Neutral Citation No: [2017] NICh 27 *Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Ref:* **HOR10405** *Delivered:* **29/11/2017**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

ANDREW DOLLIVER AND JOSEPH CHARLETON (AS JOINT ADMINISTRATORS OF CLOGHOGUE ENTERPRISES LIMITED, IN ADMINISTRATION)

and

EILEEN O'CALLAGHAN

First-named Defendant;

and

SPOC (NI) LIMITED

Second-named Defendant;

and

DEREK MURPHY

Third-named Defendant.

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HORNER J

A. INTRODUCTION

[1] The plaintiffs claim to be the joint administrators of Cloghogue Enterprises Limited ("the Company") lawfully appointed by Clipper Holdings II SARL ("Clipper").

[2] Clipper is the successor in title, it claims, to the AIB Group (UK) Plc ("AIB") and claims to have a Qualifying Floating Charge ("QFC") over the Company's property following a Global Deed of Transfer ("the Deed") of 29 January 2016.

[3] The plaintiffs made an application for summary judgment in respect of two transactions by the Company to the second defendant, which they claim were an undervalue, namely:

(i) The transfer of August 2015 of Folio AR109171 Co Antrim to the second defendant and

(ii) The March 2016 lease to the second defendant in respect of Unit 1 of the Cloghogue Business Park ("the Business Park") dated 29 March 2016.

[4] The application for summary judgment was heard on 20, 26 and 27 June and I delivered an ex tempore judgment on 29 June 2012 in favour of the plaintiffs setting aside both transactions as being at an under value pursuant to the Insolvency (NI) Order 1989.

[5] Following the ex tempore judgment the second defendants' solicitors wrote on 4 July 2017 challenging the appointment of the plaintiffs as administrators. At that time the Order had not been finalised and had been neither signed nor sealed. The court had asked to hear further submissions in respect of the consideration paid by the second defendant and also on the issue of costs. The court decided that in accordance with Order 1 Rule 1(A) that the best course was to determine the issue of whether the appointment of the plaintiffs was lawful and valid before taking any further steps. It is true to say that the first and second defendant had never admitted the plaintiffs' title. If the title issue is not resolved at the outset, then there is a risk of inconsistent decisions in respect of the property, including any application being made for possession of the Business Park. Further, as part of the challenge was to the efficacy of the floating charge, it was important pursuant to paragraph 17 of Schedule B1 that the floating charge should be enforceable. Also the notice of appointment made under paragraph 19 of Schedule B1 states that there must be a statutory declaration by or on behalf of the person who makes the appointment that "the person is a holder of a qualifying floating charge in respect of the company's property". However, even though this challenge was made very late in the day, it seemed to me that it was essential that it be addressed. Any unfairness arising from the tardiness of the application could be met by, for example, an order in respect of any additional costs which may have been incurred being made against the party responsible for the delay. To be fair, Mr McCausland on behalf of the plaintiffs, recognised the good sense of obtaining a ruling on the validity of the appointment at this stage.

[6] The above is the briefest of summaries of the circumstances which form the background to the present jurisdictional challenge and which has involved hearings extending over a period of six months. I should also say that I am indebted to counsel on both sides for the helpful written and oral submissions made during this application.

B. THE CASE PUT FORWARD BY THE RESPECTIVE PARTIES

[7] What follows is the briefest of summaries of the arguments advanced by counsel for the plaintiffs and the second defendant respectively and is not intended to be a rehearsal of the finely nuanced and detailed arguments addressed to the court by counsel on both sides.

(i) The Defendant's Case

(a) The Clipper was not registered as legal mortgagee and was not entitled to appoint the plaintiffs as administrators.

(b) Clipper was not a "holder" of a QFC within the meaning of paragraph 15 of Schedule B1.

(c) The QFC was not enforceable at the time of appointment because there were no assets to which it could attach.

(ii) The plaintiff's case

(a) The fact that Clipper was not registered as legal mortgagee was irrelevant. Inter alia, the second defendant has confused the right to possession with the right to appoint an administrator.

(b) Clipper was a holder of QFC within the terms of paragraph 15(1)(iii)(a) and (c).

(c) The QFC was enforceable at the time the appointments were made.

(d) In any event the fixed charges in respect of the book debts and bank balances failed and this property was caught by the QFC.

