Neutral Citation Number: [2017] EWCA Civ 1001

Case No: A2/2016/0260

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM MANCHESTER DISTRICT REGISTRY
HHJ Hodge QC sitting as a Judge of the High Court
2129 of 2012 and 3180 of 2013

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2017

Before:

LADY JUSTICE ARDEN
LORD JUSTICE BRIGGS

Between:

(1) SAW (SW) 2010 LIMITED **(2) NEIL WILSON ACCOUNTANCY LIMITED**	**Appellants/ Applicants**
- and –	
(1) SIMON WILSON, ANNE O'KEEFE AND FRASER GRAY (AS JOINT ADMINISTRATORS OF PROPERTY EDGE LETTINGS LIMITED) **(2) NATIONWIDE BUILDING SOCIETY**	**Respondents**

Mr Clive Wolman (Direct Access) for the **Appellants/Applicants**
Ms Lesley Anderson QC (instructed by **Addleshaw Goddard LIP**) for the **Respondents**

Hearing date: 20 June 2017

Approved Judgment

Lord Justice Briggs:

Introduction

1. This appeal from the Order of HHJ Hodge QC sitting as a judge of the High Court in the Manchester District Registry raises a single issue of law, namely whether the purported appointment of the first respondents as joint administrators of Property Edge Lettings Limited ("PELL") on 27 January 2012 was, as the appellants allege and the respondents deny, invalid.

2. The appellants, SAW (SW) 2010 Limited ("SAW") and Neil Wilson Accountancy Limited are respectively shareholders in and creditors of PELL. The joint administrators were purportedly appointed by the second respondents Nationwide Building Society ("Nationwide"), pursuant to a power to that effect contained in a debenture dated 9 May 2008 ("the Debenture") granted by PELL to Derbyshire Building Society ("DBS") to which Nationwide is the successor in title.

3. The issue as to the validity or otherwise of the appointment of the joint administrators depends upon two questions:

   i) Whether the Debenture created a qualifying floating charge within the meaning of paragraph 14 of Schedule B1 to the Insolvency Act 1986 ("para 14"); and

   ii) Whether, if so, the floating charge created by the Debenture was, or was not, enforceable on the date of their appointment.

4. The judge struck out the appellants' application for a declaration that the appointment of the joint administrators was invalid on the cross-application of the respondents, pursuant to CPR3.4(2)(a), on the basis that the Particulars of Claim disclosed no reasonable grounds for the relief sought.

5. The main grounds pleaded in the Particulars of Claim in support of the application for a declaration that the appointment of the joint administrators was invalid may be summarised as follows:

   i) The Debenture was granted without the prior written consent of the holder of an earlier floating charge over PELL's property and undertaking granted to Capital Home Loans Limited ("CHL") on 18 December 2007 ("the CHL Charge") causing a simultaneous crystallisation of the floating charge contained therein.

   ii) This meant that the Debenture could not itself constitute a floating charge (let alone a qualifying floating charge within the meaning of para 14) because there was not at the time of its grant any property of PELL to which it could attach, and the directors of PELL thereafter had no power to acquire any property for the company to which it could attach in future.

   iii) The Debenture was not enforceable at the time of the appointment of the joint administrators because there remained no property of PELL to which, even then, it could attach.

iv) The Debenture was void for common mistake, namely the assumption by both PELL and DBS that PELL had title to grant a floating charge over any of its property.

6. In an extempore judgment the judge concluded that the Debenture was a qualifying floating charge and that it was enforceable at the time of the appointment of the joint administrators. In my judgment he was right to do so, although the way in which the argument has proceeded in this court requires me to explain why for reasons which differ to some extent from his. I mean no disrespect to his analysis by confining myself to my own reasons. But I must first summarise the relevant facts.

The Facts

7. PELL was acquired by SAW in December 2007. SAW granted PELL a long lease of a residential apartment block in Exeter known as Bartholomew House, and claims to be a creditor of PELL in relation to unpaid ground rents, and to loans made to PELL which have not been repaid. The second appellant is an accountancy firm which claims to be a creditor of PELL in respect of unpaid fees.

