THE SUPREME COURT

[Appeal No. 2011/361]

Clarke J.
Laffoy J.
Charleton J.

IN THE MATTER OF J.D. BRIAN LIMITED
(IN LIQUIDATION)
T/A EAST COAST PRINT AND PUBLICITY

AND

IN THE MATTER OF J.D. BRIAN MOTORS LIMITED
(IN LIQUIDATION) T/A BELGARD MOTORS

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 Laffoy delivered on the 9th day of July, 2015

Factual and procedural background

1. The three companies mentioned in the title hereof, which were part of the Belgard Motors Group of companies, are being wound up by the Court. In the case of each of the companies the winding up order was made by the High Court on 7th December, 2009 on foot of a petition presented by the company on 13th November, 2009. The liquidator appointed by the Court in respect of each company in liquidation is Tom Kavanagh (the Liquidator). In the course of the liquidation in 2010 the liquidator applied to the High

Court pursuant to s. 280 of the Companies Act 1963 (the Act of 1963) seeking directions against the following background.

2. On 20th December, 2005 each of the companies entered into a debenture with the Governor and Company of the Bank of Ireland (the Bank). The three debentures were in similar terms. Each of the companies will henceforth be referred to as "the Company" and the related debenture will be referred to as "the Debenture" and together they will be referred to as "the Companies" and "the Debentures".

3. The charging provisions in the Debenture are Clauses 4, 5 and 6. Clause 4 provides as follows:

> "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 monies hereby secured including interest as aforesaid."

Clause 5 then elaborates on the nature of the charge and provides as follows:

> "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 . . . 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."

Clause 6 creates a mortgage by demise in favour of the Bank of the Scheduled Premises.

4. The Debenture also contains provisions of the type one would expect to find in such a security document, for example, covenants dealing with the obligations of the

Company for repayment of the monies due by the Company to the Bank and interest thereon (Clauses 1, 2 and 3). Clause 8 contains covenants by the Company to do or refrain from doing certain actions "at all times during the continuance of this security". For example, in paragraph (a) the Company covenants to "carry on and conduct its business in a proper and efficient manner". In paragraph (d) it covenants to notify the Bank forthwith of its intention or any intention on the part of any person of which it should become aware to present a petition to appoint an examiner or a liquidator or similar officer to the Company. In paragraph (k) the Company covenants in the following terms:

> "not without the prior consent in writing of the Bank [to] sell, assign or otherwise dispose of any property hereby charged as a specific charge or any of its book debts and other receivables in favour of any person."

5. Clause 10 is the provision of the Debenture which is at the core of the legal issues which arose on the Liquidator's application and which arise on this appeal. It provides:

> "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 judgement 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."

Clause 11 also deals with the conversion of the floating charge into a fixed charge and provides as follows:

> "The floating charge contained in this Deed shall in any event stand converted into a fixed charge automatically upon:
>
> (a) the filing of a petition for the winding up of the Company;
>
> (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."

Clause 12 deals with the circumstances in which it would be lawful for the Bank to appoint a Receiver and Manager, the circumstances being outlined in paras. (a) to (k) inclusive in Clause 12, the last two circumstances being the following:

"(j) if any of the events set out in Clauses 10 and 11 occurs;

(k) if any circumstance shall occur which in the sole judgment of the Bank is prejudicial to or imperils or is likely to prejudice or imperil the security hereby created;".

6. In the case of each Debenture Clause 10 was invoked by the Bank by a notice dated 28th October, 2009 (the Crystallisation Notice), which was addressed to the Company and which was headed "Notice of conversion of floating charge". Having referred to the Debenture, which was described as having "created fixed and floating security in our favour over all your undertaking, property and assets, whatsoever and wheresoever both present and future as security for your present and future liabilities to us", it then provided:

"We now give you NOTICE that we now consider that 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."

7. On 23rd June, 2010 the Liquidator initiated the application to the High Court pursuant to the provisions of s. 280 of the Act of 1963 for an order providing the Liquidator with directions, *inter alia*, in the following terms:

(a) confirming that the floating charge granted by each Company and held by the Bank had been validly crystallised; and

(b) confirming that as a result of the crystallisation of the floating charges all assets of each Company fall outside of the liquidation and accordingly, no distribution or dividend will be available or payable to any other creditor of the Company.

8. It was clear from the grounding affidavit sworn by the Liquidator on 23rd June, 2010 that the nub of the Liquidator's application for directions related to the application of s. 285 of the Act of 1963 to the circumstances and, in particular, that the Liquidator's position was that the debts due by the Company which had preferential status by virtue of subs. (1) to (7) of s. 285 did not have priority over the claims of the Bank under the Debenture. Indeed, that position was broadly reflected in the terms of the directions which the Liquidator sought.

9. The parties to the application initiated by the Liquidator were the Liquidator, the Revenue Commissioners, as a preferential creditor, and the Bank, as the holder of each Debenture.

10. Very little factual evidence was put before the High Court on the application. There was no evidence whatsoever as to what happened to the business and assets of the Company in the two week period between the service of the Crystallisation Notices on 28th October, 2009 and the presentation of the petition to wind up on 13th November, 2009, although it would not have been of any relevance to the legal issues which arose for determination in the High Court, and arise on the appeal. In the Liquidator's grounding affidavit it was disclosed that at the date of the presentation of the petitions the total

indebtedness of the Companies to the Bank was €16,250,000. It was averred that, whilst a significant portion of the assets of the Companies –

> "are properties and accordingly it is difficult to predict with precision the values that may be achieved, based on current estimated realisations in the liquidations, I anticipate that between €12,500,000 and €14,500,000 will be realised, of which circa €2,000,000 relates to assets which I say and am advised are subject to the floating charge provisions of the Debentures".

In the light of the anticipated shortfall in the monies owed to the Bank, the Liquidator averred that he was satisfied that there was no likelihood of a return to any other creditors. On that basis he believed that the monies then currently standing the liquidation account of each Company were assets to which the Bank was entitled.

11. In the replying affidavit sworn on 6th July, 2010, Noel Wall, an officer of the Revenue Commissioners, averred that the Revenue Commissioners were preferential creditors of the first two of the Companies named in the title hereof in amounts aggregating €595,850.

12. Before outlining the outcome of the application in the High Court, it is convenient to identify the statutory provisions which were in issue on the application and the statutory provisions which may be material to the proper construction of those provisions.

Statutory provisions

13. Section 285 of the Act of 1963, which is in Part VI of the Act of 1963 and applies to every mode of winding up, concerns the treatment of preferential payments in a winding up. Subs (1) defines "the relevant date", by reference to which the cut-off point in relation to periods of time over which various preferential debts are given priority is identified. Sub-paragraph (i) of subs. (1), which is relevant to the circumstances here, provides that the relevant date means –

"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."

This Court was informed that the Liquidator was appointed as provisional liquidator on the day the petition to wind up was presented in the High Court. Therefore, the relevant date in this case is 13th November, 2009, the date of the appointment of the provisional liquidator. Sub-section (2) lists the debts which in a winding up shall be paid in priority to all other debts. To take an example in which the Revenue Commissioners would have an interest, subs. (2)(a)(ii) covers –

"all assessed taxes, including income tax and corporation profits tax, assessed on the company up to 5th April next before the relevant date and not exceeding in the whole one year's assessment;"

The succeeding subss. (3) to (6) elaborate on the quantification of debts which have priority.

14. Subs. (7) of s. 285 provides:

"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."

While "debenture" is defined in the definitions section of the Act of 1963, s. 2, the expression "floating charge" is not defined. In section 2, which sets out general provisions as to interpretation, unless the context otherwise requires, "debenture" is defined as including –

> ". . . debenture stock, bonds and any other securities of a company whether constituting a charge on the assets of the company or not".

That definition, in my view, is not of any assistance in properly construing s. 285(7)(b).

15. Section 98 of the Act of 1963, while having no direct application to the facts of this case, is of some materiality because it applies the provisions of s. 285 to circumstances where a receiver is appointed under a floating charge and, in other jurisdictions, its counterpart has been considered in the context of considering issues similar to the issues which arise on this appeal. Subs. (1) of s. 98 provides:

> "Where 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, then, if the company is not at the time in course of being wound up, the debts which in every winding up are, under the provisions of Part VI relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming to the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."

For the purposes of the application of s. 285 to the appointment of a receiver, it is provided in subs. (3) that periods of time shall be reckoned from the date of the appointment of the receiver.

16. Section 99 of the Act of 1963, which deals with the registration of charges created by companies, is only of peripheral materiality to the issues on this appeal, although it is worth noting that, while it applies to "a floating charge on the undertaking or property of

the company" (subs. (2)(f)), it does not apply to the coming into being of a fixed charge on the conversion of a floating charge to a fixed charge.

17. As the authorities referred to later disclose, a new definition of "floating charge" was introduced by legislation in the United Kingdom in 1985 and 1986 and in New South Wales in 1971. There is no definition of floating charge in the Companies Act 2014 (the Act of 2014), most of the provisions of which came into operation on 1st June, 2015.

The process in and outcome of the High Court proceedings in outline

18. Having heard the Liquidator's application in the High Court, the trial judge (Finlay Geoghegan J.) delivered judgment on 25th March, 2011 (the First Judgment). In the First Judgment, she addressed the proper construction of s. 285(7) of the Act of 1963. She stated (at para. 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."

She then set out her reasons for so construing the section, in accordance with the ordinary and plain meaning of the words used, including the definition of debenture in s. 2 of the Act of 1963, in paras. 20 to 22 inclusive of the judgment. The reasons set out will be outlined later in addressing the issue of the construction of s. 285(7).

19. However, the trial judge recorded that there are relevant authorities from other jurisdictions upon which counsel for the Liquidator had relied in the High Court. Having conducted a comprehensive analysis of the relevant authorities relied on by the Liquidator she made it clear that she did not find the reasoning in the relevant authorities persuasive. Further, having stated that she concluded that s. 285(7) is not ambiguous in the meaning of s. 5 of the Interpretation Act 2005, so that it was not necessary to consider further its construction in accordance with the provisions of that Act, she stated (at para. 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."

Later (at para. 65) she stated that the issue as to the effect of the Crystallisation Notice did not have to be resolved on the application by reason of her conclusion on the construction of s. 285(7) and she left it for future resolution, if that should become necessary.

