

The Crystallisation of Floating Charges: Rethinking the Conceptual Framework

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Abstract: Crystallisation is the name given to the conversion of a floating charge into a fixed charge. While much has been written on how charges are classified as fixed or floating and on the theoretical nature of the floating charge, crystallisation is, by comparison, less developed. This article offers three main contributions. First, it draws a clear distinction between two types of crystallisation: automatic and express. Second, it applies the theoretical literature on floating charges to crystallisation and examines the different meanings crystallisation takes under these theoretical frameworks. Finally, it makes an original argument on the effectiveness of express crystallisation clauses. The claim is that because a crystallised floating charge establishes the same proprietary interest as a fixed charge *ab initio*, the legal criteria necessary to create a fixed charge should also be necessary for the triggering of an express crystallisation clause to be effective in crystallising a charge.

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Introduction

One of the fundamental features of the corporate form is that a company can borrow capital without its members being liable for the debt. Because of a company's status as a legal person, the claims of company creditors are, in general, confined to the assets of the company and cannot be asserted against the personal assets of company members.¹ This distinction between the company and its members encourages investment by limiting the potential losses of company members.² The consequence of limiting the liability of members is that it increases the risk of advancing credit. However, this default position can be contracted out of by creditors obtaining personal guarantees from company members. An additional way for a creditor to mitigate risk is to obtain security over company property. A security agreement, established through a contract called a debenture, allows a creditor to secure their debt against company property which, in the event of an insolvent liquidation or a failure to maintain the repayment schedule, allows the creditor to look to that property to satisfy the debt. By mitigating risk, security agreements increase the availability of credit and lowers its cost.³ Insolvency law, by facilitating secured credit and by giving certain creditors statutory protections,⁴ creates a hierarchy of creditors according to which assets are distributed in a liquidation. The position in this hierarchy over a given asset is determined by insolvency law based on the form of security held and the status provided by statute.

The most common form of security taken against companies is the charge. A charge creates an equitable security interest over specified assets owned by a company. There are two types of charge: a fixed charge and a floating charge. A fixed charge attaches to specific assets and prohibits the company from dealing with those assets in the ordinary course of business without permission from the charge holder. A floating charge allows such dealing. Every charge must be one type or the other as a matter of law.⁵ Parties are not free to create a new form of charge through contract because the hierarchy of creditors created by insolvency law is a closed list, which only recognises two types of charge. Floating charges rank below fixed charges in the hierarchy and are subject to several statutory encroachments in favour of preferential creditors⁶

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¹ See *Ord v Belhaven Pubs Ltd* [1998] BCC 607.

² H Hansmann and R Kraakman et al, *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, Oxford University Press, 2017), 9.

³ See V Finch, "Security, Insolvency and Risk: Who Pays the Price" (1999) 62(5) *Modern Law Review* 633; G McCormack "The Priority of Secured Credit: Anglo-American Perspective" (2003) *Journal of Business Law* 389.

⁴ See s. 175 and 176 of the UK Insolvency Act 1986 and s. 621(b) of the Irish Companies Act 2014. These provisions will be discussed in more detail below.

⁵ *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, 997. S Worthington, "Floating Charges: The Use of and Abuse of Doctrinal Analysis" in Getzler and Payne (eds) *Company Charges: Spectrum and Beyond* (Oxford 2006), 29.

⁶ Preferential status is given to the unpaid wages of employees in the UK and in Ireland while the Revenue Commissioners has preferential status in Ireland only. See S. 175(2)(b) of the UK Insolvency Act 1986 and s. 621(b) of the Irish Companies Act 2014.

and general unsecured creditors.⁷ Therefore, in an insolvent liquidation, the classification of a charge as fixed or floating may affect the charge holder's likelihood of recovering the debt but may also affect other creditors likelihood of payment.

It is not always clear which type of charge a debenture creates. Some debentures are ambiguous, and some are internally inconsistent in describing the characteristics of the charge.⁸ Because every charge must be either fixed or floating, the courts must develop rules for classifying such debentures. The current legal position is that to create a fixed charge there must be express clauses preventing the company from dealing with specific charged property in the ordinary course of business.⁹ A floating charge will be created if the debenture expressly allows the company to deal with the charged property in the ordinary course of business or is silent on the point.¹⁰ The classification of a charge as fixed or floating is not made on the basis that the parties intended to create a specific type of security. Rather, it is made by an assessment of the rights and obligations agreed between the parties and a further assessment as to the legal classification of that set of rights and obligations.¹¹ Parties who aim to create a fixed charge but who fail to include express contractual restrictions on the company's ability to deal with specific charged property will fail to legally achieve their aims and create a floating charge. Similarly, parties who never intended to create a floating charge, but who agree a set of rights and obligations which amount to a floating charge will be deemed to have created a floating charge.¹²

If certain events occur, the freedom to deal provided by a floating charge ends and the charge becomes fixed. The conversion of a floating charge into a fixed charge is called crystallisation.¹³ There are two types of crystallisation: automatic and express.¹⁴ Automatic crystallising events have been developed at common law and their occurrence results in the automatic crystallisation of the charge. The crystallisation is automatic in the sense that the charge holder is not required to take any action and there is no requirement for the events to be

⁷ S. 176A of the UK Insolvency Act 1986 requires a certain portion of the assets known as the "prescribed part" subject to a floating charge be distributed to unsecured creditors. The percentage is (i) 50% of the first £10,000; plus (ii) 20% of the remainder; up to a maximum of £600,000. There is no corresponding provision in Ireland.