8. On 18 December 2007 CHL granted PELL a £1.25 million buy-to-let loan, secured by six fixed charges, in substantially identical terms, over each of the flats within Bartholomew House, and by a personal guarantee from a Mr Shaun Kelly, then a director of SAW. I will refer to the six charges collectively as the CHL Charge. By clause 2 of each of them, PELL charged the relevant apartment by way of fixed legal mortgage, the rental income by way of fixed charge, and the remainder of PELL's undertaking, property and assets by way of floating charge.

9. By clause 4.2 of Mortgage Conditions incorporated within the CHL Charge, PELL covenanted not to create or permit any security interest in the property subject to the charge without CHL's consent. Clause 9.11 of the Mortgage Conditions provided as follows:

> "9.11. If, without the prior written consent of the Lender, the Borrower encumbers howsoever the property subject to the floating charge, or any person levies or attempts to levy any distress, sequestration or other process against the said property the said floating charge shall automatically without notice operate and have effect as a fixed charge instantly such event occurs. "

The CHL Charge was duly registered.

10. PELL subsequently sought to finance the acquisition of development land in Bude, Cornwall for the purpose of constructing 23 residential apartments. The development site consisted of 3 titles, namely (i) the Strand Hotel, (ii) land constituting the hotel's car park and (iii) a ransom strip controlling access to the development site.

11. PELL identified the commercial lending arm of DBS, trading as Salt Commercial, as a suitable lender and on 9 April 2008 received a facility letter from DBS offering to lend £3.9 million. Under clause 2.1, the facility was subject to the following conditions precedent:

i) A first ranking mortgage debenture.

ii) A first fixed charge over the development property.

iii) A personal guarantee by Mr Kelly, limited to £1 million.

12. Relying on fresh evidence submitted on this appeal (to which we had regard during the hearing *de bene esse*) the appellants say that PELL acquired the ransom strip using its own money on 30 April 2008. The remainder of the transaction, including both the acquisition of the hotel and car park sites, the execution of the fixed charge, the guarantee and the Debenture (by way of purported floating charge) all occurred at different times on 9 May 2008. The fixed charge was executed in the morning and the Debenture in the afternoon. The hotel and car park sites were acquired with funding provided by DBS under the facility.

13. Clause 3.1.3 of the Debenture was, together with the relevant opening words of clause 3.1, as follows:

> "The Company with full title guarantee as a continuing security charges to the Lender for the payment and discharge of the Liabilities in favour of the Lender:
>
> by way of floating charge all the Assets present and future not otherwise effectively mortgaged, charged or assigned by this Clause (and paragraph 14 of Schedule B1 of the Insolvency Act 1986 applies to the floating charge so created)."

By clause 3.4 provision was made for the automatic crystallisation of the floating charge in events which (as is common ground) had occurred by the time of the appointment of the joint administrators. Clause 3.12 provided that para 14 would apply to the floating charge created by the Debenture. By clause 19 PELL warranted that it had good and marketable title to the assets charged, and "full power and authority to grant to the Lender the security interest in the Charged Assets pursuant to this Debenture …".

14. Neither PELL nor DBS obtained the consent of CHL to the grant of the legal charge or of the Debenture, with the result that the consequences provided for in clause 9.11 of the Mortgage Conditions incorporated in the CHL Charge (quoted above) were thereby triggered, although this does not appear to have been appreciated by either PELL or CHL (let alone DBS or, later, Nationwide) at the time.

