FIXED CHARGES ON BOOK DEBTS—THE STORY CONTINUES

For the purposes of creating consensual security interests, are a debt and its proceeds a single indivisible asset or can they be separated? Is a security on book debts and proceeds a single indivisible charge or two charges? If it is a single indivisible charge, can it be a convertible charge, that is a charge which is fixed so long as it attaches to unrealised debts but floating in respect of proceeds of the debts? Recent decisions of the English courts have shrouded these questions in confusion. The appeal from the New Zealand Court of Appeal's decision in *Re Brumark Investments Ltd.* [2000] 1 B.C.L.C. 353 gives the Privy Council an opportunity to provide much-needed clarification.

Some general points should be stated at the outset. First, the value of a debt lies in more than just a right to sue the debtor. A security on debts can be realised otherwise than by suing the debtors for payment, such as by factoring the uncollected debts. A fixed security on debts ranks ahead of later security interests in the same property assuming all registration requirements are fulfilled. There are sound commercial reasons for taking fixed charges on uncollected debts regardless of how the proceeds are treated for security purposes.

Secondly, whether a fixed charge on debts can exist if the chargee does not control the proceeds depends on the current conceptual boundaries of security interests. Commercial law should support and facilitate business (*Re BCCI (No. 8)* [1998] A.C. 214). However, if something is legally impossible, the fact that practitioners have managed to convince themselves otherwise cannot preclude the court from striking it down: practice is not a safe harbour.

Thirdly, if a fixed charge on debts without chargee control of the proceeds is conceptually possible, as the law now stands it will not be defeated in the court on the public policy ground that it undermines the position of other claimants against the chargor whose debts have preferential status under insolvency legislation. Policy implications of extending the categories of fixed charge through contractual creativeness are a matter for Parliament rather than the courts.

The essential characteristics of a fixed charge on book debts is the issue specifically raised in *Brumark*. Since the new turn in the law achieved by the English Court of Appeal in *Re New Bullas Trading Ltd.* [1994] B.C.C. 36, the established approach—that the chargee must control both the debts and their proceeds for the charge on the debts to be fixed—has been open to question.

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According to *New Bullas*, control of a debt and of its proceeds is only required where the charging document treats them as indivisible elements of a single asset; if they are separated by contractual stipulation, security can be created which, through appropriate provision for chargee control of dealings in the uncollected debt, is fixed in respect of the debt but floating in respect of the proceeds, which therefore remain available for use in the ordinary course of the chargor's business.

The *Brumark* charge had been drafted with a view to taking advantage of the *New Bullas* debt/proceeds dichotomy but, reversing the first instance decision, the NZ Court of Appeal held that the so-called fixed charge on the book debts was really a floating charge. No valid distinction could be drawn between dealings in the form of the collection of the proceeds of the debts and dealings by way of disposals to third parties of the debts themselves. The exclusion of the proceeds of the debts from the fixed charge simply emphasised the company's freedom to deal with the debts on its own account.

The key argument against *New Bullas* is that if the chargor is free to collect the proceeds of debts for its own account, the chargor is able to extinguish the subject-matter of a charge on debts by its own act. Third parties, i.e. the debtors, are also involved so the timing of the extinction of the debts by payment does not lie totally within the chargor's control. But as between chargor and chargee, control of the debt collection process lies with the chargor. For the chargor to be in control of the process of extinguishing the subject-matter of the security is inconsistent with the nature of fixed security (*Re Yorkshire Woolcombers Assn. Ltd.* [1903] 2 Ch. 284, 294 *per* Vaughan Williams L.J). This points to the conclusion that a fixed charge on book debts that leaves the chargor free to collect the proceeds is simply conceptually impossible.

Looked at this way, it becomes clear, as Worthington has argued, that the question whether a debt and its proceeds can be divided is too broad a question to ask in this context. Proceeds can be charged by way of fixed charge whilst the debts themselves are subject to a floating charge or are unsecured. But where the issue is whether a charge on debts is a fixed charge, the security must, for the reasons just mentioned, allow the chargee to control the proceeds of debts as well as the debts themselves.

If, contrary to the analysis supported here, absence of chargee control over the debt collection process is not fatal to the existence of a fixed charge, the "one charge or two" question becomes relevant. Should the Privy Council rule in favour of a *New Bullas*-

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type security, there seems little doubt that it should be regarded as a single convertible charge (a view supported by Gough and Goode (otherwise a powerful critic of *New Bullas*) and perhaps misunderstood at first instance in *Brumark* where indivisibility was assumed to preclude convertibility). This would be a pro-secured creditor result since a convertible charge which is created as a fixed charge, though it later converts to a floating charge in respect of proceeds, will rank ahead of preferential debts. If there were two security interests—a fixed charge on the debts and a floating charge on the proceeds—the preferential debts would rank ahead in respect of the proceeds.

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ATTRIBUTING HARM: CHILD ABUSE AND THE UNKNOWN PERPETRATOR

How far should we as a society concerned to protect children be prepared to run the risk of trampling on the rights of potentially innocent parents? Once the technicality is stripped away, this was essentially the issue which the House of Lords confronted in *Lancashire County Council* v. *B* [2000] 2 W.L.R. 590. The courts may only make a care or supervision order where the local authority can satisfy the "threshold conditions" in the Children Act 1989, s.31(2). The child must be suffering, or likely to suffer, significant harm but this harm, or the risk of it, must also be:

> attributable to—
> (i) the care given to the child, or likely to be given to him if the order were not made, not being what it would be reasonable to expect a parent to give to him; or
> (ii) the child's being beyond parental control.

What then is the position if it can be shown that the child is suffering significant harm, which is attributable to a deficiency of proper care, but which cannot be directly attributed to either of the child's parents or to any identifiable individual? The *Lancashire* case concerned two babies and four adults. Child A was looked after partly by her mother and father and partly by a childminder who was the mother of child B. The father of B was living with B's mother. During the period of this arrangement, A suffered serious non-accidental head injuries which were caused by at least two episodes of violent shaking. The father of B was exonerated from any blame, but the parents of A, together with the childminder, all remained under suspicion. The evidence could not, however,

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