C. THE DOCUMENTS

[11] The mortgage debenture relied by the plaintiffs in creating a floating charge is dated 8 August 2006. It is made between the Company and the Bank ("AIB"). It contains the following material terms:

(a) Clause 2 contains a covenant to pay AIB on demand all sums of money and all costs etc in relation to the enforcement of the mortgage.

(b) Clause 3(1)(a) provides that as security for the payment and discharge of the secured obligations (exhaustively defined and including all monies due to the AIB) the Company as beneficial owner demises and assigns unto AIB the property described in the schedule which comprises folios 17337, 17447, 16290

and 24508 Co Armagh ("the Lands") and assents to the registration of a charge hereby created as a burden affecting such Lands.

(c) At Clause 3(1)(b) by way of fixed equitable charge charges to the AIB all estates or interests in any field or leasehold property (except the Lands).

(d) By Clause 3(1)(c) by way of fixed charge charges to the AIB all book debts and other debts and all balances standing to the credit of any current, deposit or other account of the Company with the AIB.

(e) By Clause 3(1)(d) by way of fixed charge charges to the AIB all stocks, shares and/or securities in any body corporate belonging to the Company.

(f) By Clause 3(1)(e) by way of fixed charge charges to the AIB the goodwill to give the benefit of any licences and registrations required or obtained for the running of any business of the Company etc.

(g) By Clause 3(1)(f) by way of fixed charge charges to the AIB all plant etc.

(h) By Clause 3(1)(g):

> "By way of floating charge charges to the (AIB) its undertaking and all its other property, assets and rights whatsoever and wheresoever present and/or the future, including those expressed as charged by way of fixed charge, if and to the extent that, such charge may fail (whether by virtue of the laws of Northern Ireland or the laws of any other jurisdiction in which the relevant property, asset or right is located or to which it subject) for any reason to operate as a fixed charge (hereinafter called **the Property charged by way of Floating Charge** and together with the Legally Mortgaged property, the Equitably Charged property, the Book and Other Debts, the Credit Balances, the Securities, the Goodwill and Intellectual Property, the Equipment and all other property hereby mortgaged or charged collectively called **the Charged Property** which expression may be taken to refer to the real and/or the personal or incorporeal property hereby mortgaged or charged as the context may require or admit);…"

(i) By Clause 3(2):

> "Each charge, mortgage or assignment by way of security hereby created is separate, independent of and distinct

from and in addition to every other such charge, mortgage or assignment."

(j) Clause 3(4) provides that:

> "The floating charge created by Clause 3(1)(g) is a qualified floating charge for the purpose of paragraph 15 of Schedule B1 of the 2005 Order."

(k) Clause 8(1) provides in respect of book and other debts that in the absence of specific written instruction from the AIB to the contrary the Company shall collect in "the Book and Other Debts and shall pay into the Company's current account with the AIB and/or if so directed by the AIB into a special or specifically designated account with the AIB either in the name of the Company or the AIB or in the joint names of the Company and the AIB or into such other account as the AIB may direct all monies which it may receive in respect of the Book and Other Debts and pending such payment hold such monies on trust for the AIB and shall not sell, factor, discount or otherwise charge or assign the same in favour of any person or purport to do so without the prior consent in writing of the AIB and the Company shall if called upon to do so by the AIB from time to time execute legal assignments of such Book and Other Debts to the AIB in such form and on such terms as the AIB may direct and give notice of such legal assignments to the debtors from whom such Book and Other Debts are due, as the AIB may require."

(l) Finally, Clause 8(2) provided that with respect to Credit Balances the Company agreed to inform the AIB as soon as any Credit Balance with any third party other than the AIB comes into existence and if so directed by the AIB the Company agreed to transfer any such credit balance "into a specifically designated account with the AIB in the name of the Company or the AIB or in the joint names of the Company and the AIB or into such other account as the AIB may direct and shall not sell or otherwise charge or assign any Credit Balance in favour of any person or purport to do so without the prior consent in writing of the AIB."

It was confirmed to the court by counsel for the plaintiffs that the AIB had fixed or floating charges in respect of all of the company's property.