15. Nationwide became successor in title to DBS in relation to the facility, the legal charge and the Debenture in December 2008. Then or not long thereafter PELL began to experience financial difficulties. I need not recite the steps thereafter taken by Nationwide to realise its fixed charge security over the Bude development site, or an abortive attempt by Nationwide to appoint administrators in relation to PELL on 24 January 2012. It is sufficient to note that Nationwide obtained CHL's consent (pursuant to paragraph 15 of Schedule B1) to its appointment of administrators as qualifying floating charge holders on or about 26 or 27 January 2012, and appointed the first respondents as administrators on 27 January. The application challenging the validity of that appointment was launched on 24 June 2015.

The Appellants' Case for Invalidity

16. Mr Clive Wolman for the appellants did not suggest that there was anything about the language of the Debenture which, as a matter of construction, made it inapt to create a floating charge over the assets and undertaking of PELL. Nor did he rely upon any of the provisions in para 14 of Schedule B1 for a submission that, if the Debenture created a floating charge recognisable by the general law, it was not a qualifying floating charge for the purposes of Schedule B1.

17. Rather, his submissions depended entirely upon the consequences of the triggering of clause 9.11 in the CHL Charge. PELL had, he said, encumbered the property subject to the floating charge thereby created so that it automatically operated and had effect as "a fixed charge instantly" upon the grant by PELL to DBS of the fixed charge on the morning of 9 May 2008, some hours before the grant of the Debenture later that day. He identified two specific consequences:

    i) The whole of PELL's then assets and undertaking (to the extent not already the subject of a fixed charge) became the subject of fixed charge security in favour of CHL; and,

    ii) The directors of PELL thereby lost, and never regained, any power to buy and sell assets of PELL and, even if they did, any such assets as were thereby acquired became immediately subject to a fixed charge in favour of CHL.

18. The result, said Mr Wolman, was that there was not on 9 May 2008, nor at any time thereafter until the purported appointment of the joint administrators, any asset, property or right of PELL to which the floating charge purportedly created by the Debenture could attach, so that the Debenture could not in substance create a floating charge, even if it purported to do so in form. At the heart of his submissions was the proposition that a company could not grant floating charge security if, by reason of the crystallisation of a prior floating charge, it neither had un-charged assets to which the new purported floating charge could attach, nor the power to acquire such assets in the future, for as long as the prior crystallised charge remained outstanding.

19. Mr Wolman further submitted that, even if the Debenture might have created a valid floating security in May 2008, it would not become an enforceable floating charge until such time as the company acquired assets to which it could attach, free from any prior charge, and this had not occurred by the time of the purported appointment of the joint administrators in January 2012. Inherent in this submission was the proposition that, for a floating charge to be enforceable within the meaning of para 16 of Schedule B1, the chargee had to be in a position to realise, for its own benefit, some assets of the company to which it attached.

20. Finally, Mr Wolman sought to rely (but without visible enthusiasm) upon his case, rejected by the judge, that the Debenture was void by reason of common mistake.

Analysis

21. The statutory provisions, relevant for present purposes, are as follows:

Insolvency Act 1986 Schedule B1

14 (1) The holder of a qualifying floating charge in respect of a company's property may appoint an administrator of the company.

(2) For the purposes of sub-paragraph (1) a floating charge qualifies if created by an instrument which—

(a) states that this paragraph applies to the floating charge,

(b) purports to empower the holder of the floating charge to appoint an administrator of the company,

(c) purports to empower the holder of the floating charge to make an appointment which would be the appointment of an administrative receiver within the meaning given by section 29(2), or

(d) purports to empower the holder of a floating charge in Scotland to appoint a receiver who on appointment would be an administrative receiver.

(3) For the purposes of sub-paragraph (1) a person is the holder of a qualifying floating charge in respect of a company's property if he holds one or more debentures of the company secured—

(a) by a qualifying floating charge which relates to the whole or substantially the whole of the company's property,

(b) by a number of qualifying floating charges which together relate to the whole or substantially the whole of the company's property, or

(c) by charges and other forms of security which together relate to the whole or substantially the whole of the company's property and at least one of which is a qualifying floating charge.