⁸ For example, see *Re Cimex Tissues Limited* [1995] 1 BCLC 409.

⁹ *Re Spectrum Plus Ltd* [2005] UKHL 41; *Re Keenan Brothers Ltd* (1985) IR 401 (SC).

¹⁰ *Re Yorkshire Woolcombers' Association Limited* [1903] 2 Ch. 284; *Re Spectrum Plus Ltd* [2005] UKHL 41 [106]; *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710.

¹¹ *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710. *Re Spectrum Plus Ltd* [2005] UKHL 41; *Re JD Brian Ltd* [2015] IESC 62.

¹² For example, aggregation of title clauses, a form of reservation of title clauses, have consistently deemed to amount to a charge which will be void for want of registration. See *Peachdart Ltd* [1983] All ER 204; *Re Charles Dougherty* [1984] ILRM 137. For a different example of a security agreement, which was not intended to be a charge, but which was held to be a charge nonetheless see *Cossett Contractors* [1998] Ch 495.

¹³ It was stated in *Buchler v Talbot* that when "a floating charge crystallises it becomes a fixed charge attaching to the assets of the company which fall within its terms" [2004] 2 AC 298, 309. See P Davies and S Worthington, Gower's *Principles of Modern Company Law* (10th edn, Sweet and Maxwell 2016), 1107-1110..

¹⁴ Different terminology is often used to describe the two types of crystallisation. Express crystallisation clauses are regularly referred to as automatic, but they are not truly automatic as they require intervention by the charge holder. The terminology used in this article is taken from the Irish High Court case of *Re JD Brian Ltd* [2011] IEHC 113 which, in the author's view, is the best language to separately describe the two types of crystallisation.

expressed in the debenture. Examples of automatic crystallising events include the making of an order for liquidation,¹⁵ the appointment of a receiver,¹⁶ and the cessation of business.¹⁷ Express crystallisation refers to clauses expressed in the debenture that provide for crystallisation on a given event. The most common form of express crystallisation is the crystallisation by notice clause which provides that the charge can be crystallised by the lender issuing notice to the company that the charge has crystallised.¹⁸

There is a fundamental difference between automatic and express crystallisation. The nature of the automatic crystallising events of liquidation, the appointment of a receiver or the cessation of trade mean that the company can no longer deal with the charged assets. Therefore, the question of the company's ability to deal, the fundamental distinction between the charges, is no longer a relevant consideration if a charge has crystallised automatically. However, under express crystallisation, the company's ability to deal may still be relevant as the company may still have possession of the charged property and may still be trading. Therefore, under express crystallisation the contractual ability of the company to deal with the charged assets may still be a live issue in a way that is not possible under automatic crystallisation.

The Irish and English courts have agreed that express crystallisation clauses are valid as a matter of law.¹⁹ The Irish Supreme Court²⁰ recently examined a further question: if a debenture contains a crystallisation by notice clause, and such clauses are legally valid, does the issuance of notice crystallise the charge or is there a further requirement for express contractual restrictions on the company's ability to deal which come into effect after notice is served. The Irish Supreme Court, overturning the decision of the High Court,²¹ decided that an express crystallisation by notice clause was effective in crystallising the charge, despite no express contractual restrictions on the company's ability to deal after notice was served. The court treated the creation of a fixed charge and crystallisation of a floating charge into a fixed charge as two separate issues. Because of this separation, the court declined to apply the case law from the classification of charges to crystallisation and instead found that the crystallisation clause was effective because it was agreed in the contract and was a legally valid clause.

¹⁵ *Re Colonial Trusts Corp* (1879) 15 Ch D 465; *Wallace v Universal Automatic Machines* [1894] 2 Ch 547 CA; *Re Crompton & Co* [1914] 1 Ch. 954.

¹⁶ *Re Panama, New Zealand and Australian Mail Co* (1870) 10 Ch D 530; *Halpin v. Cremin* [1954] IR 19; *Evans v Rival Granite Quarries* [1910] 2 KB 979.

¹⁷ *Re Woodroffes (Musical Instruments) Ltd* [1985] BCLC 227, 233; *Evans v Rival Granite Quarries* [1910] 2 KB 979, 993. *Robson v Smith* [1895] 2 Ch 118.

¹⁸ An example of such a clause is "The Bank, may, at any time, by notice in writing served on the Company, convert the floating charge contained in this Deed into a first fixed charge over all the property, assets, and rights for the time being subject to the said floating charge or over so much of the same as is specified in the notice." This is taken from the debenture in *Re JD Brian Ltd* [2015] IESC 62 and is similar to the clause used in *Re Brightlife* [1987] Ch 200.

