

Re Avanti Communications Ltd (In Administration) (2023): fixed or floating charge – a spectrum of control?

This briefing considers the recent case of *Re Avanti Communications Ltd (In Administration)* [2023] EWHC 940 (Ch) in which the English High Court considered what is required to determine that a charge is a fixed charge rather than a floating charge, including the degree of charge-holder control required for a charge to be a fixed charge. This is the first judgment discussing this distinction since the House of Lords' (now the Supreme Court) judgment in *Re Spectrum Plus* [2005] UKHL 41.

The court held that a charge granted by Avanti Communications Limited (“**Avanti**”) over its HYLAS-3 satellite, network and ground stations, orbital slots, licences and other related assets (the “**Relevant Assets**”) was a fixed charge even though Avanti had some limited permissions to deal with the Relevant Assets without charge-holder consent.

The court held that for a charge to be fixed, did not necessarily require an absolute prohibition on all dealings with the charged assets by the chargor, as had been asserted by some commentators following *Re Spectrum Plus*. Existing case law did not support this absolute approach. Instead, a more nuanced approach is required, taking into account a combination of factors, including the degree of the charge-holder's control over dealings with the charged assets and the nature of those assets.

Whilst only a first instance judgment, fixed charge holders will welcome the reining in of the absolute approach adopted by some practitioners to re-characterise certain fixed charges as floating charges.

What is the difference between a fixed charge and a floating charge?



There is no universal definition of a fixed charge nor of a floating charge. Various descriptions have emerged from the case law in this area. While these have significant overlap and similarities, they are not uniform, meaning there is still plenty of scope for debate about whether certain charges are fixed or floating.

A distinctive feature of a fixed charge is the chargor being restricted from disposing of the charged assets free from the charge, without the agreement of the charge-holder (the nuances of this are covered further below). By contrast, the essence of a floating charge is that the chargor has freedom to dispose of the charged assets free from the charge, in the ordinary course of its business, until the occurrence of a crystallising event, at which point the charge crystallises on the charged assets and this freedom is removed.

Why is the distinction important?



The distinction between fixed and floating charge is important for two main reasons:

- ✓ an insolvency practitioner appointed to the chargor cannot dispose of a fixed charge asset without the fixed charge-holder's consent or (in certain circumstances) a court order. This gives the charge-holder more control in any insolvency process in respect of the chargor; and
- ✓ realisations from fixed charge assets flow directly to the fixed charge-holders without leakage, other than the realisation costs. Whereas with floating charge realisations, certain moratorium related debts (relevant if the chargor has been in a moratorium process before it enters into administration or liquidation), fees and expenses of the insolvency process, preferential debts (certain debts that benefit from a statutory priority) and the "prescribed part" (a portion of net realisations that must be ring-fenced for unsecured creditors, up to a cap of £800k), rank ahead of payments to the floating charge-holder.



Avanti Decision

Administrators were appointed to Avanti in April 2022 and sold the Relevant Assets in a pre-pack administration sale. The Administrators applied to court to determine whether the Relevant Assets were secured by fixed or floating charges under two English law debentures (the "**Debentures**").

In *Avanti* the judge reiterated the two-stage test required to determine whether a charge is a fixed charge or a floating charge, as outlined in *Agnew v Commissioners of Inland Revenue* [2001] UKPC 28 [2001]; 2 AC 710.

First stage - contractual construction

- ✓ The court must construe the security document, in accordance with the ordinary principles of contractual construction, to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets.
- ✓ The labels used by the parties to denote their rights and obligations will be a relevant guide as to what security they objectively intended to create, such as the labels "fixed" and "floating".
- ✓ The nature of the charged assets and the chargor's business may also be taken into account in ascertaining the parties' intentions and what rights they intended to grant each other, including consideration of whether the charged assets are part of the chargor's "circulating capital" (i.e. assets that the chargor requires freedom to sell, substitute or otherwise deal with in the ordinary course of its business) or its "non-circulating capital" (for example, assets more akin to the "infrastructure" owned by the chargor that enable it to generate income).
- ✓ The nature of the charged assets has greater significance in the absence of express contractual provisions entitling the chargor to deal with those assets without the charge-holder's agreement.
- ✓ Post-contractual conduct is generally irrelevant and inadmissible, although if a stipulation in the charging documents is not adhered to in practice, the agreement may be held to be a sham and the charge characterised as a floating charge.