15 (1) A person may not appoint an administrator under paragraph 14 unless—

(a) he has given at least two business days' written notice to the holder of any prior floating charge which satisfies paragraph 14(2), or

(b) the holder of any prior floating charge which satisfies paragraph 14(2) has consented in writing to the making of the appointment.

(2) One floating charge is prior to another for the purposes of this paragraph if -

(a) it was created first, or

(b) it is to be treated as having priority in accordance with an agreement to which the holder of each floating charge was party.

16 An administrator may not be appointed under paragraph 14 while a floating charge on which the appointment relies is not enforceable.

22. The general definition section 251 of the 1986 Act provides as follows:

> ""Floating Charge" means a charge which, as created, was a floating charge ..."

This illuminates the meaning of floating charge only by requiring the assessment to be carried out at the time of its creation.

23. Apart from those statutory provisions, the meaning of floating charge is to be gathered from the well-known authorities about floating charges and, in particular, *re Yorkshire Woolcombers Association Limited* [1903] 2 Ch 284 at 295, per Romer LJ and *re Spectrum Plus Limited* [2005] 2 AC 680, in which the famous definition of Romer LJ is cited with approval at paragraph 99, as follows:

> "I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some further 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."

He continued:

> "I certainly do not intend to attempt to give an exact definition of the term 'floating charge', nor am I prepared to say that there will not be a floating charge within the meaning of the Act which does not contain all the three characteristics ..."

It is apparent from the speech of Lord Scott, at paragraphs 106-7 and 111 that it is the third of Romer LJ's characteristics that plays the predominant part in enabling a floating charge to be distinguished from a fixed charge. Mr Wolman also relied upon the following dictum of Lord Walker at paragraph 139:

> "Under a floating charge, by contrast, the chargee does not have the same power to control the security for its own benefit. The chargee has a proprietary interest, but its interest is in a *fund* of circulating capital, and unless and until the chargee intervenes (on crystallisation

> of the charge) it is for the trader, and not the bank, to decide how to run its business."

24. In my judgment, nothing in the *Yorkshire Woolcombers* case or in the *Spectrum Plus* case lends any support to Mr Wolman's central submission that the validity of an instrument as a floating charge, at the time of its creation, depends upon the existence of uncharged assets of the company creating it, or upon a power in the company to acquire assets in the future, free from any fixed charge arising from the crystallisation of a prior floating charge. On the contrary, both those leading cases concern the alternative classification of a charge as fixed or as floating, by reference simply to the construction of the relevant instrument creating the charge. This is implicit in the opening words of Romer LJ's third characteristic: "If you find that by the charge it is contemplated that ..." (*my underlining*). The question is not whether the company is inhibited in some other way from dealing with its assets, but whether it is inhibited by the terms of the instrument itself.

25. There is authority which directly contradicts Mr Wolman's central submission. In *Re Croftbell Ltd* [1990] BCC 781 the question was whether a debenture was a floating charge within the meaning of section 29(2) of the Insolvency Act 1986. Vinelott J said this, at page 786:

> " As I understand Mr Bannister's argument it is not suggested that a debenture creating a floating charge (which I think this debenture did) falls outside sec. 29(2) merely because at the time when the receivers are appointed substantially the only asset of the company is subject to a fixed charge, securing a sum in excess of the likely value of that asset – for instance, a factory in the possession of the company and used for the purposes of its business. The property of the company would then comprise the interest of the company as mortgagor and the question whether the holder of a floating charge has power to appoint a receiver over substantially the whole of the company's property cannot depend on the amount of the debt secured by the fixed charge relative to the value of the company's uncharged assets. Equally it cannot have been intended to exclude a floating charge which when created extended to future assets merely because at the creation of the charge the company had no assets or no assets which were not the subject of a fixed charge; for that would exclude the obvious and common case where the floating charge was created to finance the commencement of a company's intended business."

