge created by the debenture over book debts was a fixed charge or a floating charge. In the debenture, the charge was expressed to be a "fixed charge". McCarthy J. who gave judgment with which a majority of the court agreed, states, at p. 421:

> "It is not suggested that mere terminology itself, such as using the expression "fixed charge", achieves the purpose; one must look, not within the narrow confines of such term, not to the declared intention of the parties alone, but to the effect of the instruments whereby they purported to carry out that intention; did they achieve what they intended or was the intention defeated by the ancillary requirements?"

58. Each of the judgments in the Supreme Court in *In Re Keenan Brothers*, notwithstanding the express terms of the debentures, considered whether or not the charges created, having regard to the other terms in the debentures, were, in reality, fixed or floating

charges. There were two debentures at issue in the proceedings. Henchy J., at p. 419, epitomises what appears to be the proper approach of a court in determining whether or not a debenture, by its terms, creates a fixed or floating charge. In relation to the second debenture, he concluded:

> "As to the debenture deed of the 5th May, 1983, the company professed to charge in favour of the Bank (A.I.I.B. Ltd.) its present and future debts as a first fixed legal charge. The extent to which this was to be in reality a fixed, rather than a floating charge, is shown by the following provisions in the deed:—
>
> 1. all moneys which were received by the company in respect of book debts were to be paid into a specified A.I.B. branch and no withdrawals or payments from that account were to be made without the prior consent of the Bank;
>
> 2. the company was not, without the consent of the Bank, to carry on its business otherwise than in the ordinary and normal course;
>
> 3. the company was not, without the consent in writing of the Bank, to diminish or dispose of its book debts otherwise than by collecting and lodging them in the specified account.
>
> It seems to me that such a degree of sequestration of the book debts when collected made those monies incapable of being used in the ordinary course of business and meant that they were put, specifically and expressly, at the disposal of the Bank. I am satisfied that assets thus withdrawn from ordinary trade use, put in the keeping of the debenture holder, and sterilised and made undisposable save at the absolute discretion of the debenture holder, have the distinguishing features of a fixed charge. The charge was not intended to fasten in the future on the book debts; it was affixed forthwith and without further ado to those debts as they were collected; so it did not in any sense float over those moneys. As I understand the law, assets the subject matter of a floating charge may be disposed of, at least in the ordinary course of business, by the maker of the charge without the consent of the chargee. That was not the case here. I would allow this appeal and declare that the charge created by each of the two instruments of charge was a fixed charge."

59. The Supreme Court in *In Re Wogan's (Drogheda) Ltd*. [1993] 1 I.R. 157 followed *In Re Keenan Brothers* and made clear that where a court is required to determine whether or not a debenture creates a fixed or floating charge, that it must be done by construction of the debentures concerned and that the subsequent conduct of the parties is not a relevant evidential factor. See Finlay C.J. at p. 169. In that decision, the Supreme Court again construed the relevant debenture and concluded that, having regard to several terms of the debentures, the parties did, in reality, create a fixed charge over the book debts.

60. It appears to me, similarly, where a debenture expressly provides that a chargee may, by service of a notice, effect a crystallisation of a floating charge over all the assets or specified assets, the mere fact that the debenture so provides does not of itself mean that the service of the notice, has the intended effect *i.e.* that the floating charge crystallises. In the words of McCarthy J "mere terminology" used by the parties is not determinative of achieving the stated purpose but rather "one must look, not within the narrow confines of such term, not to the declared intention of the parties alone, but to the effect of the instruments whereby they purported to carry out that intention; did they achieve what they intended or was the intention defeated by the ancillary requirements".

61. The issue is not, of course, whether the charge created by the debenture was a fixed or floating charge but, rather, whether the service of the notice provided for in Clause 10 of the Debenture does, in reality, what it purports to do, namely, "convert the floating charge contained in this deed into a first fixed charge over all the property, assets and rights for the time being, subject to the said floating charge". Similar to the approach of the Supreme Court in the above decisions, this Court must determine whether or not the effect of the service of the notice, pursuant to Clause 10, achieved what the parties intended it to achieve, namely, the conversion of the then floating charge into a first fixed charge over all the relevant property *i.e.* over all of the property specified in the notice. Further, in accordance with the decision in *In Re Wogan's (Drogheda) Ltd*., it appears that this issue must be determined by a construction of the terms of the Debenture and the notice served, rather than any subsequent actions by either party.

62. In accordance with Clause 5 of the Debenture, the property subject to the floating charge in October 2009 appears to have been all the property of the Companies other than land and related rights, proceeds from insurance, goodwill and uncalled capital. Certain of the Companies were trading companies in the motor business. The assets, therefore, included, inevitably, stock in trade, book debts and possibly monies deposited at the Bank.

63. If the service of the notice, pursuant to Clause 10, in reality had the effect of converting the floating charge over the book debts and stock in trade of the Companies into a first fixed charge on such assets, then it must also have effected an equitable assignment of such assets to the Bank. As a consequence, the Companies would have lost the ability to deal in or dispose of those assets, save to the extent permitted by the Bank. The Court appears obliged, in accordance with the judgments in *In Re Keenan Brothers*, to determine whether, in reality, such was the effect of the service of the notice, pursuant to Clause 10 having regard to the other provisions of the Debenture and the notice served.

64. It is not clear to me from the terms of the Debenture itself whether the Debenture provides that, on the service of a notice pursuant to Clause 10, any restrictions come into force on the Company's ability to deal with assets which were formerly subject to the floating charge but which are now intended to be subject to a fixed charge. The notice served did not contain any such requirement.

65. As I have already indicated, this issue does not have to be resolved in the present application by reason of my conclusion on the construction of s 285(7) of the Companies Act 1963. If it did in the future become necessary to resolve, it would have to be further argued and in particular the Bank given an opportunity of making submissions on the issue . It was not an issue expressly addressed at the hearing before me. It would probably be necessary to consider further the nature of the assets subject to the floating charge created by each of the Companies.

Relief

As I have considered the facts in relation to J.D. Brian Motors Limited (in liquidation) I propose in the first instance making the following declaration in relation to that winding up;

That pursuant to s. 285(7) of the Companies Act 1963 as amended the preferential debts rank in priority to the claim of the Governor and Company of the Bank of Ireland to the funds realised from the assets subject to the floating charge pursuant to clause 5 of the debenture dated 20th December 2005 irrespective of whether or not the floating charge crystallised prior to the commencement of winding up.

I will hear the parties as to necessity for and form of any further declarations or directions in relation to the conduct of the liquidations to give effect to the terms of this judgment.