20. Subsequent to the delivery of the First Judgment, the Liquidator, supported by the Bank, indicated that he had instructions to appeal to this Court the conclusion of the High Court on the construction of s. 285(7) and he sought a determination of the outstanding issue in order that all the relevant issues could be before this Court on the appeal. The Revenue Commissioners did not object to that approach. Having heard further submissions from all of the parties, the trial judge delivered a supplementary judgment on 11th July, 2011 (the Second Judgment). Both the First Judgment and the Second Judgment are reported in [2011] 3 I.R. 244.

21. In the Second Judgment (at para. 6), the trial judge explained the approach which the parties had agreed to as follows:

> ". . . it was agreed by reason of the issue which had to be determined by the court *i.e.* the effect of the service of a notice pursuant to clause 10 of the Debenture in accordance with the proper construction of the Debenture and the requirement following the decision in *In Re Wogan's (Drogheda) Ltd.* [1993] 1 I.R. 157, that such issue must be determined by construction of the terms of the Debenture and not any subsequent action by either party . . ."

It is appropriate to record that, in dealing with that issue, the trial judge stated (at para. 7) that she proposed referring to the debenture given by the second named company in the title hereof (J.D. Brian Motors Ltd.) and she recorded that it was agreed that, having regard to the business of the Company at the time of the creation of the Debenture, *i.e.* a motor business including buying and selling cars, and having regard to the terms of Clauses 4 and 5 of the Debenture, the property of the Company subject to the floating charge principally included stock-in-trade, cash-at-bank and other book debts.

22. Having analysed the provisions of the Debenture in the context of the proper approach to the construction of commercial contracts, for reasons set out in the Second Judgment, which will be considered later, the trial judge concluded (at para. 20) that, on a proper construction of the Debenture, the service of the Crystallisation Notice pursuant to Clause 10 of the Debenture, did not have "the effect of converting the property subject to the floating charge created by the Debenture into a first fixed charge over such property".

23. The order of the High Court (Finlay Geoghegan J.) was dated 18th July, 2011 and it contained the following declarations:

> ". . . pursuant to section 285(7) of the [Act of 1963] that the preferential debts of the Companies rank in priority to the claims of [the Bank] as debenture holder to the funds realised from the assets subject to the floating charges pursuant to Clause 5 of the Debentures irrespective of whether said floating charges were converted into fixed charges prior to the commencement of the winding up of the Companies

AND . . . that the service of notice by [the Bank] pursuant to the provisions of said Debentures did not have the effect of converting said floating charges into first fixed charges over the property."

The appeal

24. The Liquidator is the appellant on the appeal. He has sought orders setting aside both of the declarations made by the High Court quoted above. The grounds of appeal are unusually succinct and to the point and, in essence, assert that the trial judge erred in law and in fact and/or in a mixed question of law and fact in making the findings embodied in the two declarations in the order dated 18th July, 2011 as to –

(a) the construction of s. 285(7) and

(b) the effect of each of the Crystallisation Notices dated 28th October, 2009,

and, further, in failing to hold that, as a result of the valid crystallisation of the floating charge in each Debenture prior to the winding up of the Company, s. 285(7) does not apply and that the preferential debts owed by the Company do not rank in priority to the claims of the Bank.

25. The Revenue Commissioners were, in reality, the respondents on the appeal. The Bank was also represented and made submissions and, in the main, adopted the approach of the Liquidator.

26. In addressing the issues which arise on the appeal, it seems to me logical to consider, first, whether the service by the Bank of the Crystallisation Notice on the Company had the effect of converting what was a floating charge in the Debenture into a fixed charge, so that no floating charge existed at the commencement of the winding up. Whether or not the service of the Crystallisation Notice had that effect, having regard to the finding of the trial judge on the construction of s. 285(7), it will be necessary to consider, secondly, whether, on the proper construction of that provision, the preferential

creditors have priority over the claims of the Bank under what had been the floating charge in the Debenture before its conversion.

Effect, if any, of Crystallisation Notice: discussion

The judgments of the High Court

27. In the First Judgment (at para. 45) the trial judge identified two separate issues which needed to be addressed:

(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" (meaning an event other than a business cessation event, such as a winding up, or a chargee intervention event, such as the appointment of a receiver), and thereby cause the floating charge to become fixed on all or specified assets; and

(ii) if, as a matter of principle, the chargee may do so, whether, on the facts, the service by the Bank of the Crystallisation Notice was effective to crystallise the floating charge created by the Debenture such that it then became a fixed charge on all the property which had been the subject of the floating charge.

28. On issue (i), the trial judge stated (at para. 56) of the First Judgment that she was 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. That conclusion, with which I agree, is not disputed by any of the parties to the appeal. She then pointed out that whether the parties actually achieved their intention is a separate issue and she went on to consider that issue by reference to the decision of this Court in *In re Keenan Bros. Ltd.*

[1985] I.R. 401 (*Keenan Bros.*), although emphasising that the issue here is not whether the charge as created by the Debenture was a fixed or a floating charge, but rather the effect of the service of the Crystallisation Notice pursuant to Clause 10 of the Debenture. She then summarised the task for the Court as follows (at para. 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."

29. As has been recorded above, in the First Judgment the trial judge left for future resolution that issue, given that it was not necessary to resolve it having regard to her conclusion on the construction of s. 285(7).

30. In the Second Judgment the trial judge quoted paras. 57 to 65 of the First Judgment, including the analysis of the decision of this Court in *Keenan Bros.* It is clear from the Second Judgment that there was a degree of consensus between the parties as to the approach to be adopted, as has already been recorded. In particular, it was recorded (at para. 8) that there was agreement that, if the effect of the Crystallisation Notice was to convert the floating charge into a fixed charge, then, as a matter of law, the Company was no longer thereafter entitled to deal with any of its stock, cash-at-bank or book debts without the consent of the Bank, which meant that the Company could no longer carry on its normal trade.

31. Moreover, there was no dispute as to the general principles which apply to the construction of an agreement between the parties which would include a debenture, reference being made to the decision of this Court in *Analog Devices B.V. v Zurich Insurance* [2005] 1 I.R. 274. However, by reference to the decision of the Privy Council in *Agnew v. Commissioner of Inland Revenue* [2001] 2 A.C. 710 (*Agnew*), the approach to determining whether or not a charge created by a debenture was or was not a fixed charge was stated to be a two-stage process, the first stage being to construe the debenture and seek to gather the intentions of the parties from the language they used, that is to say, to ascertain the nature of the rights and obligations which they intended to grant each other in respect of the charged assets. Thereafter, it was open to the Court to embark on the second stage of the process, categorisation, which is a matter of law and does not depend on the intention of the parties. The final sentence in the passage from the decision of the Privy Council quoted stated:

> "If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charge assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it."

I agree with the observation of the trial judge that the approach of the Privy Council appears to be identical to that of Henchy J. and McCarthy J. in this Court in *Keenan Bros.*

32. The trial judge considered it appropriate to adopt a similar approach to determining whether the effect of the service of the Crystallisation Notice pursuant to Clause 10 of the Debenture was to convert the floating charge over the stock-in-trade, cash-at-bank and books debts into a fixed charge over such property, the first step being to construe the Debenture to ascertain the intention of the parties as to the rights and obligations granted to or imposed on each other in relation to the property the subject of the floating charge after

service of such notice and the second stage being to determine whether such rights and obligations are consistent with the charge being a fixed charge.

33. The trial judge accepted as correct a submission made on behalf of the Liquidator and the Bank that the Court should have regard, when construing Clause 10 of the Debenture, to the fact that a notice may only be served by the Bank where the Bank considers the relevant property to be "in jeopardy". However, she rejected the submission on behalf of the Liquidator and the Bank that the Court should construe Clause 10, by reason of the fact that it refers to the conversion of the floating charge into first fixed charge, as including, by necessary implication, a restriction on the Company thereafter from dealing or disposing of any of the assets the subject of the Crystallisation Notice without the consent of the Bank, the trial judge citing a passage from the speech of Lord Scott in *Re Spectrum Plus Limited* [2005] 2 A.C. 680 (*Spectrum Plus*), which will be quoted later, and suggesting that the submission "put the cart before the horse". Having observed that the Debenture is silent as to any rights of the Bank or obligations of the Company in relation to the property the subject of the floating charge after service of the Crystallisation Notice, she stated (at para. 16) that there is nothing in the Debenture which restricts the entitlement of the Company to deal with or dispose of its stock-in-trade or to use the proceeds of its book debts or cash-at-bank specifically following the service of such notice.

34. The trial judge attached some significance to Clause 8 of the Debenture, insofar as it sets out obligations on the Company "at all times during the continuance of this security". Referring to the obligations expressly set out in para. (a) that the Company shall "carry on and conduct its business in a proper efficient manner", she found that such a continuing obligation was inconsistent with the existence of a fixed charge over its stock-in-trade, cash-at-bank and books debts. In relation to para. (k) of Clause 8, which is quoted above, the trial judge concluded that it was confined to property charged by the Debenture

as a specific charge. The inclusion of restriction in relation to specifically charged property she considered "underscores the absence of any similar provision restricting sale or other disposal of property subject to the floating charge after the service of a notice, pursuant to Clause 10 of the Debenture and hence the absence of any such intention on the part of the parties expressed in the Debenture".

35. On the foregoing basis, the trial judge concluded (at para. 19) that, as a matter of construction, "there is no intention expressed in the Debenture that the Company should after the service of the Crystallisation Notice be restricted in its use of the property subject to that notice, other than pursuant to Clause 8". Therefore, she concluded that the Company continued to be entitled to use such property for the proper carrying on and conduct of its business, including selling stock-in-trade and making payments from cash-at-bank and realised book debts, without the necessity of obtaining the consent of the Bank for sale or other disposal. That entitlement she found to be inconsistent with the existence of a first fixed charge over the stock-in-trade, cash-at-bank and book debts in favour of the Bank. Accordingly, she found that the service of the Crystallisation Notice did not have the effect of converting the property the subject of the floating charge into a first fixed charge over such property.

36. Before considering the bases on which counsel for the Liquidator and the Bank dispute the correctness of those findings, it is convenient to consider the main authorities which were addressed on this point.