26. The meaning of floating charge in section 29(2) is in no relevant respect different from that in paragraph 14 of Schedule B1, as amplified by section 251. Both provisions require the question to be answered at the time of the creation of the relevant charge. Vinelott J's analysis makes two perceptive points. The first is that the company may well wish to grant a floating charge for the purpose of setting itself up in business by borrowing working capital, before it has any significant assets to which the charge can attach. The second is that a prior fixed charge over all or part of the company's assets nonetheless leaves a subsequent floating charge to attach to the company's equity of redemption under the fixed charge. An equity of redemption is, in this context, no mere chancery abstraction. A company may well wish to grant potentially valuable floating charge security to one intending lender, subordinated to

prior fixed charges over the same assets, upon the basis that the prior charge may be redeemed in due course by repayment of the prior lender, leaving the subsequent floating charge as valuable security. In my judgment Vinelott J's analysis is correct both in principle, and for those practical commercial reasons.

27. Both before the judge and on appeal there was extensive analysis of the question whether clause 9.11 of the CHL Charge really did have the effect of creating fixed charges over all PELL's assets ranking in priority to the Debenture. The judge relied on the well-known principle in *Abbey National v Cann* [1991] 1AC 56 in reaching a contrary conclusion. Mr Wolman maintained that the judge was wrong, in particular because the company had acquired the ransom strip at Bude with its own money rather than with money borrowed under the DBS facility, some 10 days prior to the grant of the Debenture. More generally, he relied upon *Fire Nymph Products Limited v The Heating Centre PTY Ltd* (1992) 7ACSR 365 (a decision of the New South Wales Court of Appeal) as showing that an automatic crystallisation clause could have an immediate effect so as to create fixed charges having priority to rights created by the later instrument which triggered crystallisation. Interesting though these arguments were, they do not impact upon the question whether a company can create a floating charge without immediately available free assets to which it can attach, or any prospect of obtaining them before redeeming the prior floating charge. Thus, I am prepared to assume, but without deciding, (i) that the *Fire Nymph* case would be followed in this jurisdiction; (ii) (although Arden LJ thinks otherwise) that it would apply to Clause 9.11; and (iii) that the *Abbey National v Cann* principle is not (contrary to the judge's view) a complete answer to the appellant's case. Assuming therefore that the entirety of PELL's assets were subject to simultaneous fixed charges caused by the crystallisation of the floating charge granted to CHL, none the less the Debenture was a qualifying floating charge at the time of its creation because, on its true construction, it manifested the essential characteristics identified by Romer LJ and affirmed by the House of Lords in the *Spectrum Plus case*.

28. Although there is neither authority nor academic writing precisely on the point in relation to the effect of automatic crystallisation of an earlier floating charge upon a later floating charge, such as there is tends to affirm the view that provisions in the earlier charge affect only the priority rather than the validity of the later floating charge: see *Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800 (where the terms of the earlier floating charge meant that it took priority over the later floating charge); *Re Automatic Bottle Makers Limited* [1926] 1 Ch 412 (where different terms did not) and, more generally, Goode on *Legal Problems of Credit and Security* (5th Ed.) at [4-07, 4-32, 4-56 and 5-43] and Bridge and others on *The Law of Personal Property*, at [36-027 to 028].

29. Mr Wolman's alternative submission that, even if a floating charge when created, the Debenture was unenforceable at the time of the appointment of the joint administrators, is in my view misconceived. The essence of his submission was that a floating charge was not enforceable within the meaning of para 16 of schedule B1 for as long as the assets to which it related were the subject of any prior security, fixed or floating.

30. Paragraph 15 of Schedule B1 expressly contemplates that a floating charge holder may appoint administrators even though there is a prior floating charge, either by giving the prior chargee two business days' written notice or by obtaining its consent

(as occurred in the present case). This procedure plainly assumes that a second or lower-ranking floating charge may nonetheless authorise the appointment of administrators by the chargee.