¹⁹ Most recently in *SAW (SW) 2010 Ltd v Wilson* [2017] BCC 373. See also, *Re Brightlife* [1987] Ch 200 and *Re JD Brian Ltd* [2015] IESC 62.

²⁰ *Re JD Brian Ltd* [2015] IESC 62.

²¹ *Re JD Brian Ltd* [2011] IEHC 113

This article will analyse the question considered by the Irish Supreme Court with the aim of expanding the conceptual understanding of the crystallisation of floating charges more generally. Part one briefly discusses the case law which provides that for a charge to be classified as fixed the debenture must contain express contractual restrictions on the company's ability to deal with the charged assets in the ordinary course of business. Part two outlines the four main theories which attempt to explain the nature of the floating charge and argues, based on the theoretical analysis, that crystallisation of a floating charge into a fixed charge establishes the same proprietary interest as a fixed charge *ab initio*. Part three shows that express crystallisation clauses are legally valid but are fundamentally different from automatic crystallising events because the company's ability to deal is not relevant under automatic crystallisation but is under express crystallisation. Given the above, part four argues that it is inconsistent to allow an express crystallisation clause to convert a floating charge into a fixed charge without meeting the criterion necessary for the creation of a fixed charge *ab initio*, namely, the inclusion of express contractual restrictions on the company's ability to deal coming into effect after the triggering of the clause.

The fundamental claim of this article is that triggering an express crystallisation clause should fail to crystallise a floating charge unless the debenture provides restrictions on the company's ability to deal coming into effect after the clause has been triggered. It argues that for insolvency law to be consistent, the principles used in classifying a charge as fixed or floating must also be used in determining whether triggering an express crystallisation clause is effective in crystallising a floating charge. These principles are that labels used in a debenture and the subjective intention of the parties are secondary considerations to the legal criteria which must be satisfied to establish a specific type of proprietary interest. Therefore, this article disagrees with the decision of the Irish Supreme Court.

While English law has accepted express crystallisation clauses as legally valid, it has not yet directly addressed their effectiveness. In this area of law, the highest English and Irish Courts have a history of relying on each other's decisions.²² For English law, or any other common law jurisdiction, to follow the Irish Supreme Court decision would, in the author's view, be an error. This article aims to provide a detailed argument in support of this view with the overall aim being to clarify this complex area of law and inform its future development.

The Classification of Charges

In *Re Yorkshire Woolcombers*²³ Romer LJ set out a three-step test for characterising the floating charge, the third of which has become the distinguishing characteristic between a fixed and a floating charge. This characteristic of the floating charge is that, until some step is taken, the company can carry on its business in the ordinary way in relation to the charged assets. The

²² The Irish Supreme Court in *Re JD Brian Ltd* [2015] IESC 62 quoted extensively from the House of Lords decision in *Re Spectrum Plus Ltd* [2005] UKHL 41 which had relied on the earlier Irish Supreme Court case of *Re Keenan Brothers Ltd* (1985) IR 401.

²³ *Re Yorkshire Woolcombers' Association Limited* [1903] 2 Ch. 284.

House of Lords²⁴ and the Privy Council²⁵ have stated that this characteristic is the primary hallmark of a floating charge that serves to distinguish it from a fixed charge.²⁶ Therefore, a charge will be classified as floating if the company is permitted to deal with the assets in the ordinary course of business.

One possible approach for determining the company's freedom to deal with charged assets would be to examine the conduct of the parties and see if the company had, in practice, dealt with the charged assets in the ordinary course of business. However, it is well-established that, in general, any conduct occurring after entry into an agreement is inadmissible as an aid to construction of that agreement.²⁷ It follows, and the courts have confirmed,²⁸ that in general, the conduct of the parties after the execution of the debenture is also irrelevant as to the issue whether it creates a fixed or a floating charge.²⁹

Another possibility would be to infer restrictions based on the labels used and the subjective intention of the parties.³⁰ For example, if the debenture states that it creates a fixed charge, and it was the parties' subjective intention to create a fixed charge, then a fixed charge is created. It follows from this creation of a fixed charge that the company cannot deal with the charged assets in the ordinary course of business because this is the fundamental characteristic of the fixed charge. The restrictions are implied and flow from the parties' subjective intention and use of the label fixed charge. The courts have consistently rejected this approach.

Instead, charges are classified as a matter of law based on an objective assessment of the rights and obligations expressed in the debenture. Each charge has distinct characteristics and the extent to which a debenture meets these characteristics will determine whether the charge is classified as fixed or floating. The fundamental characteristic of a fixed charge is that the company cannot deal with the charged assets in the ordinary course of business. Therefore, to create a fixed charge the debenture must provide an express prohibition on the company's ability to deal. These restrictions must be sufficient to provide the charge holder with control over the assets.³¹ If the debenture fails to meet this requirement the charge will be classified as

²⁴ *Re Spectrum Plus Ltd* [2005] UKHL 41 [106].

²⁵ *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710, [12].

²⁶ The Irish Supreme Court have also relied on Romer LJ's characterisation of the floating charge in *Re JD Brian Ltd* [2015] IESC 62, [42].

²⁷ *Whitworth Street Estates v Miller* [1970] AC 583.