Authorities

37. The issue in *Keenan Bros.* arose on an application under s. 280 of the Act of 1963 by the liquidator of that company, which was being wound up by the Court. At a time when it was in serious financial difficulties, the company had executed a charge in favour of Allied Irish Banks Limited and created a debenture in favour of Allied Irish Investment

Bank Limited. On each of those securities the company had given the chargee what was described as a first fixed charge on its book debts, present and future. Each contained restrictions on the manner in which the company could deal with book debts. For example, as is quoted in the report (at p. 404), the charge contained the following provisions:

> "(ii) The company shall pay into an account with the bank designated for that purpose all moneys which it may receive in respect of the book debts and other debts hereby charged and shall not without the prior consent of the bank in writing make any withdrawals or direct any payment from the said account.
>
> (iii) The company shall, if called upon to do so by the bank –
>
> (a) execute a legal assignment of its book debts and other debts to the bank;
>
> (b) deliver an account to the bank of the particulars of and amounts due in respect of its book debts and other debts at that date.
>
> (iv) The company shall not without the prior consent in writing of the bank purport to charge, waive, assign or otherwise deal with its book debts or other debts in favour of any other person."

The issues on which the liquidator had sought directions was whether the charge and the debenture from the outset created fixed or floating charges. It was held by this Court that fixed charges were created on the company's book debts, both present and future from the outset.

38. In his judgment, before analysing the provisions of the charge and the debenture which are quoted above, Henchy J. made the following observations, which I consider to be of particular significance to the issue as to the effect of the service of the Crystallisation Notice, in that he outlined the legal effect in Irish law of a floating charge and a fixed charge and the legal effect of the crystallisation of a floating charge (at p. 418):

"One of the essential differences between a fixed charge and a floating charge given by a company is that a fixed charge takes effect, upon its creation, on the assets that are expressed to be subject to it, so that those assets, as they then exist, or, when the charge applies to future assets, as soon as they come into existence, will stand encumbered by the charge, and the company will be able to deal with those assets only to the extent permitted by the terms of the charge. On the other hand, in the case of a floating charge, while such charge is effective in law from the date of its creation, because it is of its nature, dormant and hovering, it does not attach to the assets expressed to be subject to it so as to prevent the company from continuing to deal with those assets in the ordinary course of business, until the happening of some event, such as the appointment of a liquidator, which shows that the company is no longer in business, or until the chargee intervenes. At that point, the floating charge is said to crystallise and the rights of the chargee become the same as if he had got a fixed charge; thereafter the company cannot deal with the assets in question except subject to the charge. A floating charge, so long as it remains floating, avoids the restricting (and in some cases, paralysing) effect on the use of the assets of the company resulting from a fixed charge. While a charge remains a floating one, the company may, unless there is agreement to the contrary, deal with its assets in the ordinary course of business just as if there were no floating charge."

39. As regards the provisions contained in the charge, which I have outlined above, Henchy J. stated (at p. 419):

"Since the assets stated to be charged as a fixed charge were 'the book and other debts present and future', and since, under the provisions I have quoted, those assets were to be segregated in a special account and there to be virtually frozen and rendered unusable by the company save with the prior consent in writing of the

> Bank, I consider that the charge, far from being floating or dormant or hovering over those assets, had fixed on them to such an extent that they were unusable in the ordinary course of business save at the discretion of the Bank. The charge therefore was, as it was expressed to be, a fixed charge."

Henchy J. came to a similar conclusion having considered the charging clause and the restrictions imposed on the company in the debenture, which he considered created such a degree of sequestration of the book debts when collected as 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.

40. McCarthy J. in his judgment came to the same conclusion. However, he made a number of observations which are worth recording. First, he referred to the decision of the High Court of England in *Siebe Gorman v Barclays Bank* [1979] 2 Lloyds Rep. 142 (*Siebe Gorman*), stating that there Slade J. "had given a judicial blessing in England to a claim by way of fixed charge on book debts, where this was purported to be created by an instrument with marked similarities to those the subject of this appeal.". McCarthy J. stated that during the course of the hearing, the Court was informed that the securities were, in fact, modelled on those in *Siebe Gorman*, although it was emphasised that the monies received in respect of the book debts in the case being considered "were paid into a special account and not, as in *Siebe Gorman*, into the ordinary account of the mortgagor." The purpose of adverting to those observations is because they may elucidate later references to *Keenan Bros.* in the context of subsequent consideration of *Siebe Gorman* by the United Kingdom courts.

41. In relation to the approach to construction of the security, McCarthy J. stated (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?"

That passage, in my view, bears out the statement of the trial judge that this Court in *Keenan Bros.* adopted a similar approach to that subsequently adopted by the Privy Council in *Agnew*.

42. In *Re Holidair Limited* [1994] 1 I.R. 416 (*Holidair*), this Court had to consider, in the context of an examinership, whether a charge, which was expressed to be "by way of first fixed charge" on "all book debts and other debts present now and from time to time due and owing to such company together with all rights and powers of recovery in respect thereof" at the outset created a fixed charge or a floating charge. Blayney J., having stated that the only provision in the debenture which might be relied upon as possibly preventing the companies from carrying on their business in the normal way using their book debts was Clause 3.08, which he had quoted, and which, in his opinion, did not have that effect. He set out his conclusion as follows (at p. 447):

> "I am satisfied, accordingly, that the correct construction of the clause is that the trustee had a discretion to determine into what company account, with what bank, the proceeds of book debts should be paid from time to time. But there is no restriction in the clause on the companies drawing the monies out of these accounts. Accordingly, there is nothing in it to prevent the companies from using the proceeds of the book debts in the normal way for the purpose of carrying on their business. By reason of this the charge has also the third characteristic referred to by Romer L.J. in his judgment in *In re Yorkshire Woolcombers' Association Ltd.* [1903] 2 Ch. 284 and is accordingly a floating charge and not a fixed charge."

By way of explanation, the trustee referred to in that passage represented the interest of the debenture-holder banks. The third characteristic of a floating charge identified by Romer L.J. referred to in that passage was formulated as follows (at p. 295):

> ". . . 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."

43. About a quarter of a century after it was decided, the decision of the English High Court in *Siebe Gorman* was overruled by the House of Lords in *Spectrum Plus*. In *Spectrum Plus* the Law Lords considered the decisions of this Court in both *Keenan Bros.* and *Holidair*.

44. The most in-depth analysis of the question whether the security given by *Spectrum Plus* to the relevant bank created a fixed charge or a floating charge is to be found in the speech of Lord Scott. He stated (at para. 78) that the security created by the debenture was expressed to include "[a] specific charge [of] all book debts and other debts . . . now and from time to time due and owing to [Spectrum]" and also:

> "[a] floating security [of] its undertaking and all its property assets and rights whatsoever and wheresoever present and/or future including those for the time being charged by way of specific charge pursuant to the foregoing paragraphs if and to the extent that such charges as aforesaid shall fail as specific charges but without prejudice to any such specific charges as shall continue to be effective."

While noting (at para. 79) that the expression "specific charge" was potentially ambiguous, Lord Scott concluded that in the context in which it was used was intended to mean a fixed charge in contrast to a floating charge. Lord Scott (at para. 81) also quoted a provision of the debenture, which he then paraphrased as follows:

> "This provision barred Spectrum from dealing with its book debts in any of the ways specified but left Spectrum free to deal with the debtors who owed the debts and, in particular, to collect the debts in the normal course of business."

It is convenient at this juncture to observe that in this case there is a certain inconsistency in language between the charging clauses, in particular Clause 5, in each Debenture in issue here quoted at para. 3 above and Clause 10 quoted at para. 5 above. Clause 5 refers to "specific charge" and "floating security", while Clause 10 refers to "first fixed charge" and "floating charge". Adopting the approach adopted by Lord Scott, I conclude that, having regard to the context, the intention of the Company and the Bank in the case of Debenture was to mean a fixed charge in contrast to a floating charge in both clauses.

45. To put the passage from the speech of Lord Scott, which, as is mentioned in para. 33 above, was cited by the trial judge, into context it is appropriate to start at para. 116 thereof. There he stated that an attempt had been made to justify the categorisation of the charge as a fixed charge by looking no further than the receipt by the bank, through the operation of the clearing system, of the proceeds of cheques from Spectrum's debtors that were paid in by Spectrum. The consequent crediting of Spectrum's account with amounts equal to the proceeds of the cheques and Spectrum's ability to draw on that account for its business purposes was not inconsistent, it was suggested, with the categorisation of the charge over the book debts as a fixed charge. It was stated that the point was stressed by Mr. Moss, Q.C., counsel for the bank. Lord Scott rejected that argument and he stated that the categorisation as a fixed charge must depend on what, if any, restrictions there were on the use the chargor could make of the credit to the account that reflects each payment in. He continued (at para. 117):

> "The bank's debenture placed no restrictions on the use that Spectrum could make of the balance on the account available to be drawn by Spectrum. Slade J in *Siebe Gorman* thought it might make a difference whether the accounts were in credit or

in debit. I must respectfully disagree. The critical question, in my opinion, is whether the chargor can draw on the account. If the chargor's bank account were in debit and the chargor had no right to draw on it, the account would have become, and would remain until the drawing rights were restored, a blocked account. The situation would be as it was in *In re Keenan Bros Ltd.* But so long as the chargor can draw on the account, and whether the account is in credit or debit, the money paid in is not being appropriated to the repayment of the debt owing to the debenture holder but is being made available for drawings on the account by the chargor."

46. Against that background the passage (excluding the first sentence) quoted by the trial judge is to be found in para. 119 where Lord Scott stated:

"Slade J in *Siebe Gorman*, . . . and Mr Moss QC in his submission on behalf of the bank in the present case, attributed considerable significance to the labels that the parties to the debenture had chosen to attribute to the charge over book debts. Mr Moss indeed argued that a debenture expressed to grant a fixed charge thereby limited by necessary implication the ability of the chargor to deal with the charged assets. He argued that Spectrum had no right without the consent of the bank to draw on the account into which the cheques received by Spectrum in payment of its book debts had to be paid. This limitation was, he said, an inevitable result of the grant by the debenture of the fixed charge. This argument . . . puts the cart before the horse. The nature of the charge depends on the rights of the chargor and chargee respectively over the assets subject to the charge."