31. Mr Wolman submitted that this might be so in relation to a chain of floating charges, but had no application where the prior charge was (as is to be assumed here) fixed, either on original creation or by reason of the crystallisation of a prior floating charge. This is in my view an unrealistic submission. First, in the overwhelming majority of cases, the same events which occur during the company's financial collapse will have caused all floating charges in a relevant chain to crystallise so that, from the perspective of the chargee seeking to appoint administrators, a prior floating charge will have by then created fixed charges over the company's assets.

32. Secondly, I consider that the reason why paragraph 15 only requires notice to, or consent from, the holder of a prior floating charge is because it is floating rather than fixed chargees who have the right to appoint administrators out of court. The obvious purpose of paragraph 15 is to enable the holders of prior floating charges to appoint their chosen administrators, should they wish to do so, in preference to those selected by the holder of the subordinate charge.

33. Thirdly, I consider that the requirement in paragraph 16 that the floating charge relied upon for the appointment of administrators "be enforceable" is concerned with the question whether the chargee has a right to enforce, rather than with the question whether there are free assets to which the chargee can have recourse for the purposes of enforcement. A floating charge is in my judgment enforceable if any condition precedent to enforcement has been satisfied (such as an event of default) and there remains a debt for which the floating charge stands as security.

34. Mr Wolman sought to rely upon *re John Jones ex parte the National Provincial Bank* [1932] 1 Ch 548, in which a floating charge was held to have been enforced by sale of the charged assets, rather than by a notice of crystallisation. But that case was concerned with the question when enforcement occurred, because of a change in the law which affected enforcement only after a certain date. It was not in the least concerned with the question whether a floating charge was "enforceable". That depends upon whether the chargee has a present right to enforce, rather than upon the question whether enforcement has actually taken place.

35. Finally, it is in my view nothing to the point that the existence of prior fixed charges over the assets subject to a floating charge may mean that the floating chargee cannot take the usual practical steps towards enforcement, such as taking control of and selling the relevant property. The power to appoint administrators is in my judgment itself a means of enforcement. Mr Wolman could not, upon the court's enquiry, identify any reason why paragraphs 14 to 16 of Sch B1 should be interpreted in any different way.

36. I can deal briefly with the appellant's alternative case based upon common mistake. The supposed mistake was said to be a perception in May 2008 on the part of both PELL & DBS that PELL had title to grant the Debenture as a first floating charge, when in truth the prior or simultaneous crystallisation of the CHL floating charge meant that it could not do so. The judge rejected this submission on the simple ground that a party cannot rely upon common mistake as the escape route from a

transaction if it has itself warranted the truth of the common assumption. Mr Wolman could not offer any cogent reason why the judge's conclusion in that respect was wrong. In my judgment it was plainly correct.

37. For those reasons I would dismiss this appeal.

Lady Justice Arden:

38. I am grateful to Briggs LJ for his judgment and analysis. I have come to a different view about the meaning of Condition 9.11, which I shall call "the automatic crystallisation clause", which leads to a different analysis but the same outcome. I would, therefore, also dismiss this appeal. I use the same abbreviations as Briggs LJ.

Critical issue and approach

39. Because the issues before the judge fell to be decided on the pleadings, I take the appellants' case at its highest, which means that I assume that any question of fact will be decided in their favour. So, my reasoning does not rely on potentially disputed issues which might be raised by Nationwide, if the case went to trial, such as the question whether Nationwide had notice of the automatic crystallisation clause.

40. The critical issues are whether, in the events which have happened, the Debenture created a floating charge and whether that charge was enforceable at the date of the appointment of the administrators: see paragraphs 14 and 16 of Schedule B1 to the Insolvency Act 1986, set out in paragraph 21 above.

41. If, as the judge held, those conditions were satisfied, and there is no dispute of fact which would have to be determined at trial, the claim that the administrators were not duly appointed has no prospect of success and was properly struck out.

Interpretation of the automatic crystallisation clause

42. The automatic crystallisation clause provides:

> 9.11. If, without the prior written consent of the Lender, the Borrower encumbers howsoever the property subject to the floating charge, or any person levies or attempts to levy any distress, sequestration or other process against the said property the said floating charge shall automatically without notice operate and have effect as a fixed charge instantly such events occurs.