[12] The Deed between AIB and Clipper records that AIB and Clipper had entered into a sale and purchase agreement whereby AIB had agreed to sell and Clipper had agreed to purchase the assets and the contractual rights of the AIB. The deed provided at Clause 1 that the AIB as:

(a) Beneficial owner free from encumbrances, and as the registered owner, or as applicable, the party entitled to be registered as owner, with effect on and from the date of this Deed, hereby assigns absolutely to the Buyer, subject to

the subsisting rights of redemption of the Borrowers and any Obligor and to the extent capable of assignment, all of its right, title, interest, estate, entitlement, benefit and obligation (present and future, and whether legal, equitable or beneficial or contingent except as otherwise expressly stated in this Deed) in and under each Loan Asset, and the Security and Credit Documentation applicable to each such Loan Asset (including all schedules and appendices to such Credit Documentation) and the Seller's right, title and interest in and to the Ancillary Rights and Claims and including without limitation. …

1.1 All right, title, benefit, estate, entitlement and obligation of the Seller in the Loan Assets and Security constituted by the documents listed in Schedule 2 …"

Schedule 2 lists, inter alia, the mortgage debenture dated 8 August 2006 between the Company and AIB including the specific charges over and in respect of the Lands. There are other mortgages in respect of other properties. There is a mortgage of 10 November 2006 between the Company and AIB relating to 41 Church View, Holywood, County Down (Folio No. DN974001, County Down) and a mortgage dated 12 January 2017 between the Company as borrower and AIB in respect of lands and premises at 311 Cavehill Road, Belfast (AN 152155L County Antrim).

D. RELEVANT STATUTORY PROVISIONS

[13] Administration orders for insolvent companies were an innovation in Northern Ireland introduced following the recommendations of the Cork Committee and came into effect originally through the Insolvency (Northern Ireland) Order 1989. This provided that an administrator could be appointed out of court by the holder of a QFC, or by the company or the directors or by the court. Schedule B(1) makes provision for the administration of companies.

[14] Paragraph 15 deals with the power to appoint:

"15(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; or

(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 of Article 5(1).

(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 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] The plaintiff relies primarily on paragraphs 3, 15(3)(a) and (c).

[16] Paragraph 17 provides that an administrator may not be appointed under paragraph 15 while a floating charge on which the appointment relies is not enforceable.

[17] Further, paragraph 19(2) provides that the notice of appointment must include a statutory declaration by or on behalf of the person who makes the appointment –

"(a) That the person is a holder of a qualifying floating charge in respect of the company's property."

Lightman and Moss on the Law of Administrators and Receivers of Companies (5th Edition) at 3.005 state that "If the administrator is in any doubt as to the validity or character of the charge under which he has been appointed, he should investigate any material facts that may not be clear, seek legal advice and, if necessary, **seek the directions of the court**." (emphasis added)

[18] The nature and the effect of the administration order was set out clearly by Lord Hoffmann in *Freakley v Centre Reinsurance Company International* [2006] UKHL 45 at [7] when he said:

> "In essence an administration order did two things. First, it placed procedural bar on the enforcement of security over the company's property or the commencement or continuance of legal proceedings or execution against the company. Secondly, it substituted for the existing management a court-appointed administrator with power, under the control of the court, to manage the company's business property. It did not alter substantive rights under contracts into which the company had entered or security which it had given. It did not affect the company's capacity, under its new management, to continue to trade and incur liabilities. It did not, save to the extent which I shall explain, affect the priorities which creditors would have if the company was wound up. That was left to any future reconstruction or liquidation."

[19] An administrator so appointed must carry out his duties with the objective of:

> "(i) Rescuing the company as a going concern; or
>
> (ii) Achieving a better result for the company's creditors as a whole and would be likely if the company were wound up (without first being placed into administration); or
>
> (iii) Realising property in order to make a distribution to one or more secure or preferential creditors."

It is important to note that the first objective, that is rescuing the company as a going concern, is the primary objective of the administration. Paragraph 60 of Schedule B1 provides:

> "(1) The administrator of a company may do anything necessary to expedient the management of the affairs, business and property of the company."

Under paragraph 68 the administrator of the Company shall on his appointment "take custody and control of all the property to which he thinks the company is entitled."

[20] The holder of a fixed charge cannot appoint an administrator or administrative receiver. A mortgage debenture is freely assignable, but the assignee takes subject all equities "subsisting between the assignor and the company at the

date that notice is given to the company, unless the debenture can make provision that the assignor may transfer free of such equities": see 3-002 of Lightman and Moss."

