Published on *The National Law Review* https://natlawreview.com

(UK) Avanti: The Evolution of a Spectrum – from Fixed to Floating Charge, who Needs Control?

Article By:

Helena Clarke

In a decision likely to be welcomed by both debtors and lenders, the High Court has held that a charge granted by Avanti Communications Limited ("Avanti") was properly characterized as a fixed charge (rather than a floating charge) notwithstanding that the charger retained an element of control over the charged assets. A key plank of the decision was that the relevant assets were not 'fluctuating assets' or 'stock in trade' that the charger might be expected to dispose of in the ordinary course of its business.

This is the first major case examining the nature of fixed and floating security since the House of Lords' decision in *Re Spectrum Plus* ("*Spectrum*") in 2005, which recharacterized a purported fixed charge over book debts as a floating charge as the charger was free to use the secured assets and therefore the lender lacked the requisite control required for a fixed charge to attach to the assets. Common practice following *Spectrum* has been the assumption that anything less than total control of a charged asset by the lender will result in the classification of the charge as a floating charge. The Court's decision in Avanti moves away from this towards a more nuanced approach.

The difference that a characterization of 'fixed' or 'floating' can make to a creditor has always been significant but has now taken on new importance since the reintroduction of HMRC's preferential status in respect of certain taxes in insolvency proceedings. This elevates HMRC's claim such that it is now paid in priority to creditors holding a floating charge, and given that HMRC's debts are often large, this has the potential to significantly deplete the pool of resources available for floating charge creditors.

The Facts

Avanti was part of a group that operates satellites and provides wholesale satellite broadband and connectivity services to a range of consumers including internet providers, mobile network operators, and governments. Avanti, along with certain other group companies entered administration on 13 April 2022 and immediately entered into a pre-pack sale of the assets of the company. The administrators brought an application for directions from the court to determine whether certain of Avanti's assets which had been sold pursuant to the pre-pack arrangements were charged by way of fixed or floating charges in order that they can properly distribute the proceeds of the sale to the creditors of Avanti.

The assets in question comprised certain satellite equipment, certain equipment used in the operation of the network and ground station facilities, certain satellite network filings (which essentially comprised Avanti's rights to use certain valuable orbital slots for its satellites), and certain ground station licenses issued by Ofcom (the "**Relevant Assets**").

The Judgment

Mr. Justice Johnson undertook a detailed consideration of the caselaw surrounding the characterization of fixed and floating charges and observed that the caselaw supports a nuanced approach to characterization which depends on a number of factors beyond simply whether there is a total prohibition on the use of the asset by the charger (the approach commonly attributed to the decision in *Spectrum* and which Mr Justice Johnson contends is an incorrect interpretation of the judgment).

The Court held that:

- It is helpful to consider a 'spectrum' with total freedom of management at one end, and a total prohibition on dealings at the other. However, it is not the case that a fixed charge can only attach to assets sitting at the 'total prohibition' end of the spectrum.
- It is not sensible or feasible to identify the location of the point on the spectrum where a floating charge gives way to a fixed charge or vice versa.
- In establishing the proper characterization of a charge, the nature of the charged assets must be taken into account. Where an asset is circulating capital, one of a class of fluctuating assets, or stock in trade of a charger, then it is likely that the Court will conclude that liberty to deal with such assets is inconsistent with a fixed charge. In contrast, where charged assets are income-generating and do not necessarily fluctuate, some liberty to release the charged assets may not be inconsistent with a fixed charge.

In considering the facts of the case, the Court held that the Relevant Assets were subject to a fixed charge. In coming to this conclusion, the following factors were considered:

- The charging clause expressed the charge over the Relevant Assets to be a fixed charge (although it was noted that the description of the charge in the charging document is not, in itself, determinative);
- Avanti's ability to deal with the Relevant Assets were "materially and significantly limited" including restrictions on disposal, including provisions that required any proceeds received by Avanti following a disposal (in excess of a $1m threshold) must be used in paying down the secured debt;
- The Relevant Assets were income generating and did not represent circulating capital, fluctuating assets or stock in trade.

Moving Forwards

This judgment moves away from the binary approach that had been broadly adopted by the market in the years following *Spectrum* that a fixed charge required a total prohibition on use of the assets by the chargor. Given that the court's approach in Avanti is nuanced, and no precise 'point on the spectrum' is identified as where a floating charge might give way to a fixed charge, we can expect that lenders will approach any change to their existing policies with caution. However, this case opens the door to greater freedom for a chargor to deal with their assets without compromising their lender's security position.

In an insolvency scenario we can see that this decision might lead to more disputes about whether a charge is fixed or floating, given it potentially widens the scope of a fixed charge if control does not have to be absolute. As mentioned at the outset, HMRC's position as secondary preferential creditor can often deplete the available funds to floating charge holders. If there is scope to argue a charge is fixed, why would a lender not take the point particularly if this would result in moving up the order of priorities ahead of HMRC and a larger recovery.

It has always been the case that whether a charge is fixed or floating depends on the specific circumstances, but in some respects this decision has made the grey area in the middle of the spectrum, greyer, particularly for insolvency practitioners who need certainty as to whether a charge is fixed or floating before making a distribution.

National Law Review, Volume XIII, Number 134