²⁸ See *Re William Gaskell Limited* [1994] 1 BCLC 197; *Re Armagh Shoes Limited* [1984] BCLC 405; and *Re Wogan's (Drogheda) Limited* [1993] IR 157.

²⁹ There are some narrow exceptions to this general principle that post contractual conduct is irrelevant. Most notably where the agreement is alleged to be a sham or a mere pretence. For a full discussion of these exceptions see S Atherton and R Mokal, "Charges Over Chattels – Issues in the Fixed/Floating Jurisprudence" (2005) 26(1) *The Company Lawyer* 10, 16-18.

³⁰ This line of argument was advanced in *Re Spectrum Plus Ltd* [2005] UKHL 41, [119]: "Mr Moss indeed argued that a debenture expressed to grant a fixed charge thereby limited by necessary implication the ability of the chargor to deal with the charged assets....This limitation was, he said, an inevitable result of the grant by the debenture of the fixed charge".

³¹ Millet LJ in *Re Cosslett (Contractors) Ltd* [1998] Ch 495, 510 stated that "The essence of a fixed charge is that the charge is on a particular asset or class of assets which the chargor cannot deal with free from the charge without the consent of the chargee. The question is not whether the chargor has complete freedom to carry on his business

a floating charge. The statement of the Privy Council in *Agnew v. Commissioner of Inland Revenue*³² which was referenced with approval by the House of Lords³³ and the Irish Supreme Court³⁴ is worth stating in full:

In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it.³⁵

Stage one involves the court, based on an objective construction of the debenture as a whole, ascertaining the rights and obligations the parties intended to grant each other. In making this assessment, the subjective intentions of the parties to create a specific type of charge and the labels used to describe the charge can provide a limited insight into the rights and obligations the parties intended to grant each other. However, what is more significant is the extent and scope of the restrictions on the company dealing with the assets in the ordinary course of business expressed in the debenture. If the labels used and the subjective intentions of the parties conflict with the rights and obligations expressed in the debenture, the latter takes precedence. This position was outlined by the House of Lords in *Re Spectrum Plus Ltd*, “[b]oth sides agree that the label of “fixed” or “specific” (which I take to be synonymous in this context) cannot be decisive if the rights created by the debenture, properly construed, are inconsistent with that label”.³⁶ Similarly, Millet J in *Orion Finance Limited* stated “the effect of the document as a whole is inconsistent with the terminology which the parties have used, then their ill-chosen language must yield to the substance”.³⁷

Stage two involves the ascertained rights and obligations that the parties intended to grant each other being classified as fixed or floating. This is a matter of law; the subjective intentions of the parties to create a specific type of charge and the labels used to describe the charge are

as he chooses, but whether the chargee is in control of the charged assets.” Similarly, in *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710, [23] it was stated “if the charged assets are not under its control such that it can prevent their dissipation without its consent, then the charge cannot be a fixed charge”.

³² *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710.

³³ *Re Spectrum Plus Ltd* [2005] UKHL 41.

³⁴ *Re JD Brian Ltd* [2015] IESC 62.

³⁵ *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710, [32].

³⁶ *Re Spectrum Plus Ltd* [2005] UKHL 41, [141].

³⁷ *Orion Finance Limited v Crown Financial Management Limited* [1996] 2 BCLC 78, 84.

completely irrelevant. This was made clear by Lord Scott, in *Smith v Bridgend County Borough Council* who stated the classification of a charge “does not depend on the parties’ intention to create a security. Their intention, objectively ascertained, is relevant to the construction of their contract. But once contractual rights have, by the process of construction, been ascertained, the question whether they constitute security rights is a question of law that is not dependent on their intentions”.³⁸

The importance of the above discussion is that when the courts are classifying a charge the subjective intention of the parties and the labels used are subordinate to what is expressed in the debenture. An important quote comes from *Re Keenan Brothers Ltd* in the Irish Supreme Court, which was cited with approval in *Re Spectrum Plus*³⁹:

It is not suggested that mere terminology itself – such as using the expression fixed charge achieves the purpose; one must look, not within the narrow confines of such terms, not to the declared intention of the parties alone, but to the effect of the instruments whereby they purported to carry out that intention; did they achieve what they intended or was the intention defeated by ancillary requirements.⁴⁰

The final line is informative. The intention of the parties to create a specific type of charge must be given effect by the debenture, otherwise their subjective intentions will be defeated by ancillary requirements, which, in this context, is the existence of express contractual restrictions on the company’s ability to deal.

The courts have been very clear on the process involved in classifying a charge as fixed or floating. They have been less clear, and provided much less explanation, as to why they follow this process. A convincing explanation lies in the fact that charges create proprietary interests that are enforceable against third parties. Contract law places very few limits on the form that contracts must take. Once parties meet the legal requirements necessary to create a legally binding contract, and the contract does not contravene the law, parties have freedom to create whatever form of agreement they wish. The law of property is very different and requires parties to conform their agreements to a limited number of standard forms. This is referred to as the *Numerus Clausus* principle which holds that the catalogue of proprietary interests comprises a closed list.⁴¹ The principle is an old one, being articulated in 1834 in *Keppel v Bailey* which provided that “incidents of a novel kind [cannot] be devised and attached to

³⁸ *Smith v Bridgend County Borough Council* [2001] UKHL 58. Lord Hoffmann, in the same case, stated that the intention of the parties “are relevant only to establish their mutual rights and obligations. Whether such rights and obligations are characterised as a floating charge is a question of law” at [42]. For similar remarks see *Re Brightlife* [1987] Ch 200, 204; *Re Bond Worth Ltd* [1980] Ch. 228, 245. *Street v Mountford* [1985] AC 809, 819.