[21] Finally Section 11 of the Land Registration Act (NI) 1970 deals with the conclusiveness of the Land Register. It states:

> "11(1) Save as is otherwise provided by or under this Act the register shall be conclusive evidence of the titles shown on that register and of any right, privilege, appurtenance or burden as shown thereon, and the title of any person shown thereon shall not, in the absence of actual fraud be in any way affected in consequence of his having notice of any deed, document or matter relating to or affecting the title so shown."

E. DISCUSSION

Floating Charges

[22] There is an excellent history of floating charges provided in an article by R C Nolan entitled "*Property in a Fund*" in (2004) LQR 108 at 117-130.

[23] The hallmarks of a floating charge were identified by Romer J in *Re Yorkshire Woolcombers Association Limited* [1903] 2 Ch 284 at 295:

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

> way so far as concerns the particular class of assets I am dealing with." (Emphasis added)

In *Evans v Rival Granite Quarries Limited* [1910] 2 KB 979 at 999 Buckley LJ said:

> "A floating charge is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. … A floating security is not a specific charge …"

[24] In *Agnew v Commissioner of Inland Revenue* [2001] 2 AC 710 (PC) Lord Millett said at paragraph [13]:

> "It is the third characteristic which is the hallmark of a floating charge and distinguishes it from a fixed charge. Since the existence of a fixed charge would make it impossible for the company to carry on business in the ordinary way without the consent of the charge holder, it follows that its ability to [do] so without such consent is inconsistent with the fixed nature of the charge."

[25] It was originally thought that a fixed charge could not be taken over current or circulating assets, only over fixed ones. Following *Siebe Gorman and Co Limited v Barclays Bank* [1979] 2 Lloyds Rep 142 it became clear that the key issue was whether the company was free to deal with the assets in the ordinary course of business, not whether the charged assets were fixed or current. Thus it is theoretically possible to have a fixed charge over current assets and also possible (and indeed easier) to have a floating charge over assets such as land. (*Siebe Gorman and Co Limited* was not overruled by the House of Lords in *Spectrum Plus Limited* [2005] 2 AC 680 on this issue).

Registration

[26] The second defendant complains that Clipper is not in a position to appoint administrators because it is not registered in the Land Registry as the legal mortgagee of the Lands, and therefore cannot make any appointment of administrators, if I understand the second defendant's argument correctly. This is incorrect. A floating charge is an immediate equitable charge on the assets of a company. It is freely assignable and was assigned by AIB to Clipper. As an equitable charge, a QFC charge does not require to be registered. Moir on *Land Registration* at 17.19 states:

> "A floating charge is not capable of registration unless it crystallises, although the charge may register a cautionary inhibition in order to protect its interests."

[27] In those circumstances the complaint that Clipper has not been registered as legal mortgagee of the Lands, (the responsibility for which incidentally rests entirely with the Land Registry) is not of any legal significance in this instance. There has been an assignment from AIB to Clipper and Clipper is now (inter alia) the holder as required by paragraph 15 of Schedule B1 because its security from the company fulfils the requirements of, inter alia, paragraph 15(3)(c).

[28] If the second-named defendant's argument was correct then the holder of a QFC of the whole of a Company's property that was otherwise unencumbered could never appoint an administrator despite the clear words of paragraph 15(3)(a) of Schedule B1. The error on the second defendant's part arises from equating "holder" with "legal mortgagee" or legal owner and/or from confusing the appointment of an administrator with the powers of a mortgagee. There is no problem with the holder of a QFC appointing an administrator if the holder can bring himself within one of the categories set out in paragraph 15 of Schedule B1. The second defendant seems to think that it is necessary that a holder should be a legal owner and registered as such but this is quite wrong. "A person is a holder of a qualifying floating charge if his security from the company is one or more qualifying floating charges over the Company and that qualifying floating charge, where all the qualifying floating charges together, relate to the whole or substantially the whole of the Company's property, or if he holds 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 those items of security is a qualifying floating charge": see 5.51 of Gowdy and Gowdy on *Corporate Insolvency*.

[29] The dispute in this case is not about the right to possession of a mortgagee as it was in *Paragon Finance Plc v Pender* [2015] 1 WLR 3412 which the second defendant relied upon. The issue in dispute is whether Clipper was entitled to appoint the plaintiffs as administrators.