While, as will appear later, I consider that the task of the Court here in ascertaining, as a matter of construction of the Debenture, the effect of the service of the Crystallisation Notice is fundamentally different to the task of determining, as a matter of construction of a debenture, whether a fixed charge or a floating charge on book debts is created on the

execution of the debenture, with which the courts were confronted in *Keenan Bros.* and *Spectrum Plus*, I have set out the issue in the *Spectrum Plus* case and Lord Scott's observations in some detail, because the trial judge attached weight to the observations at para. 15 in the Second Judgment.

47. Before leaving the decision of the House of Lords in *Spectrum Plus* it is worth recording that Lord Walker in his speech (at para. 150) quoted the passage from the judgment of Blayney J. in *Holidair*, which is quoted at para. 42 above, stating that the reasoning in it "is compelling". In general, a comparison of the reasoning in *Spectrum Plus*, on the one hand, and the reasoning of this Court in *Keenan Bros.* and *Holidair*, on the other hand, does not disclose any major inconsistencies, so that, if *Keenan Bros.* had been decided by an English court, it is reasonable to assume that it would not have suffered the fate of *Siebe Gorman* and been overruled.

48. As noted above, both this Court in *Keenan Bros.* and the House of Lords in *Spectrum Plus* were concerned with the proper characterisation and effect of a charge over book debts when created, by reference to the charging clause and the other provisions of the Debenture. The United Kingdom authority in which issues most analogous to the issues on this appeal were considered was the decision of the Chancery Division of the High Court in *Re Brightlife Limited* [1987] Ch. 200 (*Brightlife*). There the company (Brightlife) was being wound up in a creditors' voluntary liquidation. Brightlife owed over £200,000 to an American company, to which I will refer as the lender, and the debt was secured by a debenture. It also owed over £70,000 to the Commissioners of Customs and Excise for Value Added Tax. The issue was whether the lender's debenture conferred only a floating charge so that the claim for Value Added Tax, being preferential, took priority under the provision in force in the U.K. at the relevant time corresponding to s. 285(7). That provision (s. 614(2)(b) of the Companies Act 1985) was in precisely the same terms as s. 285(7)(b).

49. In *Brightlife* the charging clause in the debenture had three elements. The first dealt with freehold and leasehold property. The second charged –

> "by way of first specific charge (a) all book debts and other debts now or at any time during the continuance of this security due or owing to Brightlife and the benefit of all securities and guarantees now or at any time held by Brightlife in relation thereto; (b) the goodwill and uncalled capital for the time being of Brightlife; and (c) the benefit of any licences for the time being in Brightlife."

The third element was a floating charge over after-acquired freehold and leasehold property and "the undertaking and all other property, assets and rights whatsoever present and future of Brightlife", subject to a proviso prohibiting the creation of any other charges ranking in priority to or *pari passu* with the floating charge or the disposal of any assets subject to the floating charge contrary to the provisions of a covenant by Brightlife.

50. There were two further provisions of the debenture given by Brightlife which were considered to be of significance. The first was Clause 3B which provided:

> "[The lender] 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 [the lender] 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."

That was the provision which corresponded to Clause 10 of the Debenture in this case. The other provision was Clause 13, which was a covenant for further assurance and which provided as follows:

> "Brightlife shall execute and do all such assurances, acts and things as [the lender] may reasonably require for perfecting or protecting the security created by these presents over the property hereby charged or any part thereof or for facilitating the realisation of such property and the exercise of all powers, authorities and

> discretions vested in [the lender] . . . and shall in particular execute all transfers, conveyances, assignments and assurances of such property whether [to] [the lender] or its nominees . . . which [the lender] may think expedient and for the purposes of this Clause a certificate in writing by [the lender] to the effect that any particular assurance, act or thing required by it is reasonably required shall be conclusive evidence of such fact."

51. The first argument advanced on behalf of the lender, which, in my view, is not of particular relevance to this case, was that para. (a) of the second element of the charge in Clause 3 had from the outset created, according to its terms, a "first specific charge" over "all book debts and other debts". Hoffman J. rejected that argument, stating that neither *Siebe Gorman* nor *Keenan Bros.*, which he described as "an even stronger case" than *Siebe Gorman*, was of assistance to the lender, having stated earlier, in a passage referred to by Lord Scott in *Re Spectrum Plus* (at p. 209):

> "In this debenture, the significant feature is that Brightlife was free to collect its debts and pay the proceeds into its bank account. Once in the account, they would be outside the charge over debts and at the free disposal of the company. In my judgment a right to deal in this way with the charged assets for its own account is a badge of a floating charge and is inconsistent with a fixed charge."

52. Hoffman J. then went on to deal with the alternative submission on behalf of the lender, which, in my view, is of particular relevance to this case, namely that the floating charge was converted into a fixed charge before the resolution for winding up was passed. The chronology was that on 4th December, 1984, Brightlife had given notice of a creditors' meeting to be held on 20th December, 1984 at which a resolution to voluntarily wind up Brightlife would be proposed. The lender then served four separate notices on Brightlife on 10th December, 1984, including a demand for payment, notice pursuant to Clause 3(B), and a demand pursuant to Clause 13 for execution forthwith of "a legal assignment of all

book debts currently due to Brightlife . . . specifying full details of the said debts therein". The notice pursuant to Clause 3(B) was expressed to be notice –

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

53. Having remarked that s. 614(2)(b), which he was applying, and s. 196, being the section of the U.K. Companies Act 1985 corresponding to s. 98 of the Act of 1963, originated in the Preferential Payments in Bankruptcy Amendment Act, 1897, Hoffman J. stated (at p. 211):

> "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 *Re Griffin Hotel Co. Ltd.* 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, . . ., the preferential debts would have no priority. One could construct other examples of cases which would slip through the net. Counsel for [the lender] submits that this is such a case. He says that the notices under cll 3(B) and 13 caused crystallisation of the floating charge over all or part of the assets before the winding up but without the appointment of a receiver."

It is perhaps apt to remark, lest it be considered overlooked, that as in the corresponding United Kingdom provision, under s. 98 of the Act of 1963 the taking of possession by or on behalf of the debenture holder of any property comprised in or subject to the charge also

triggers the application of the priority of preferential creditors under s. 285(7). The reference to the fact that a defect in drafting was revealed by the decision in *Re Griffin Hotel Limited* will be considered further in considering the issue as to the proper construction of s. 285(7). Hoffman J. also recorded that, while since that decision Parliament had made many amendments to the Companies Acts, until very recently before his judgment no attempt had been made to reverse the effect of the decision. He then stated that the Insolvency Act 1985 had by then done so, by defining a "floating charge" as "a charge which as created was a floating charge".

54. Having analysed the opposing submissions made on behalf of the Commissioners of Customs and Excise, and having determined that it would be inappropriate for the courts to impose additional restrictive rules on the grounds of public policy, a conclusion with which the trial judge expressly concurred in the First Judgment (at para. 56), and having noted that, on the case before him, it was not necessary to decide questions about automatic crystallisation, Hoffman J. stated (at p. 215):

> "The notices under Clauses 3(B) and 13 constitute intervention by the debenture-holder and there is in my judgment no conceptual reason why they should not crystallise the floating charge if the terms of the charge upon their true construction have this effect.
>
> Counsel for the commissioners last submission was that the actual notice under Clause 3(b) was ineffective because the assets over which the charge was to be crystallised were not 'specified in the notice'. The notice said that it was to apply to 'all the assets of Brightlife Ltd. the subject of the said floating charge', In my judgment that is sufficient specification. It is not necessary to list each separate asset. Although my decision that the notice under Clause 3(B) crystallised the charge makes it unnecessary for me to decide whether the notice under Clause 13 did so in respect of the book debts, I will add for the sake of completeness that in

my judgment it did. The company's obligation to execute an assignment removed that freedom to deal with the debts which made the charge float."

The outcome, accordingly, was that the debts secured by the debenture ranked in priority to the preferential debts in respect of all the assets in the hands of the liquidator.

55. Hoffman J. clearly considered that he was bound by the earlier decision of the English High Court in *Re Griffin Hotel* [1941] Ch. 129 (*Griffin Hotel*) on the construction of the counterpart of s. 285(7)(b). As noted at para. 53 above, he recorded in his judgment (at p. 211) that since *Griffin Hotel*, Parliament had made many amendments to the Companies Acts but until recently no attempt had been made to reverse the effect of the decision. However, the Insolvency Act 1985 had by then done so by introducing the definition of a "floating charge" quoted in para. 53 above. However, that provision had not been introduced at the time of the transactions under consideration by Hoffman J., so that he was deciding the matter by reference to a provision in identical terms to s. 285(7)(b). While the wording of Clause 10 of the Debenture under consideration here differs somewhat from the wording of the corresponding clause under consideration by Hoffman J. and there is no covenant for further assurance in the Debenture, if it is appropriate to apply the reasoning of Hoffman J. to this case, the outcome as regards the effect of service of the Crystallisation Notice should be the same as in *Brightlife*.

56. In embarking on the analysis of the judgment of Hoffman J. in *Brightlife*, I observed that it is the United Kingdom authority in which issues most analogous to the issues on this appeal were considered. That is because it necessitated a determination as to the effect of Clause 3B of the debenture in issue there, which provided that the debenture holder might by notice to Brightlife convert the floating charge into a specific charge. There is one Irish authority in which a somewhat similar clause was obliquely referred to. That is the decision of this Court in *Re Wogan's (Drogheda) Limited* [1993] 1 I.R. 157. In that case, in the context of an examinership, this Court was considering the effect of a

debenture given by the company in examinership to a lender and specifically whether a fixed charge or a floating charge was created over the book debts of the company. In the judgment of Finlay C.J., the relevant clauses of the debenture were outlined and these included, in addition to the charging clauses, Clause 8(a) which was quoted as being in the following terms:

> "If the lender shall by notice in writing make a demand on the company as provided for in clause 8(a) hereof then the floating charge created by clause 4(e) hereof shall immediately on service of such notice on the company become crystallised and be a specific fixed charge on . . . all book debts and other debts and securities then due to the company . . .."