³⁹ *Ibid*, [55].

⁴⁰ *Re Keenan Brothers Ltd* (1985) IR 401 (SC), 4.

⁴¹ See *Charles v Barzey* [2003] 1 WLR 437 PC, [11]; K Gray and S Gray, *Elements of Land Law* (5th edn, OUP 2009), 137; H Hansmann and R Kraakman, Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights (2002) 31 *Journal of Legal Studies* 373, 374; N McGrath, “The Floating Charge in Ireland after *Re JD Brian Ltd*” (2012) 35(1) *Dublin University Law Journal* 306, 314.

property at the fancy or caprice of any owner”.⁴² Merrill and Smith describe the principle as follows:

When parties wish to transfer property in land, they must specify which legal form they are using - fee simple, lease, and so forth. If they fail to be clear about which legal interest they are conveying, or if they attempt to customize a new type of interest, the courts will generally recast the conveyance as creating one of the recognized forms.⁴³

The reason for the application of this principle is that property rights are enforceable against third parties in a way that contractual rights are not. Because of the general enforceability, the number of property interests must be limited, and the different interests must be standardised so that third parties can understand the attributes of these interests.⁴⁴ This allows third parties to understand the degree to which property is encumbered, to avoid violating property rights and to comprehend the value of the interests if they wish to acquire them. The general enforceability of property interests comes at the cost of limitations placed on the ability of contracting parties to create new property interests or alter the form of existing property interests.⁴⁵

There are obvious similarities with how the courts classify charges. As will be discussed immediately below, charges create proprietary interests and are enforceable against most third parties. In response, insolvency law limits the number of charges to fixed and floating and standardises these interests so that certain criteria must be satisfied to establish that interest. Precisely as described in the above quote from Merrill and Smith, if parties fail to include express contractual restrictions on the company’s ability to deal, despite their intentions to create a fixed charge, the court will recast the debenture as a floating charge. In order to maintain the number of charges to two and to maintain a base level of standardisation, the courts prioritise the rights and obligations expressed in the contract over the labels used and the subjective intention of the parties to create a specific type of security.

The interest created by a charge

All charges create an equitable security interest as the creation of a charge involves no transfer of legal title. The nature of the security interest created by a fixed charge is relatively straightforward. A fixed charge holder gains an immediate equitable property interest in the particular asset subject to the charge.⁴⁶ This right provides the charge holder immediate control over that property such that the property cannot be disposed of to anyone other than a *bona fide*

⁴² *Keppel v Bailey* (1834) 2 My. & K. 517, 535.

⁴³ T Merrill and H Smith, “Optimal Standardization in the Law of Property: The Numerus Clausus Principle” (2000) 10 *Yale Law Journal* 1, 3.

⁴⁴ *Ibid*, 8.

⁴⁵ J Smits, *Advanced Introduction to Private Law* (Elgar 2017), 70.

⁴⁶ S Atherton and R Mokal, “Charges Over Chattels – Issues in the Fixed/Floating Jurisprudence” (2005) 26(1) *The Company Lawyer* 10, 11.

purchaser for value without notice unless with the permission of the charge holder.⁴⁷ There is ample case law to support this conclusion, for example, it was stated in *Re Cimex Tissues Ltd* that a “fixed charge attaches to the charged property *in specie* either immediately or as soon as it is acquired by the charger”.⁴⁸ In *Re Spectrum Plus* Lord Walker stated that under a “fixed charge the assets charged as security are permanently appropriated to the payment of the sum charged, in such a way as to give the chargee a proprietary interest in the assets”.⁴⁹

The interest created by a floating charge is more complex with at least four theories offering alternate explanations. The aim of this section is to show that crystallisation establishes the same interest in the crystallised charge as a fixed charge *ab initio*. This may seem obvious, as crystallisation is the conversion of a floating charge into a fixed charge, but one of the theories disagrees with this assertion and claims that the same interest exists in all charges. If the interest created by a crystallised floating charge and a fixed charge is the same, it strengthens the claim that the requirements necessary to establish this interest should also be the same.

There is consensus that a floating charge creates an immediate security interest rather than a future security coming into effect on crystallisation.⁵⁰ This is supported by the fact that floating charges must be registered as a security on their creation and from early judicial statements describing floating charges.⁵¹ The statement of Buckley LJ in *Evans v Rival Granite Quarries Ltd* is regularly provided as support for this view: “[a] floating security 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”.⁵² The difficulty with the floating charge is determining the nature of this security interest, with this determination potentially altering the meaning of crystallisation. Does a floating charge confer a proprietary interest in the fund of assets subject to the charge but not in any specific asset, or a proprietary interest in each specific asset plus a license to deal with those assets in the ordinary course of business or does it provide no property rights at all, in either the fund or the specific assets.