Was Clipper the holder of an enforceable QFC?

[30] As I have observed there can be no doubt that Clipper, being the assignee of AIB, held a debenture secured "by charges and other forms of security which relate to the whole or substantially the whole of the company's property at least one of which is a qualifying floating charge." That is clear from the debenture. The Company's property was secured under the debenture to the AIB whether by fixed or floating charges. As I have observed there can be no doubt that Clipper, being the assignee of the AIB held a debenture secured "by charges and other forms of security which relate to the whole or substantially the whole of the company's property at least one of which is qualifying floating charge": see paragraph 15(3)(c) of Schedule B(1).

[31] The complaint made by the second defendant is on the basis that the Lands are the subject of fixed charges and Clause 3(1)(g) of the debenture is a Floating Charge "only over property not already dealt with. Accordingly, the floating charge

only applies to property of the Company charged by a fixed charge only if the fixed charge fails." In essence the second defendant complains that the floating charge secured no property of the company at the time of appointment. It was therefore not enforceable. This issue has been addressed in two cases. The first by Vinelott J in *Re Croftbell Ltd* [1990] BC 781 and then by the Court of Appeal in England in *Saw (SW) (2010) Ltd v Wilson & Ors (as joint administrators of Property Edge Lettings Ltd)* [2017] EWCA Civ 1001.

[32] *Re Croftbell Limited* is a case which deals with the appointment of an administrative receiver, rather than an administrator. The company was a member of a group of companies whose only substantial asset was the share capital of another company which owned a valuable site. Those shares cost £2m of which £1.7m was borrowed from a debenture holder. At the time of execution of the debenture, the company also executed a pledge of the shares to the debenture holder as security and gave a second fixed charge over the shares to another lender to secure a £400,000 advance. The company's other assets and liabilities related to transactions with other group companies. The company argued that the receivers were not administrative receivers within the meaning of Section 29(2) of the English Insolvency Act 1986 because the charge in the debenture although expressed to be a floating charge did not answer the description of a floating charge, in light of the pledge of the shares. The company submitted that because it merely acquired and held the shares in another company and never traded and otherwise only entered into inter-company transactions, the debenture could not constitute a charge on a class of assets which changed the ordinary course of business, nor could the company carry on business in the ordinary way with that class of assets until something was done to crystallise the charge, for the company had no business. In the alternative the company argued that if the debenture did create a floating charge, it should nonetheless be disregarded for the purposes of Section 9 of the 1986 Act because it was a mere artifice aimed at circumventing the purpose of Part II of the Act: the power of the court to appoint an administrator should not be stultified by the device of tacking a floating charge on to a fixed charge over the company's sole or principal asset.

[33] The court held, acceding to the debenture holder's application to dismiss the application for appointment of an administrator, that:

> "(1) The company's submission that the debenture did not create a floating charge led to the conclusion that the debenture had no operation at all, which could not be accepted in relation to a debenture expressed to create a floating charge over present and future property of the company.
>
> (2) A floating charge in Section 29(2) had to include a floating charge which when created extended to future assets even if at the creation of the

> charge the company had no assets or no assets which were not the subject of a fixed charge, and the intentions of the company when the debenture was executed, and the debenture holder's knowledge of those intentions were irrelevant."

Vinelott LJ said:

> "For my part I think it is sufficient to say that I see no ground on which the court could conclude that a charge which according to the terms created a floating charge over the present and any future property of the company had no operation at all."

He then dealt with the second argument raised about the appointment of an administrative receiver as follows:

> "As I understand Mr Bannister's argument it is not suggested that the debenture creating a floating charge (which I think this debenture did) falls outside Section 29(2), merely because at the time when the receivers 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 the future assets, merely because of 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."

Then he went on to say:

> "I do not think that the answer to the question whether the holder of a debenture, which on its face

> creates a floating charge, has power to appoint an administrative receiver can turn on the intentions of the company when the debenture was executed or the knowledge by the debenture holder of those intentions'."

[34] In this case even if all the property owned by the company is the subject of fixed charges, the floating charge is being created over present assets and future assets not caught by any fixed charge and any assets caught by a fixed charge where that charge fails. The argument advanced by the second defendant, even on the basis that there are at present no assets not caught by the fixed charges, assumes that there will be no future assets.