Assuming that there is a typographical error in the report, in that the clause quoted is obviously not Clause 8(a) referred to in the body of the report, nonetheless, it is clear that the debenture provided that the lender could by notice effect the crystallisation of the floating charge into a specific fixed charge. The finding of this Court (at p. 170) was that the combined effect of the charging clauses in the debenture and Clause 8, to which express reference was made, was to confer upon the charge created by the debenture the precise characteristics of a fixed charge as set out by McCarthy J. in *Keenan Bros.* The commentary on that finding in Courtney on *The Law of Companies* (3rd Ed.) at para. 18.104 to the following effect is very persuasive:

> "While the Supreme Court did not specifically comment upon the validity of this clause, Finlay C.J. referred to Clause 8 in the reasoning for his conclusion. It seems inconceivable that the Supreme Court could base its decision, albeit in part, on a clause which the law did not consider to be effective. Moreover, there is no sound policy reason why the giving of notice to that effect ought not effect crystallisation."

Further, I agree with the views expressed by the trial judge in the First Judgment (at para. 44) that it is preferable to refer to a crystallisation of the type provided for in a clause such as Clause 10 under consideration here as "express crystallisation", rather than "automatic" crystallisation.

57. Before considering the submissions made on behalf of the parties, I think it is appropriate to emphasise that the decision of Hoffman J. in *Brightlife* and in a subsequent authority which will be referred to in the context of the construction of s. 285(7) are no longer of relevance in the United Kingdom. The current position in the United Kingdom is succinctly summarised in the following passage in Lynch-Fannon and Murphy on *Corporate Insolvency and Rescue* (2nd Ed.) at para. 9.30:

> "In relation to priorities, and the consequent effect of this decision [*Brightlife*], the situation in England is clarified by ss. 175(2) and 251 of the Insolvency Act 1986. Now a floating charge, which was created as a floating charge, will not have priority over preferential debts even though crystallising before the liquidation. The issue is therefore moot under English law."

Submissions on behalf of the Liquidator

58. The Liquidator does not quibble with what the trial judge stated in para. 63 of the First Judgment, as quoted in para. 28 earlier. What he takes issue with is the finding in para. 16 of the Second Judgment that there is nothing in the Debenture which restricts the entitlement of the Company to deal with or dispose of its stock in trade or to use the proceeds of its book debts or cash-at-bank specifically following the service of the crystallisation notice. The gravamen of the Liquidator's response is that Clause 10 of the Debenture must mean that the service of a Crystallisation Notice brings to an end the general freedom of the relevant Company to deal with its assets. It is submitted that crystallisation, whether happening as a matter of law (for example, as in the case of a

receivership) or as a matter of contract, brings to an end, as a matter of law, the entitlement of the Company to use and dispose its assets in the ordinary course of business. Further, it is submitted that, because this restriction happens as a matter of law, it does not need to be expressly spelt out in the Debenture in order to occur. On the contrary, it is submitted that where a charge starts life as a "floating charge" but some contractual event occurs which the parties have agreed will convert it into a "fixed charge", it inevitably follows that the parties have implicitly agreed that the consequences of fixed charge status will thereafter apply, namely, that the entitlement to use and dispose of the assets in question in the ordinary course of business will no longer be enjoyed by the chargor. It is submitted that any other interpretation would render the crystallisation clause, in this case Clause 10, a nullity.

59. As regards the covenants in Clause 8 of the Debenture and the fact that they are expressed to endure during the continuance of the security, the Liquidator's position is that the covenant in para. (a) of Clause 8 in relation to carrying on and conducting business is of no relevance, in that it can only apply for so long as the chargor is actually carrying on business and not beyond crystallisation, for example, by the appointment of a receiver. By using the terminology of converting the floating charge "into a first fixed charge", it is submitted that the parties to the Debenture clearly intended that upon service of the Crystallisation Notice the use of any charged assets would require the consent of the Bank. Any other conclusion, it is suggested, would run entirely counter to what the parties bargained for and what Irish business people have, for decades, understood to be the nature and effect of crystallisation. Clause 10, it is submitted, should be analysed and applied in the same way as Hoffman J. analysed Clause 3B in *Brightlife*.

Submissions on behalf of the Bank

60. In general, the Bank's position is the same as that of the Liquidator. However, it is strongly urged on behalf of the Bank that the issue for this Court in determining the effect of the service of the Crystallisation Notice is entirely different from the task which faced the Court in *Keenan Bros.* and the later decisions of this Court in which it was considered. In each of those cases, it is submitted, the security document set out in detail the obligations and rights of the chargor and the chargee while the Company was operating as a going concern. So the question was not one of construction of the security document to ascertain to what restrictions the relevant asset (in each case book debts) was subject. Rather, the question in those cases was primarily one of characterisation by reference to the balance of control of the asset class. In this case, it is submitted, the situation is different, in that the primary question is not whether a listed set of restrictions and entitlements constituted a fixed or a floating charge, but rather whether, by use of specific legal terminology, the parties in fact intended, upon the service of the Crystallisation Notice, that any further disposition of a charged asset would require the consent of the Bank as chargee. The answer, it is submitted is that, by reason of the use of the term "first fixed charge" in Clause 10, a necessarily implied global prohibition on the use of any assets the subject of the floating charge arose on the service of the Crystallisation Notice. In short, the Bank's position, which is put very convincingly, is that there is simply no basis for the conclusion in para. 19 of the Second Judgment that there is no intention expressed in the Debenture that the Company should, after service of the Crystallisation Notice, be restricted in its use of the property the subject of that notice.

Submissions on behalf of the Revenue Commissioners

61. The starting point in defining the position of the Revenue Commissioners on the effect of the service of the Crystallisation Notice is their reliance on and application of what is stated in para. 63 of the First Judgment, which is quoted at para. 28 above. The

Revenue Commissioners correctly submit that there is no express provision in the Debenture that specifies that the service of a crystallisation notice pursuant to Clause 10 causes an equitable assignment of the assets the subject of the floating charge or that, in consequence, the Company is to lose the ability to deal in or dispose of those assets. The approach of the Revenue Commissioners, understandably, is to attack the bases on which the Liquidator and the Bank argue that, notwithstanding the absence of an express provision, the service of the Crystallisation Notice put to an end the entitlement of the Company to deal with the assets which have been the subject of the floating charge.

62. The Revenue Commissioners' interpretation of Clause 10 is that it is "a trigger event" in the Debenture. In other words, it triggers the right of the Bank to appoint a receiver, an act which itself would result in the crystallisation of the floating charge, so as to effectively remove the assets from the control of the Company. In this connection Clause 12(j) is pointed to. That interpretation, it is submitted, means that there is an answer to the argument of the Liquidator and the Bank that the finding of the trial judge means that Clause 10 is devoid of effect. Further, it is suggested that the two step process which that interpretation gives rise to, the service of the Crystallisation Notice and the exercise of the right to appoint a receiver under Clause 12(j), is more suitable to redress the situation which gives rise to the entitlement to serve the Crystallisation Notice under Clause 10, namely, that the Bank considers that the property, assets and rights the subject of the floating charge are "in any way in jeopardy". It is suggested by the Revenue Commissioners that the source of the jeopardy could be other than the financial state of the Company, for example, conditions of storage might put the assets in jeopardy, in which case the two step process could be commercially appropriate in that the Bank could serve the Crystallisation Notice as a warning and that might lead to the risk to the assets being dealt with by the Company.

63. Whatever benefits are perceived from interpreting Clause 10 as a "trigger event", the fact is that on a plain reading of Clause 10, in the context of the provisions of all of the Debenture, it is not open to such interpretation. Clause 10 provides that in a certain situation (where the Bank considers that the property, assets and rights the subject of the floating charge are in any way in jeopardy), and where the Bank takes certain action (the service of a notice on the Company), the result will be to "convert the floating charge . . . into a fixed charge". It is a separate and distinct action by the Bank in a particular situation which crystallises the floating charge. Other situations in which crystallisation occurs are set out in Clause 11, one being the appointment of a receiver. It is true that by virtue of Clause 12(j), where notice has been served under Clause 10, the Bank may appoint a receiver. However, Clauses 10, 11 and 12 read together are not open to the construction that, in order to crystallise the floating charge, if the Bank invokes Clause 10, it must also invoke Clause 12(j).

64. It is also suggested by the Revenue Commissioners that to have the effect which the Liquidator submits Clause 10 has, it will be necessary for the Court to imply into the Debenture a clause similar in terms to Clause 8(k), which is quoted in para. 4 above, which implication would be triggered by the service of the Crystallisation Notice. However, it is submitted that this would not be sufficient as regards book debts and that it would be necessary to go further and to imply in addition provisions similar to the provisions under consideration in *Keenan Bros.* That overlooks the fundamental difference between the situation being considered in *Keenan Bros.* and the situation being considered here. In *Keenan Bros.* this Court, on the basis of what was provided in the security documents, was determining whether from the outset a charge over book debts could be properly characterised as a fixed charge, so that, as Henchy J. put it, the company will be able to deal with the assets, the book debts, only to the extent permitted by the terms of the charge into the future. On the other hand, here the purpose of the Bank serving the Crystallisation

Notice under Clause 10 is to "convert the floating charge . . . into a fixed charge", which, when it happens, again using the words of Henchy J., means that the Company cannot deal with the assets in question except subject to the charge. In my view, the question of implying terms into Clause 10 does not arise.

65. In general, the Revenue Commissioners take issue with the contention of the Liquidator that, as a matter of law, upon the crystallisation of a floating charge, the ability of the chargor to deal with or dispose of the charged assets come to an end and they suggest that this proposition is not supported by any authority. In my view, once again, referring back to the statement from the judgment of Henchy J. in *Keenan Bros.* quoted above, the effect of the crystallisation of a floating charge is clearly stated there as that the company cannot deal with the assets in question except subject to the charge.

66. In opposing the Liquidator's submission that crystallisation brings to an end, as a matter of law, the entitlement of the Company to use and dispose of its assets in the ordinary course of business, the Revenue Commissioners submit that the proposition is contrary to decisions of this Court with respect to the nature of fixed charges, including the decision in *Keenan Bros.* They rely, in particular, on the passage from the judgment of McCarthy J. in *Keenan Bros.*, which is quoted at para. 41 above. It is submitted that there is no rational basis for taking a different approach to the categorisation of a security as a fixed or a floating charge based on whether it was purported to be a fixed security on creation, or whether it initially floated and was later to be converted. That, it seems to me, is the fundamental flaw in the reasoning of the Revenue Commissioners.