Gough argues that a floating charge creates an immediate security interest but a “deferred proprietary interest” coming into effect on crystallisation.⁵³ Therefore, crystallisation establishes the proprietary interest in the charged assets and, despite no new charge being created, is similar to the creation of a fixed charge. A principal problem with this view is that a majority of the case law has found a proprietary interest to exist in a floating charge,⁵⁴ most

⁴⁷ E Ferran, “Floating Charges the Nature of the Security” (1988) 47(2) *Cambridge Law Journal* 213, 213.

⁴⁸ *Re Cimex Tissues Ltd* [1995] 1 BCLC 409.

⁴⁹ *Re Spectrum Plus Ltd* [2005] UKHL 41, [138].

⁵⁰ See T Courtney, *The Law of Companies* (Bloomsbury, 4th Ed., 2016), 1414. W Gough, *Company Charges* (2nd edn 1996), 97-98; L Gullifer and J Payne, in J Getzler and J Payne (eds) *Company Charges: Spectrum and Beyond* (Oxford 2006), 56.

⁵¹ *Wallace v Evershed* [1899] Ch 891, 894 per Cozens-Hardy “A floating security gives an immediate equitable charge on the assets”.

⁵² *Evans v Rival Granite Quarries Ltd* [1910] 2 KB 979, 999.

⁵³ W Gough, *Company Charges* (2nd edn 1996), 97-101.

⁵⁴ See *Driver v Broad* [1893] 1 QB 744; *Wallace v Evershed* [1899] 1 Ch 891; *Re Dawson* [1915] 1 Ch 626; *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710, [11]

notably the House of Lords decision in *Re Spectrum Plus* which clearly stated that a floating charge creates a proprietary interest.⁵⁵ A further problem is the artificial distinction between a security interest in property and a proprietary interest. Worthington believes that logically there cannot be a separation between the creation of security interest and the creation of a proprietary interest in the same property as “security is based on property; if a charge does not give rise to a proprietary interest in the company’s property then no security is created”.⁵⁶ Ferran agrees by pointing out that the ability of a floating charge holder to recover property, as opposed to compensation, is indicative of an equitable interest.⁵⁷ Another point which conflicts with Gough’s view is the similarities between floating charges and equitable proprietary interests. Equitable proprietary interests denote a quantum of rights over an asset which can be enjoyed against other persons,⁵⁸ are assignable⁵⁹ and are binding on third parties other than a bona fide purchaser for value without notice.⁶⁰ Floating charges provide rights over assets, are assignable⁶¹ and are enforceable against at least some other third parties such as unsecured creditors and against subsequent floating charge holders.⁶²

The strength of Gough’s view is that it provides a simple explanation for crystallisation and why a company can alienate assets subject to a floating charge. However, crystallisation and the ability of a company to alienate charged assets can also be explained by alternative theories which better align with case law and do not create an unnecessary and artificial distinction between a security interest in property and a proprietary interest.

McKendrick⁶³, Hudson⁶⁴, and Goode⁶⁵ argue that a floating charge provides an immediate proprietary interest in the fund of assets to which the charge applies but without creating a proprietary interest in any specific asset within that fund.⁶⁶ McKendrick defines a fund as a collection of assets vested in one person to manage on behalf of another with the person managing the assets having liberty to change the components of the fund.⁶⁷ Under this theory, charged assets can be alienated because no proprietary interest exists in any specific asset.

⁵⁵ Lord Walker stated that “a floating charge, by contrast, the chargee....has a proprietary interest”. *Re Spectrum Plus Ltd* [2005] UKHL 41, [139]

⁵⁶ S Worthington, “Floating Charges: The Use of and Abuse of Doctrinal Analysis” in J Getzler and J Payne (eds) *Company Charges: Spectrum and Beyond* (Oxford 2006), 39. Davies and Worthington make a similar claim that, “[e]very security interest ultimately gives the holder of the security a proprietary claim over assets” P. Davies and S Worthington, *Principles of Modern Company Law* (10th edn, Sweet and Maxwell 2016), 1100.

⁵⁷ E Ferran, “Floating Charges the Nature of the Security” (1988) 47(2) *Cambridge Law Journal* 213, 216.

⁵⁸ E Mckendrick, *Goode on Commercial Law* (4th edn, Penguin, 2010), 34.

⁵⁹ *Driver v Broad* [1893] 1 QB 744; *Re Interview* 1975 IR 382, 395.

⁶⁰ P Pettit, *Equity and the Law of Trusts* (11th edn Oxford), 21.

⁶¹ *Driver v Broad* [1893] 1 QB 744 – in that case the court treated a contract for the sale of debentures that covered land as being a contract for the sale of an interest in land for the purposes of the Statute of Frauds.

⁶² In *Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800 the court held that a floating charge takes priority over a later floating charge on the same assets provided the charge has been validly registered.