[35] In *Saw (SW) (2010) Limited v Wilson and Others (As Joint Administrators of Property Edge Lettings Limited)* the Court of Appeal in England heard an appeal by a shareholder and creditor of a company in administration against the striking out of their application for a declaration that the second respondent building society did not have an enforceable floating charge over the company's property and did not therefore have the power to appoint the first respondent joint administrators. The background facts can be summarised as follows. A, a mortgage lender, granted a loan to a company, B, secured by fixed and floating charges. B covenanted not to create or permit any security interest in the property subject to the charges without A's consent. Clause 9.11 of the mortgage conditions provided that if, without A's prior written consent, B further encumbered the property subject to the floating charge, the charge would automatically become a fixed charge. In 2008, C, a building society, granted B a loan facility subject to a first ranking debenture over its assets by way of a floating charge. A's consent was not obtained, but B warranted a good and marketable title to the assets charged. Provision was made for the automatic crystallisation of the charge. B later experienced financial difficulties. C sought to realise its security. It obtained A's consent to the appointment of joint administrators pursuant to the power contained in the debenture. The appellants challenged the validity of that appointment. They claimed that the debenture had been granted without A's prior written consent, causing an immediate crystallisation of A's charge. They contended that the debenture could not therefore constitute a floating charge within the meaning of Schedule B1 paragraph 14 (our paragraph 15) of the Insolvency Act 1986 because there was not at the time of its grant any property of B to which it could attach, and that B had no power thereafter to acquire any property to which it could attach in the future. **It further argued that the debenture was not enforceable at the time of the appointment of the administrators because there remained no property of B to which it could attach.** The Court of Appeal dismissed the appeal on the basis that none of the authorities regarding floating charges provided any support for the appellants' main submission that the validity of an instrument as a floating charge, at the time of its creation, depended on the existence of uncharged assets of the company creating it, or on 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. Instead both cases concerned the

alternative classification of a charge as fixed or as floating by reference simply to the construction of the relevant instrument creating the charge. The question was not therefore whether B was inhibited in some other way from dealing with its assets, but whether it was inhibited by the terms of the instrument itself. The meaning of floating charge in Section 29(2) of the English Insolvency Act which dealt with the appointment of administrative receivers was in no relevant respect different from that in Schedule B1 paragraph 14 (our paragraph 15). Both provisions required the question to be answered at the time of the creation of the relevant charge.

Briggs LJ said:

> "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 whereupon 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 …** The question is not whether the company is inhibited in some way from dealing with its assets, but whether it is inhibited by the terms of the instrument itself."(My underlining)

Briggs LJ then referred to the authority of *Re Croftbell Limited* and the comments of Vinelott J referred to above which directly contradicted the submissions of Mr Wolman. He went on to say:

> "26. The meaning of floating charges in Section 29(2) is in no relevant respect different from that in (paragraph 14) (our paragraph 15) 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 purposes 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."

He continued:

> "29. Mr Wolman's alternative submission that, even if a floating charge when (sic) created, the Debenture was unenforceable at the time of the appointment of the joint administrators, is in my view misconceived. The essence of this submission was that a floating charge was not enforceable within the meaning of paragraph 16 (our paragraph 17) 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 (our paragraph 16) 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 the 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 occurred 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 (our paragraph 16) 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 requirements of paragraph 16 (our paragraph 17) that the floating charge relied upon for the appointment of administrators might be enforceable is concerned with the question whether the charge has a right to enforce, **rather than with the question whether there are free assets to which a 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."** (Emphasis added)

Arden LJ said at paragraph 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 Brigg LJ, states, is an authority in Section 29(2) of the 1986 Act, and not paragraphs 14-16 of Schedule B1), there is no inherent requirement that the company should have any 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) (our paragraph 15(3)(b)) requires is that the floating charge **relates to the whole or substantially the whole of the company's property** and it 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."

She then goes on to say at paragraph 51:

> "Under paragraph 16 (our paragraph 17) 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 (our paragraph 17) 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 …" (Emphasis added)

[36] I am satisfied on the facts that this is a QFC under paragraph 15 and that even if the property of the company at the time of creation of the qualifying floating charge was subject to fixed charges, and in particular the lands were the subject of fixed charges, the floating charge, under the debenture can provide security in respect of future property not caught by the fixed charges, including any equity of redemption, and was not dependent on the fixed charge in respect of the Lands failing or the fixed charge in respect of any other assets failing. I am further satisfied that Briggs LJ was correct in rejecting the submission that the debenture was unenforceable because the assets to which it related were the subject of a prior security, whether fixed or floating or because there were no assets of value caught by the floating charge at the date of appointment.