67. Before addressing the specifics of the flaw, I think it would be useful to make some general observations following on from the analysis of the decisions in *Keenan Bros.* and *Agnew* set out at para. 31 above. The approach which is found in those authorities is an example of an application of a broader principle. Where the law makes a formal distinction between two different types of legal arrangements, as it does in s. 285 of the

Act of 1963 between floating and fixed charges, then the question concerning into which category a particular arrangement or agreement falls is determined by an objective analysis of the substance of the arrangement or agreement concerned in which the name given to the arrangement or agreement by the parties is not decisive. A similar approach can be seen in, for example, *Irish Shell & BP Limited v. Costello* [1981] ILRM 66 in the context of determining whether an agreement in respect of the occupation of a property in return for a periodic payment can properly be characterised as a lease or a licence. However, it is also important to emphasise that the description given by the parties to their arrangement or agreement remains an appropriate part of the overall analysis. The task is to identify the terms of the arrangement or agreement concerned in accordance with the appropriate principles of the construction of legally binding documents. This requires the application of the "text in context" approach. But text remains an important part of that analysis and, just as any other provision in an agreement or an arrangement must be considered as part of the overall assessment of the intention of the parties in the light of the words which they have used to express their agreement, so must all due regard be paid, in that exercise, to how the parties describe the arrangement concerned. That is not, of course, to say that if, properly construed, the entirety of the agreement creates a set of rights and obligations which makes it inconsistent to characterise that agreement in the way in which it is described by the parties, the Court is not required to depart from the term which the parties have chosen to use. But it would be wrong to suggest that the term used by the parties may not, in many cases, be important and can, at least in some cases, be decisive.

68. Returning to the specifics of the reasoning of the Revenue Commissioners, the task of the Court in a *Keenan Bros.* type situation is to construe the security document to determine the nature of the charge created over a particular class of assets, for example, book debts. As all the authorities make clear, the terminology deployed in the security document is not conclusive. The fact that the charge is referred to as a "fixed charge" does

not necessarily mean it is a fixed charge. As McCarthy J. stated in *Keenan Bros.* the Court has to look to the effect of the security document to see whether it achieves what was intended, for instance, to create a fixed charge. It may contain provisions which defeat what the parties intended. This is illustrated by the authorities which have been considered earlier. For example, in *Keenan Bros.* this Court was satisfied that fixed charges were created by the two security documents, whereas in *Holidair* this Court found that the charge was a floating charge although described in the debenture as a fixed charge.

69. The task of the Court in this case, like the task of the High Court of England and Wales in *Brightlife*, is to determine whether a notice served in accordance with the express terms of a clause in the security document does, on a once-off basis, what it was intended to do, that is to say, convert a floating charge into a first fixed charge. There is no categorisation involved in this task where, as in this case, the notice relates to all of the property, assets and rights the subject of the floating charge. The only possible effect of the service of the notice in accordance with Clause 10 is to convert the floating charge into a first fixed charge. While the Revenue Commissioners acknowledge that there is a strong similarity between the facts and issues in this case and those considered in *Brightlife*, it is argued that *Brightlife* can be distinguished on a number of bases. As will be clear from my observation at the end of paragraph 55 above, I do not consider the differences to be of any materiality to the determination of the effect of the service of the Crystallisation Notice in this case.

Effect, if any, of Crystallisation Notice: conclusion

70. It will be recalled that in the First Judgment the trial judge concluded 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. I agree with that conclusion. However, she

stated that whether the parties actually achieve their intention is a separate issue by reason, *inter alia*, of the Supreme Court decision in *Keenan Bros.* The line of authority starting with *Keenan Bros.* in this jurisdiction and ending with the decision of the House of Lords in *Spectrum Plus* has been examined in considerable detail earlier with a view to identifying the task which the Court had to consider in each of those cases and to comparing it with the task of the Court in this case. As I have stated in addressing the submissions made on behalf of the Revenue Commissioners, they are different tasks. The task in this case is to determine whether, on a once off basis, the service of the Crystallisation Notice under Clause 10 converted the floating charge into a fixed charge. I am satisfied that in applying the principles enunciated in *Keenan Bros.* in carrying out that task, the proper conclusion is that, as a matter of construction of Clause 10, the intention of the parties was that, on the service of the Crystallisation Notice, the Company would thereafter be restricted in the use of the property and assets and rights which had been the subject of the floating charge and, contrary to the view expressed by the trial judge at para. 19 of the Second Judgment, that the Company would cease to be entitled to use such property in carrying on its business without the consent of the Bank. That conclusion, in my view, is fully in accordance with the principles outlined in the judgments of Henchy J. and McCarthy J. in *Keenan Bros.*

71. On the plain wording of Clause 10 of the Debenture, the intention of parties is absolutely clear. The situation is identified in which the Bank has the right to serve a notice under Clause 10. That situation is that the Bank, in its sole judgment, considers the property, assets and rights the subject of the floating charge to be in jeopardy. It is assumed that the Bank considered that to be the position on 28th October, 2009. The purpose of the notice which the Bank acquired the right to serve in that situation is also clearly stated in Clause 10. It was to convert the floating charge in the Debenture into a first fixed charge. Accordingly, the clear intention of the parties was that, on the service of

the notice, the floating charge would become a fixed charge and the consequences of that occurring, including the obligations flowing from the consequences, would be borne by the Company as chargor. It is true that those consequences were not spelt out in Clause 10, nor were they spelt out in relation to the conversion of a floating charge into a fixed charge by reason of the happening of an event specified in Clause 11. The consequences ensue as a matter of law on the service of the notice under Clause 10. In legal parlance the conversion of the floating charge into a fixed charge is known as crystallisation since the late nineteenth century. As the passage from the judgment of Henchy J. in *Keenan Bros.*, which is quoted at para. 38 above, clearly demonstrates, the consequence of the intervention of a chargee which results in crystallisation, for example express crystallisation, is that –

> ". . . the rights of the chargee become the same as if he got a fixed charge; thereafter the company cannot deal with the assets in question except subject to the charge."

That was what was intended to happen under Clause 10 of the Debenture and it is what actually happened on the service of the Crystallisation Notice on 28th October, 2009.

72. In my view, there is nothing either in the Debenture or in the Crystallisation Notice which precludes that consequence. Once the floating charge crystallises, on whatever basis, the obligation of the Company under Clause 8(a) to carry on and conduct the business in a proper and efficient manner ceases, irrespective of the wording which suggests that the Company's obligation will continue "at all time during the continuance of this security". Clause 8(k) has no bearing on the crystallisation of the floating charge. It merely relates to and restricts dealing with property which was the subject of the specific charge provided for in Clause 5 of the Debenture from the outset.

73. In summary, Clause 10 is absolutely clear as to the intention of the parties in conferring the right on the Bank to serve notice on the Company, the intention being to

convert the floating charge into a fixed charge. Such conversion, in other words, crystallisation of the floating charge, was intended to have and did have well established consequential effects on the respective obligations and rights of the chargor and the chargee. The effects flowed from the action of service of the notice. This is not a case of putting the cart before the horse.

Construction of s. 285(7): discussion

First Judgment of the High Court

74. In her analysis of s. 285(7) in the First Judgment, the trial judge stated (at para. 20):

> "It is important to note that the section, by its words, gives priority 'over the claims of holders of debentures under any floating charge created by the company', and not over the claims of holders of any floating charge 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." (Emphasis in original).

75. The trial judge expressed the view, in para. 21, that 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 the winding up.

76. I read the ordinary language of s. 285(7)(b), in the context of all of the provisions of the section and all of the provisions of the Act of 1963, differently. Section 285 comes into play "[in] a winding up", which, where the winding up is a winding up by the Court, as here, comes into being when the winding up order is made by the Court. The section, in subs. (1) to (6), identifies debts due to certain creditors which are to be paid in priority to all other debts, identifying the creditors and the extent to which their debts are to get priority. How those creditors and those debts are to be treated *inter se* is dealt with in para. (a) of sub. (7). Paragraph (b) of sub. (7) deals with the situation where there is a shortfall of assets to meet the claims of the general body of creditors and it deals with two competing classes of debts or claims:

(i) the debts which have priority by virtue of subs. (1) to (6) and

(ii) the "claims of holders of debentures under any floating charge created by the company".

Paragraph (b) of subs. (7) gives priority to the debts referred to at (i) over the claims referred to at (ii).

77. Looking at the application of para. (b) from the perspective of the Liquidator, after the winding up order was made on 7th December, 2009 he had to decide how to apply para. (b) of subs. (7), because there was a shortfall of assets to meet the claims of the general creditors and there is one holder of a debenture who is claiming against the assets, the Bank. The Liquidator had to decide whether the debts of preferential creditors, such as the Revenue Commissioners, get priority in accordance with para. (b) over the claims of the Bank as the holder of the Debenture. The debts of the preferential creditors would get priority provided the claims of the Bank were under the floating charge created by the Company in favour of the Bank by the Debenture. On the wording of s. 285 the Liquidator

is assessing the situation in the winding up. Where, as here, the floating charge created by the Company in favour of the Bank had crystallised before the commencement of the winding up, the claim of the Bank is not a claim under a floating charge. Rather it is a claim under the fixed charge which came into existence on the crystallisation of the floating charge. That being the case, the Bank retains its priority as a fixed chargee. If it were otherwise, the Liquidator would be paying the priority debts, not out of property comprised in or subject to a floating charge, but rather out of property comprised in a fixed charge.

78. To read s. 285(7)(b) as entitling preferential creditors to priority for the priority debts specified in s. 285 over the claims of a debenture holder whose charge has crystallised into a fixed charge prior to the commencement of the winding up and to have those debts discharged out of property which at the time is subject to the fixed charge, by reason of the fact that the fixed charge evolved from a floating charge, in my view, would be to rewrite s. 285(7)(b). It is clear on the face of subs (7) that the operative time for the assessment of entitlement to priority in accordance with para. (b) is in the winding up, that is to say, after the winding up order is made. If the Oireachtas had intended that the holder of a debenture who, at the time of the assessment, has a fixed charge, but that fixed charge is the result of the crystallisation of a floating charge which occurred prior to the commencement of the winding up, should lose priority for its claims to the priority debts and that the priority debts should be paid out of property comprised in what at the commencement of the winding up was a fixed charge, that should have been provided for in para. (b) of subs. (7). In my view, as it stands, para. (b) cannot be read to achieve that end.