⁶³ E Mckendrick, *Goode on Commercial Law* (4th edn, Penguin, 2010), 65

⁶⁴ A Hudson, *The Law of Finance* (Sweet and Maxwell 2009), 573.

⁶⁵ R Goode, “The Case for the Abolition of the Floating Charge” in J Getzler and J Payne (eds) *Company Charges: Spectrum and Beyond* (Oxford 2006), 12

⁶⁶ Atherton and Mokal also take this position. See S Atherton and R Mokal, “Charges Over Chattels – Issues in the Fixed/Floating Jurisprudence” (2005) 26(1) *The Company Lawyer* 10, 12.

⁶⁷ E Mckendrick, *Goode on Commercial Law* (4th edn, Penguin, 2010), 65

Crystallisation is the moment when the proprietary rights of the floating charge holder change from being “contingent rights over a fluctuating fund of property into rights.....over identified property”.⁶⁸ In other words, crystallisation makes the proprietary interest specific, thereby creating an immediate and specific interest in the assets which is the same as a fixed charge.

There has been apparent support from the courts for the fund-based theory. The Privy Council in *Agnew* described a floating charge as a “proprietary interest in a fluctuating fund of assets”.⁶⁹ Lord Walker in *Re Spectrum Plus Ltd* stated that under “a floating charge, by contrast, the charge...has a proprietary interest, but its interest is in a fund of circulating capital...until the chargee intervenes (on crystallisation of the charge)”.⁷⁰ However, Nolan has put forward a view which is consistent with the above quotations from *Agnew* and *Spectrum* but that disagrees with the fund-based theory. Nolan argues that having a proprietary interest in a fund means that the charge holder has a proprietary interest in each asset comprising the fund, but that interest is subject to the superior power of the company to alienate those assets free from that interest.⁷¹ He argues to reify the fund, as Goode, Hudson and McKendrick do, creates unnecessary confusion and that, because a fund has no legal personality it is a contradiction to argue that a proprietary interest exists in a fund while no interest exists in assets comprising the fund.⁷² The difficulty with Nolan’s theory, and a similar but distinct theory advanced by Worthington,⁷³ is to accurately describe the proprietary interest that exists in specific assets given the company’s ability to freely alienate those assets.

Worthington’s solution is to claim that a floating charge creates the same type of proprietary interest in specific assets as a fixed charge, and not some “lesser, ill-defined interest”, but that the charged assets are subject to a license to deal making them defeasible.⁷⁴ According to Worthington, defeasance occurs when a third party acquires charged assets within a license to deal and takes the property free of the charge. Under this view, crystallisation is a revocation of the license to deal but does not alter the proprietary interest. Nolan, while agreeing that a floating charge is derived from a fixed charge and that a floating charge creates a proprietary interest, does not believe the interest vested in a fixed and floating charge is the same. Instead he claims a floating charge creates a proprietary interest in specific assets, but it is an interest that is so limited it allows the company to alienate free from that interest. He also draws a distinction between defeasance and overreaching.⁷⁵

⁶⁸ A Hudson, *The Law of Finance* (Sweet and Maxwell 2009), 572.

⁶⁹ *Agnew v. Commissioner of Inland Revenue* [2001] 2 AC 710, [11].

⁷⁰ *Re Spectrum Plus Ltd* [2005] UKHL 41. [139].

⁷¹ R Nolan, “Property in a Fund” (2004) 120 *Law Quarterly Review* 108.

⁷² *Ibid*, 130.

⁷³ S Worthington, “Floating Charges – An Alternative Theory” (1994) 53(1) *Cambridge Law Journal* 81.

⁷⁴ *Ibid*, 85.

⁷⁵ He argues that defeasance brings an interest to an end and so cannot explain why a charge holder can replace interest by different assets which will then be subject to the same charge. On this basis he uses overreaching instead of defeasance.

Of the above theories, it is submitted that Nolan's view is the most accurate conception of the floating charge. An important quote comes from Buckley LJ in *Evans v. Rival Granite Quarries Ltd*,⁷⁶ which has been widely cited and approved in much of the case law⁷⁷ and in academic work⁷⁸:

A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some act or event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security.⁷⁹

This quote, if taken as a true description of a floating charge which most cases and academic literature do, is only reconcilable with Nolan's theory. It clearly states a floating charge is not a specific (or fixed⁸⁰) security plus a license to deal ruling out Worthington's theory. It also clearly states that the floating charge applies to each item comprised in the security which rules out the fund-based theory. Nolan's conception of a floating charge as a security which creates a proprietary interest that is lesser than a fixed charge but that applies to each asset within the fund subject to the charge holder's superior ability to alienate free from the interest prior to crystallisation fits perfectly with Buckley LJ's statement.

Crystallisation, on Nolan's view, is the change of the very limited interest in specific assets in the fund, which had been subordinated to the company's power to deal into the same proprietary interest created by a fixed charge which prevents the company from dealing with the charged assets. Therefore, crystallisation is the establishment of a proprietary interest which is the same as the creation of a fixed charge. While this article supports Nolan's theory as the true conception of a floating charge, the above view of crystallisation as the point at which the same proprietary interest as a fixed charge is also true under the fund-based theory and Gough's theory of the floating charge. Only Worthington disagrees with such an interpretation of crystallisation.