43. Ms Lesley Anderson QC submits that an automatic crystallisation clause should not be liberally construed. I agree that, once such a clause is activated, it may severely impede a company's business, and it is not realistic to approach such a clause on the basis that the parties would have intended it to be applicable save in so far as it so provides. This is consistent with the dictum of Hoffmann J in *Re Brightlife Ltd* [1986] BCLC 418, 426 that "the commercial inconvenience of automatic crystallisation gives rise to a strong presumption that it was not intended by the parties."

44. In this case, the critical wording to be interpreted is "If... the Borrower encumbers howsoever". This is to contrasted with the words "any person levies or attempts to

levy any distress" etc. If either of these events occurs, crystallisation is automatic "instantly such event occurs".

45. In my judgment, the words "If… the Borrower encumbers" does not apply to the prior act of attempting to encumber property or agreeing to enter into such security. It only applies when the Borrower actually encumbers the property in question in a legally binding way. I reach this conclusion from the contrast in wording set out in the preceding paragraph. In view of the deliberate reference to attempts in relation to distress etc, the word "encumber" can only mean the actual act of an encumbrance. Mr Wolman emphasises the word "howsoever", but the function of that word, in my judgment, is simply to make it clear that all forms of encumbrance are included. That is not an issue in this case because a floating charge is necessarily an encumbrance.

46. The result of this interpretation is that crystallisation takes place "instantly such an event occurs." The word "instantly" can mean either "simultaneously" (in the same moment) but it can also mean "forthwith or immediately upon" the occurrence of such event. In my judgment, the latter is the obvious and natural meaning given the deliberate use of the word "encumbers" in the first operative event.

Application of paragraphs 14 and 16 on my interpretation of the automatic crystallisation clause (Condition 9.11)

47. In my judgment, the floating charge created in favour of Nationwide meets all the requirements of Paragraph 14. The floating charge states that Paragraph 14 applies to the floating charge. It purports to empower the holder of the floating charge to appoint an administrator. It also purports to empower the holder of the floating charge to make an appointment of an administrative receiver within the meaning of section 29 (2) of the Insolvency Act 1986. The floating charge also relates to the whole or substantially the whole of the company's property. No party suggested that the "Assets" subjected to the Nationwide Debenture (see paragraph 13 above) did not constitute the "whole or substantially the whole of the company's property" for the purpose of subparagraph (3) (b) of Paragraph 14.

48. That completes the statutory conditions for the creation of a qualifying floating charge. There is no additional condition that there should be any assets available within the floating charge at the moment it is created. Moreover, as Vinelott J explained in *re Croftbell Limited* (which, as Briggs LJ states, is an authority on section 29(2) of the 1986 Act, and not paragraphs 14 to 16 of Schedule B1), there is no inherent requirement that the company should have assets which fall within the floating charge at the moment of its creation, in order for it to be validly created. If there was a requirement that there should be some assets at the date of the creation of the charge, it would be completely unclear what value or amount of assets were required. All that paragraph 14(3)(b) requires is that the floating charge "relates to the whole or substantially the whole of the company's property" and that is in my judgment satisfied by a floating charge which has effect in relation to the whole of that property when it comes into existence.

49. There were, in fact, clearly assets in this case on which the floating charge could bite, such as the equity of redemption in the property charged to CHL. I leave open the question whether a floating charge, which is not merely a "lightweight" charge (to adopt the term used by practitioners and the parties in this case but having no

particular relevance to it), but a "phantom" charge, by which I mean a charge which is executed when a company has no property and in circumstances where no party to it intends that the company should acquire property to fall within it, is even a valid floating charge.