79. The trial judge (at para. 22 of the First Judgment) referred to the absence in s. 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" as a

subsidiary reason in support of what she considered the proper construction of the subsection. She stated:

> "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."

In my view, there is no lacuna in s. 285, if it is given the construction which I suggest it must be given in accordance with its ordinary language used. The expression "the relevant date" in subs. (1), as I stated at para. 13 above, is the date by reference to which the cut off point in relation to periods of time over which various preferential debts are given priority is identified. The application of subs. (7), however, occurs in the winding up and para. (b) must be applied in accordance with the situation which prevails after the commencement of the winding up in relation to the nature of the charge to which the claims of the debenture-holder relate, that is to say, whether it is then floating or fixed.

80. While I propose now considering the decisions of other jurisdictions referred to by the trial judge, on the basis of the analysis of s. 285 conducted above, I am of the view that the construction which the trial judge has put on subs. (7)(b) is only achievable by an amendment of that provision by the Oireachtas.

Decisions of other jurisdictions on counterpart of s. 285(7)(b)

81. As is clear from the judgment of Hoffman J. in *Brightlife*, he considered that he was bound by the decision of the High Court in *Griffin Hotel*. In that case, in November

1937 the company had issued a debenture to the lender which contained a charge by way of floating security upon the company's undertaking and property, present and future, including its uncalled capital to secure its indebtedness to the lender. In December 1938 the lender issued a writ for the purpose of enforcing its debenture and subsequently in December 1938 an order was made in the action appointing a receiver and manager of part only of the property then subject to the debenture, the remaining property being purposely excluded as it was subject to prior charges. On 15th March, 1939 an order was made for the winding up of the company by the Court. The issue for the High Court was the application of two provisions of the UK Companies Act 1929: s. 78, which was in precisely the same terms as s. 98 of the Act of 1963; and s. 264(4)(b), which was in precisely the same terms as s. 285(7)(b) of the Act of 1963. In his judgment Bennett J. stated (at p. 135):

> ". . . the provisions of s. 78 do not exclude or prevent the operation of s. 264(4)(b). There is, in my judgment, no language in the sections which excludes or prevents the operation of subs. 4(b) in the supposed case.
>
> [However], that conclusion upon the construction and effect of the statutory provisions leaves open the question whether or not, in the supposed events, there is, when the winding up takes place, any floating charge or any property subject to that charge. In my judgment, s. 264(4)(b) only operates if, at the moment of the winding up, there is still floating a 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, the charge ceased to be a floating charge upon the property and assets of which Mr. Veale was appointed receiver. The charge on that day crystallized and became fixed on that property and

those assets. It remained a floating charge upon 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 s. 264(1) have a priority over the claims of the plaintiffs, by force of the provisions of s.264(4). This seems to be a corollary of the proposition established by *In re Lewis Merthyr Consolidated Collieries Ltd. . . .*"

82. The last sentence in that quotation has been the subject of criticism in the past. Indeed, in the First Judgment (at para. 36), having expressed the view that Bennett J. reached a conclusion on the wording of the section under consideration in the passage quoted in the preceding paragraph without any consideration of the phrase "the claims of holders of debentures under any floating charge created by the company", the trial judge stated that Bennett J. did not explain why he considered that the section under consideration by him only operated "if, at the moment of the winding up, there is still a floating charge created by the company", save the statement in the last sentence. The trial judge then set out the facts and judgments both in the High Court and the Court of Appeal in *In re Lewis Merthyr Consolidated Collieries Ltd* [1929] 1 Ch. 498 (*Lewis Merthyr*). She stated (at para. 31) that it did not appear to her that the decision in that case on the construction of s. 107 of the Companies Consolidation Act 1908, which was the section in that Act which corresponded to s. 98 of the Act of 1963, was such that the conclusion of Bennett J. in *Griffin Hotel* might be considered a corollary, stating that the corollary would be whether the provision under the legislation enacted in 1908 or 1929 which corresponded with s. 285(5) "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".

83. The decision in *Lewis Merthyr*, in my view, is not of assistance in resolving the issue as to the construction of s. 285(7) on the facts of this case, although it may explain

what Bennett J. meant in the controversial sentence. As is noted above, the issue there concerned the application of the provision then corresponding to s. 98 of the Act of 1963 (s. 107 of the Companies (Consolidation) Act 1908) in circumstances where the debenture under which the receiver was appointed created both a fixed charge and a floating charge and the issue was over which assets, whether the assets the subject of the floating charge only or, alternatively, the assets the subject of the floating charge and the assets the subject of the fixed charge, priority was given to the preferential debts. It was held that the priority applied only to the assets the subject of the floating charge. One can understand why the losing party in the case argued the point. The corresponding section to s. 98, like s. 98, stipulated that the preferential payments "shall be paid . . . out of any assets coming into the hands of the receiver". In the Court of Appeal Lord Handworth M.R., noting that the receiver was taking possession of property which was comprised in or subject to both the fixed charge and the floating charge stated (at p. 512):

> "But s. 107 is only directed to debentures secured by a floating charge, so that when one comes to the words 'any assets' it must mean such assets as are subject to a floating charge which the receiver receives in his character of receiver. It is in respect of those assets that a duty is imposed upon him to deal with them in a particular way."

Likewise, Lawrence L.J. stated that the assets the subject of the fixed charge were "outside the scope and purview" of the section.

84. In *Griffin Hotel*, Bennett J., having determined that, as regards the property over which a receiver had been appointed before the winding up order was made, what had been a floating charge had become a fixed charge, the circumstances were that he was applying the counterpart of s. 285(7)(b) to a situation where, at the commencement of the winding up, some assets of the company were subject to a fixed charge and other assets were subject to a floating charge, which mirrored the factual situation to which the Court of

Appeal was applying the counterpart of s. 98 in *Lewis Merthyr*. Presumably that was why Bennett J. considered his decision flowed from the decision in *Lewis Merthyr*.

85. The suggestion by Bennett J. in *Griffin Hotel* that his reasoning was a corollary of the decision in *Lewis Merthyr* was also implicitly criticised in the dissenting judgment of Barwick C.J. in *Stein v. Saywell* (1969) CLR 529, which was a decision of the High Court of Australia on an appeal from the Supreme Court of New South Wales. The statutory provision under consideration there was the subsection of the Companies Act 1961 of New South Wales the relevant portion of which was in precisely the same terms as paragraph (b) of s. 285(7). The trial judge outlined the outcome of the appeal in the First Judgment (at para. 35) and quoted a long passage from the dissenting judgment of Barwick C.J. (at para. 36). Having regard to the chronological summary of the facts as set out in the majority judgments of McTiernan and Menzies JJ (at p. 547), I think it reasonable to truncate the events which gave rise to and the factual context of the application of the counterpart of s. 285(7) in that case to the following:

(i) A petition to wind up the company the subject of the proceedings was presented by a creditor on 13th August, 1965 and a provisional liquidator, Mr. Saywell, was appointed on that day.

(ii) On 24th August, 1965 Mr. Saywell was appointed as receiver and manager pursuant to the powers contained in a deed of floating charge created by the company in 1963. Significantly, that triggered the crystallisation of another floating charge contained in a debenture created in 1964 in favour of individuals, who were respondents on the appeal, whereupon, as stated in the summary, that floating charge "became fixed and specific '*ipso facto*'", on 24th August, 1965, as Barwick C.J. acknowledged (at p. 542).

(iii) On 11th November, 1965 Mr. Saywell was appointed receiver and manager pursuant to the 1964 floating charge.

(iv) Finally, a winding up order was made on 22nd November, 1965, whereupon Mr. Saywell was appointed as liquidator.

86. The passage from the judgment of Barwick C.J. quoted in the First Judgment commences with the statement that the High Court of Australia was not bound by the decision in *Griffin Hotel*, after which he expressed his opinion that the proposition that s. 292(4) (the counterpart of s. 285(7)) did 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 had crystallised, was insupportable. Thereafter, much of the passage concerns the proper construction of the counterpart of s. 98 of the Act of 1963 and, in effect, Barwick C.J. construed the counterpart of s. 285(7) in the same sense as he had construed the counterpart of s. 98. Barwick C.J. went on to consider the policy behind and the interaction between the counterpart of s. 98 and the counterpart of s. 285(7) in some detail. He did so in the context that there existed in New South Wales law at the time (but apparently not in England when *Griffin Hotel* was decided) a provision similar to s. 220(2) of the Act of 1963 which provides that in a case in which subs. (1) does not apply, the winding up of a company by the court shall be deemed to commence at the presentation of the petition for the winding up. By way of explanation, subs. (1) of s. 220 of the Act of 1963 relates to a situation in which, before the presentation of the winding up petition, a resolution has been passed by the company for voluntary winding up. That was not the situation in this case, so that s. 220(2) applied and the commencement of the winding up of each Company related back to 13th November, 2009, the date of the presentation of the petition to the High Court.

87. Later, in a passage not quoted by the trial judge, Barwick C.J. repeated his conclusion as to the construction of the counterpart of s. 285(7) (at p. 546) stating:

> "In my opinion, the operation of s. 292(4) cannot be limited to the occasions when the charge remains floating at the commencement of the winding up. It will come

> into play if the claims of the chargee to assets or their proceeds arises out of a security which initially created a floating charge which, having become specific, now comprises those assets. The final words of s. 292(4) 'and shall be paid accordingly out of any property comprised in or subject to that charge', in my opinion, support this view of the operation of the section."

Of course, on the facts summarised above, the crystallisation of the floating charge had occurred after the presentation of the petition, but Barwick C.J. stated immediately before the passage quoted by the trial judge that he would prefer not to base his reasons "for the appellant's success" on that ground, the appellant being the representative of the class of employees of the company who were claiming to be preferential creditors.

88. Following the decision in *Griffin Hotel*, the majority decision of the High Court of Australia in that case was that s. 292(4) (the counterpart of s. 285(7)) did not confer priority to preferential debts over the claims of the debenture holders under a floating charge which became specific after the presentation by a creditor of a winding up petition, but before the making of the winding up order. As the trial judge recorded in the First Judgment (para. 37), subsequent to the decision in *Stein v. Saywell*, a legislative amendment was introduced in 1971 in New South Wales by virtue of which "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".