Second stage - categorisation or characterisation as a matter of law

- ✓ After the rights and obligations of the parties have been ascertained, the court must categorise or characterise the charge. This is a matter of law. The labels used by the parties to describe the charge are irrelevant. One must assess whether the rights and obligations agreed in respect of the charged assets are consistent, as a matter of law, with fixed charge security or floating charge security.
- ✓ In this legal analysis, a critical question is the nature and extent of the charge-holder's control of the charged assets.
- ✓ If the chargor is free to deal with the charged assets and withdraw them from the ambit of the charge without the consent of the charge-holder, the charge is inconsistent with the existence of a fixed charge over those assets.

The court decided that the relevant charges under the Debentures were fixed charges when created and at the time of sale of the Relevant Assets. In reaching this decision, the court found as follows:

First stage test – contractual construction

- Under the Debentures, the Relevant Assets were all expressed to be charged by way of fixed charge.
- The Relevant Assets were all subject to considerable restrictions upon their disposal, contained in a complex thicket of provisions in the finance documents (which we have not sought to summarise in this note), although there were some limited permitted dealings in the Relevant Assets.
- There was no history of the relevant restrictions on disposals of the Relevant Assets not being observed. To the contrary there was at least one example of them being observed, when a waiver of the restrictions was sought from the charge-holders in connection with some factoring arrangements.

Second stage test – categorisation or characterisation as a matter of law

- The court disagreed with previous academic commentators who had asserted that only a total prohibition of all dealings and withdrawals of the charged assets without permission of the charge-holder is enough to create a fixed charge. The court concluded that existing case law did not support this absolute approach.
- In considering whether a charge is fixed or floating, it is helpful to look at the range of possibilities as a spectrum, with total freedom of management of the charged assets at one end of the spectrum, and a total prohibition on dealings of any kind with the charged assets at the other end of the spectrum. A charge is not necessarily a floating charge just because it is not located at the total prohibition end of the spectrum.
- The case law supports a more nuanced approach, taking into account a combination of factors, including the degree of the charge-holder's control over dealings with the charged assets and the nature of those assets.
- Charged assets forming part of a chargor's circulating capital are more natural subjects of a floating charge. Put another way, a charge over assets regarded as circulating capital which the chargor is free to deal with is inconsistent with a fixed charge. However a charge over assets constituting non-circulating capital, where there is some liberty to deal with those assets, will not necessarily be inconsistent with a fixed charge.
- As regards control, although there was not a total restriction on Avanti dealing with the Relevant Assets, its ability to deal with the Relevant Assets was extremely limited. In terms of complete freedom to deal with the Relevant Assets, Avanti only had such freedom if the disposal fell into some very limited asset sale exceptions which provided no opportunity for Avanti to dispose of the Relevant Assets in the ordinary course of its business/trading. Other permitted disposals required Avanti to comply with conditions that rendered them commercially unattractive. The overall scheme of restrictions gave the charge-holders very significant control over the Relevant Assets – Avanti's freedom to deal with them was materially and significantly limited; it had no ability to deal with the Relevant Assets in the ordinary course of its business.
- As regards the nature of the Relevant Assets, these did not resemble the circulating capital or fluctuating capital of Avanti. They were more in the nature of tangible and non-tangible infrastructure owned by Avanti, used to generate the sources of its income. The Relevant Assets did not need to be sold to generate this income. In addition, the Relevant Assets were all inherently difficult to transfer.

In summary, therefore, the court held that the Relevant Assets were assets that could perfectly well have been subject to a fixed charge. They were income generating assets of Avanti, which were not themselves part of the circulating capital or fluctuating assets or circulating stock in trade of Avanti.

Please see full judgment [here](#).



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