50. It is important to note that the statutory requirements in Paragraph 14 apply to the floating charge as created: see section 251 of the Insolvency Act 1986. Subsequent crystallisation is not relevant. I am not, on my interpretation, concerned with the effect on the creation of the Nationwide floating charge of the *contemporaneous* crystallisation of the CHL floating charge.

51. Under paragraph 16 of Schedule B1, the floating charge has to be enforceable. This is a statutory condition on the appointment of an administrator and it therefore applies subsequently to the creation of the floating charge. The word "enforceable" clearly means "capable of being enforced". Again, it is not a statutory requirement that at the time relevant for paragraph 16 purposes there should be any assets of value within the floating charge at this moment in time. In the present case, the assets included an equity of redemption which may or may not have been of value to the floating charge holder. Nor in my judgment does it necessarily matter at that time whether the floating charge has ceased to float. The effect of its ceasing to float is that the incomplete assignment effected by the charge has become a completed assignment: see *Business Computers Limited v Anglo-African Leasing Limited* [1977] 1 WLR 578. The significant point for paragraph 16 purposes is that in this case Nationwide had not then taken any step to enforce the Debenture. There is no suggestion that its contractual right to take such steps had not arisen. In my judgment, that means that the charge was enforceable for paragraph 16 purposes.

52. On my interpretation of the automatic crystallisation clause, crystallisation occurred after, and not at the same time as, the floating charge was created. That avoids the necessity for any discussion as to how the floating charges then ranked. The important point for my purposes is that the subsequent automatic crystallisation of the prior floating charge does not prevent the Nationwide floating charge from being enforceable by the appointment of an administrator in January 2012. I accept Mr Wolman's point that the prior floating charge would have encompassed assets agreed to be charged to Nationwide but that does not prevent the enforcement of the second floating charge in favour of Nationwide.

53. CHL declared itself to be a floating chargee in its response to the notice under paragraph 15 of Schedule B1. Ms Anderson submits that this was indicative of the fact that CHL did not consider that its floating charge had crystallised under the automatic crystallisation clause. I have not attached any weight to this fact. First the question of what CHL knew or agreed raises questions of fact. Second, CHL had a floating charge for the purpose of the Insolvency Act 1986 because it was a floating charge "as created": see section 251 of the Insolvency Act 1986, set out in paragraph 22 above. That may have been the limit of the confirmation which CHL was giving.

54. I would qualify paragraph 24 above since crystallisation may occur as a result of occurrence of events outside the terms of the floating charge (*Re Woodroffe's (Musical Instruments) Ltd* (1985) BCLC 227.).

55. As to paragraph 28 above, the cases there cited do not deal with the effect of the crystallisation of a prior floating charge on a second floating charge, which was created before the date of crystallisation of the prior charge, still less the crystallisation of a second charge at precisely the same time as it is created. As explained, the legal consequence of crystallisation (however occurring) of a floating charge is in principle to complete the assignment which until such an event would have been inchoate. In many cases this event under a prior floating charge will terminate the company's licence to trade with the assets within either floating charge so that neither floating charge is able to float: c.f. the third element of a floating charge identified by Romer LJ in *Re Yorkshire Woolcombers Association* (see paragraph 23 above) and see *Re Woodroffe's (Musical Instruments) Ltd*). Whether it does in fact have this last-mentioned effect would be a question of fact: *Re Woodroffe's (Musical Instruments) Ltd.* In the present case, there is or may be an issue of fact as to whether automatic crystallisation of CHL's prior floating charge did in fact put an end to the company's power to manage its business.

56. Mr Wolman relied on the appellants' evidence that the Debenture creating the floating charge was executed earlier in the same day as the other documentation required by Nationwide and he submitted that the CHL floating charge, therefore, crystallised by virtue of the automatic crystallisation charge before the grant of the other charges in favour of Nationwide. However, he rightly accepted that, because the delivery of all the charging documents was a condition precedent to the facility letter, the prior execution of the Debenture could only have constituted the delivery of a charge in escrow.

57. For these reasons, I would make the order that Briggs LJ proposes.