89. In the United Kingdom, Hoffman J. had occasion to re-visit the issue of the priority of preferential creditors in *Re Permanent Houses (Holdings) Ltd.* [1988] BCLC 563. However, it was the application of the equivalent of s. 98 of the Act of 1963 which was at issue there. The facts were complicated but the significant feature which emerges from the sequence of events which culminated in the appointment of the receiver, as set out in the judgment (at p. 566), is that the floating charge had crystallised before the receiver was

appointed. Hoffman J. recorded the fact that, although the equivalent of s. 98 (s. 196 of the U.K. Companies Act 1985) had been amended by the Insolvency Act 1986, Schedule 13, Part I, to make it clear that the section applied when the charge "as created, was a floating charge", the amendment did not apply to receivers appointed before it came into force on 29th December, 1986. Accordingly, he had to consider whether s. 196 required that the charge over the assets in question should be floating at the moment when the receiver is appointed or whether it was sufficient that it was floating when created. Hoffman J. stated (at p. 568) that he could not see any basis for giving s. 196 and s. 614 of the Companies Act 1985 (the counterparts of s. 98 and s. 285) different constructions, so that, in effect, he adopted the same approach as he had adopted in *Brightlife*. He noted that in *Stein v. Saywell*, none of the judges, including Barwick C.J., thought that the equivalent of s. 98 and the equivalent of s. 285(7) should be construed differently. Like the trial judge in this case, he did confess to "a personal preference for the powerful reasoning of Barwick C.J. in his dissenting judgment" but once again he considered himself bound by the decision in *Griffin Hotel*.

Submissions made on behalf of the parties

90. Predictably the line taken by the Liquidator and the Bank is that the Court should follow the approach adopted in *Griffin Hotel* and in the succeeding cases in the United Kingdom in which it was followed and that adopted by the majority in *Stein v. Saywell*. In essence, their position is that the words "as created" in respect of a floating charge such as the Debenture in the present case cannot be read into s. 285(7) and that, as happened in the United Kingdom, specific legislation is required if, in the case of a holder of a debenture, priority under s. 285(7)(b) is to be determined by reference to the fact that the debenture holders' charge, as created, was a floating charge. As will be clear from my analysis of the wording of the provision at paras. 75 to 78 above, I consider that submission to be correct.

It is important to emphasise that that conclusion is based on what I consider to be the proper reading of the ordinary language of s. 285(7). It is not based to any extent on the so-called "*Barras Principle*" invoked by the Liquidator and the Bank and referred to in this Court by Fennelly J. in *Clinton v. An Bord Pleanála and ors.* [2007] 1 I.R. 272.

91. The position of the Revenue Commissioners, also predictably, is that the statutory interpretation of the trial judge is impeccable. It is urged that, when examined on its merits, the decision in *Griffin Hotel* ought not to be followed. Once again, I would emphasise that my interpretation of s. 285(7)(b) is based on a reading of the ordinary language used in the section. Having said that, there are a number of points made by the Revenue Commissioners which I think it is appropriate to comment on. It is suggested that the interpretation of s. 285(7) urged on behalf of the Liquidator and the Bank would lead to an almost capricious ordering of priorities on insolvency. A debenture holder under a floating charge who can initiate an express crystallisation by service of a notice similar to the Crystallisation Notice before the appointment of a receiver or the commencement of a winding up will avoid the effects of both s. 98 and s. 285 and effectively leap-frog over the preferential creditors. That is certainly the case and, in my view, it is an unsatisfactory state of affairs. However, it can be rectified by amending legislation, as was done in the United Kingdom and in New South Wales.

92. The Revenue Commissioners submit that there is no necessity to insert the words "as created" into the legislation, as has been done in the United Kingdom. It is suggested that the words "created by the company" used in connection with "any floating charge" in para. (b) of s. 285(7) can only mean the charge as originally created, or later amended, by the Company. It is submitted that the conversion from a fixed charge to a floating charge which occurred in this case on the service of the Crystallisation Notice was not an act of the Company. The conversion was done unilaterally by the Bank and, thus, the conversion was created by the Bank, not by the Company. The reality is that only the Company could

create a charge over its assets and only the Company could change the nature of a charge over its assets. It is true that the Company gave the Bank the authority to initiate the conversion. However, the conversion was the act of the Company.

93. The Revenue Commissioners attach particular significance to the word "under" in the phrase "under any floating charge created by the company" in s. 285(7)(b). As I understand the argument, it is that when the conversion of a floating charge to a fixed charge takes place on the service of the Crystallisation Notice, there is not, as a matter of law, any new charge created. While this is not clearly spelt out, I assume that the argument is that the original floating charge is still the charge. What is overlooked in that argument and what I think it is appropriate to reiterate is that the competing factors in the application of s. 285(7)(b) are the priority debts of the preferential creditors, on the one hand, and the claims of the holder of the debenture under a floating charge, on the other hand. Once the floating charge crystallises, the claims of the debenture holders are not claims under a floating charge; they are claims under a fixed charge.

94. Finally, in the context of addressing the so-called *Barras Principle* argument, the Revenue Commissioners brought to the Court's attention s. 621(7) of the Act of 2014, which was due to come into operation on 1st June, 2015, and which is a verbatim replication of s. 285(7) of the Act of 1963, which it has now replaced. The point made by the Revenue Commissioners was that as s. 621(7) was enacted after the decision of the High Court, it is untenable to suggest that the will of the Oireachtas is properly to be determined according to a judgment at first instance in a foreign court, *i.e.* the judgment in *Griffin Hotel*. Being conscious of the volume of work which the Company Law Review Group and the State authorities involved put into the enactment of the Act of 2014, which, containing 1,448 sections and 17 schedules is, I understand, the largest piece of legislation ever enacted in the State, one regrets finding that what Hoffman J. characterised in *Brightlife* as "a defect in the drafting" is perpetuated in the Act of 2014.

Construction of s. 285(7): conclusion

95. For the reasons set out above and, in particular at paras. 75 to 78, I conclude that on the application of para. (b) of s. 285(7) of the Act of 1963, which occurs in the winding up of a company, the reference to "the claims of holders of debentures under any floating charge created by the company" means a floating charge which exists at the commencement of the winding up. It does not mean a floating charge which has been converted into a fixed charge by virtue of express crystallisation in accordance with the terms of the debenture prior to the commencement of the winding up. Accordingly, as, in this case, the floating charge of each Company in favour of the Bank had crystallised by service of the Crystallisation Notice on 28th October, 2009 prior to the presentation of the petition to wind up each company, the priority debts of the preferential creditors identified in subs. (1) to (6) of s. 285 do not have priority over the claims of the Bank under each of the Debentures and those priority debts may not be paid out of the property comprised in and subject to the property which was the subject of the floating charge before crystallisation.

96. That conclusion deals only with the specific facts of this case, where there was an express crystallisation under the terms of the contract between each Company and the Bank. No view needs to be, or is, expressed as to whether there would be a similar outcome on what is called an automatic crystallisation. Unfortunately, it does appear that the replacement of s. 285(7), s. 621(7) of the Act of 2014, requires to be amended to reverse the undoubtedly unsatisfactory outcome of this decision, which gives rise to a number of concerns.

97. One concern is the possibility that, absent amending legislation, a form of false crystallisation might be contrived in circumstances where the form of the documentation undoubtedly creates a crystallisation, but where, in substance, the debenture holder allows

the business to continue as if the floating charge was still in existence. It is important to reiterate, as stated at para. 10 above, that there is no evidence before this Court as to what happened between the service of the Crystallisation Notice and the presentation of the petition to wind up in this case and there is no suggestion of any lack of genuineness in the crystallisation process. Accordingly, what follows is *obiter*. In the hypothetical situation envisaged an issue might well arise as to the effectiveness of the creation of a fixed charge by crystallisation on the service of the notice if there was evidence to suggest that, either with the knowledge or at least tacit approval of the debenture holder, things continued on after the service of the notice in a way which was inconsistent with the fact that a crystallisation had taken place. Acknowledging that what happened subsequent to an event cannot normally be used to interpret the legal consequences of the event itself, which must be assessed in the light of the facts at the time when it occurred and the language used in the documents giving effect to it, nonetheless, in such a hypothetical situation an affected preferential creditor could argue that the debenture holder had waived the crystallisation event or, alternatively, that it was estopped from relying on it, if it was clear that the debenture holder permitted the situation to continue more or less as if it were a floating charge after the crystallisation event. Given the current unsatisfactory legislative position on the basis of the finding as to the proper construction of s. 285(7), it is not unreasonable to postulate that a court faced with a hypothetical situation would be reluctant to accept what was in substance a purely nominal crystallisation which the debenture holder did not seek in substance to rely on in any way between the crystallisation event and the winding up.

98. Another concern brings me back to s. 99 of the Act of 1963, which is referred to in outlining the statutory provisions above, where it is noted that under that provision there was no requirement for the registration of the conversion of a floating charge to a fixed charge. The trial judge, as noted earlier, stated 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. That proposition, with which I agree, is a fundamental plank in the determination of the effect of the Crystallisation Notice in this case. However, in this connection, one is conscious of the concerns expressed in Lynch-Fannon and Murphy on *Corporate Insolvency and Rescue* at para. 9.36 on the current state of the law arising from that proposition. There it is stated that it may be necessary to re-visit the questions raised by certain forms of crystallisation in the short term and, in particular, against the backdrop of a consideration of fundamental insolvency law principles, which include the necessity of transparency as between creditors and debtor companies, it being suggested that the occurrence of less than public events is contrary to the principles which underpin the system of registration of company charges and other encumbrances.

Order

99. There will be an order allowing the appeal and setting aside the portions of the order of the High Court dated 18th July, 2011 referred to in the notice of appeal and substituting therefor the following directions:

(a) that the floating charge created by Clause 5 of each of the Debentures was converted into a fixed charge over the property of each Company by virtue of the service of the Crystallisation Notice by the Bank on 28th October, 2009 and, accordingly, prior to the commencement of the winding up of each Company; and

(b) that the claims of the Bank as debenture holder to the funds realised from the assets the subject of the floating charges created by the Debenture and converted into fixed charges on 28th October, 2009 shall rank in priority to

the preferential debts due by the Company identified by reference to s. 285(1) to (6) of the Act of 1963.

Approved.
Mary Laffoy
9th July 2015.