[37] There is limited evidence about whether or not there are any other assets of the Company not referred to in the debenture to which the qualifying floating charge can attach. However, for the sake of completeness, and despite the authorities to the contrary, I am going to assume that the second defendant is correct in its proposition that the floating charge needed assets to which it could attach at the date of appointment (although this is clearly wrong). This means I need to look to see whether or not any of the fixed charges failed and if so whether they would be

caught by the floating charge under paragraph 3(1)(g) of the debenture. I will try and deal with this issue as briefly as possible.

[38] In *National Westminster Bank Plc v Spectrum Plus Limited* [2005] UKHL 41 the House of Lords reaffirmed that when considering whether a charge is fixed or floating can usually be determined by testing it against the characteristics set out by Romer LJ in *Yorkshire Woolcombers Association Limited* (see above). Lord Scott considered that the third characteristic identified by Romer J to be the "hallmark" of floating charge. The key issue was whether the charger maintained the ability to control and manage the assets and withdraw them from the security. Lord Walker indicated that one way for a charge booked debts to be characterised as a fixed charge would be for the account, into which the proceedings are required to be paid, to be effectively "a blocked account, in fact".

[39] In the present debenture the book debts and bank balances are charged by way of a fixed charge under clause 3(1)(d). That clause also requires that book debts are to be paid into the company's current account "with the AIB and/or if so directed by the AIB into a special or specifically designated account with the AIB either in the name of the Company or the AIB or in the joint names of the Company and AIB or into such other account as the AIB may direct all moneys which it may receive in respect of the book and other and pending payment hold them for on trust for the AIB. The Company has to execute legal assignments of such book or other debts when required to do so. Further the Company has to inform the AIB as soon as any credit balance with any third party comes in existence and if so directed by the AIB shall transfer it into a specifically designated account with the AIB in the names of the Company or the AIB or both or into such other account as the AIB may direct. The Company agrees not to charge etc any credit balance in favour of any person without the prior consent in writing of the AIB.

[40] It seems to me that on the basis of the evidence before this court the charge in this case is a floating one both in respect of book debts and the bank balances. As Lord Scott said at [107]:

> "In all these cases, and in any other case in which the chargor remains free to remove the charged assets from the security, the charge should, in principle, be characterised as a floating charge. The assets would have the circulating, ambulatory character distinctive of a floating charge."

Both the book debts and the bank balances despite the restrictions placed upon them by clause 8(2) seem to retain Romer LJ's third characteristic. Both these assets are of a circulating, ambulatory character which is the mark of a floating charge.

[41] Finally, the further suggestion tentatively advanced on behalf of the second defendant that because the Lands are the subject of a prior fixed charge, the

administration has no effect and/or the administrators have no rights over those Lands is, if I have understood the argument being made, quite wrong. In this case I find that the administrators have been lawfully and validly appointed. Their appointment is in respect of the Company and the administration applies to all of the Company's property, including the Lands the subject of the fixed charges. The administrators have a duty, as I have pointed out to take into their custody under their control all the property which they think the Company is entitled to manage the Company's affairs: see paragraphs 68 and 69 of Schedule B1. Further the secured creditor is protected because an administrator's statement of proposal under paragraph 50 may not include any action which "(a) affects the right of the secured creditor of the Company to enforce his security".

F. CONCLUSION

[42] On the basis of the evidence before this court, I conclude:

(i) Clipper is the holder of a QFC in respect of the Company.

(ii) QFC was enforceable at the date of appointment.

(iii) The plaintiffs were lawfully and validly appointed as administrators over the Company's property.

(iv) Even though the Lands owned by the Company are subject to a fixed charge, those Lands still form part of the property of the Company which is subject to the administration order.

(v) The fixed charges in respect of the working debts and/or the bank balances are floating rather than fixed charges.

(vi) The failure of the Land Register to register Clipper as the successor in title to the AIB is not relevant to the validity of the appointment of the administrators.

[43] I will hear the parties in respect of the issue of costs.