Express Crystallisation Clauses

Insolvency law provides for numerous statutory encroachments on the claims of floating charge holders on an insolvent liquidation. These encroachments state that preferential creditors⁸¹ are

⁷⁶ *Evans v. Rival Granite Quarries Ltd* [1910] 2 KB 979.

⁷⁷ *Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800, 806. *Re Cimex Tissues Ltd* [1995] 1 BCLC 409; *Cossett Contractors* [1998] Ch 495, 510; *Re Spectrum Plus Ltd* [2005] UKHL 41, [100].

⁷⁸ See T Courtney, *The Law of Companies* (Bloomsbury, 4th Ed., 2016), 1415; R Nolan, "Property in a Fund" (2004) 120 *Law Quarterly Review* 108, 125; E Ferran, "Floating Charges the Nature of the Security" (1988) 47(2) *Cambridge Law Journal* 213, 232;

⁷⁹ *Evans v. Rival Granite Quarries Ltd* [1910] 2 KB 979, 999.

⁸⁰ Specific and fixed are often used interchangeably in the case law. *Re Spectrum Plus Ltd* [2005] UKHL 41, [79].

⁸¹ Preferential status is given to the unpaid wages of employees in the UK and in Ireland while the Revenue Commissioners have preferential status in Ireland only. See S. 175(2)(b) of the UK Insolvency Act 1986 and s. 621(b) of the Irish Companies Act 2014.

to be paid before floating charge holders and that a “prescribed part” of the payment due to floating charge holders is instead to be distributed to general unsecured creditors.⁸² However, several cases⁸³ decided that because an express crystallisation clause had changed the floating charge into a fixed charge prior to liquidation, the crystallised charge was no longer subject to statutory encroachments that apply to floating charges. These cases have since been overturned by legislative reforms. In both England and Ireland, a crystallised floating charge, despite becoming a fixed charge, is still subject to those statutory encroachments because it was originally created as a floating charge.⁸⁴ It is important to note that these legislative changes have not altered the meaning of crystallisation as the conversion of a floating charge into a fixed charge. They have merely changed the scope of the statutory encroachments to apply to any charge that is originally created as a floating charge.

As stated in the introduction, crystallisation takes two forms: automatic and express. Automatic crystallisation occurs on an order for liquidation, the appointment of a receiver, or on the cessation of trade. Due to the nature of these events, the company can no longer deal with the assets in question. Express crystallisation provides for crystallisation on a given event set out in the debenture, for example, the issuance of a notice of crystallisation. After the issuance of notice, there may remain a possibility for the company to continue to deal with the charged assets, a fact which distinguishes the two forms of crystallisation.

The legal validity of express crystallisation clauses has been questioned on two grounds. The first is that because express crystallising events lie outside the crystallising events recognised at common law (automatic crystallising events) they should not be legally valid. The second is that it is against public policy to allow the triggering of an express crystallisation clause, which is a private contractual event, to alter the likelihood of non-contracting third parties receiving satisfaction of their debt.

The leading case on the validity of express crystallisation clauses is *Re Brightlife*.⁸⁵ The debenture created a floating charge over the company’s undertaking and all other property, assets and rights. The debenture gave the charge holder a right at any time to convert the floating charge into a fixed charge by issuing a notice of crystallisation. Prior to a liquidation order, notice was served to crystallise the charge. If that notice crystallised the charge the consequence would be, based on the law as it then stood, that the charge holder would rank ahead of the company’s other main creditor, Customs and Excise. Submissions on behalf of

⁸² S. 176A of the UK Insolvency Act 1986 requires a certain portion of the assets known as the “prescribed part” subject to a floating charge be distributed to unsecured creditors. The percentage is (i) 50% of the first £10,000; plus (ii) 20% of the remainder; up to a maximum of £600,000. There is no corresponding provision in Ireland.

⁸³ *Re Griffin Hotel* [1940] 1 Ch 129. *Re Christonette International Ltd* [1982] 1 WLR 1245 *Re Brightlife* [1987] Ch 200; *Re JD Brian Ltd* [2015] IESC 62.

⁸⁴ In Ireland Section 92(b) of the Companies (Accounting) Act 2017 altered section 621(7) of the Companies Act 2014 (the provision that provides preferential creditors rank ahead of floating charges) from “any floating charge created by the company” to “any charge created as a floating charge by the company”. This follows the definition of floating charge used in Section 251 of the UK Insolvency Act 1986.

⁸⁵ *Re Brightlife* [1987] Ch 200.

the Customs and Excise claimed, *inter alia*, that the events of crystallisation were limited to events recognised at common law and could not be achieved through contract. Hoffmann J. rejected this argument. After reviewing the case law,⁸⁶ he found that certain events were recognised as crystallising events at common law but that there was nothing in law that prohibited other events, set out in contract, from crystallising a charge. Hoffmann J. concluded that such clauses were not “excluded by a rule of law”.⁸⁷ The Irish Supreme Court agreed in *Re JD Brian* stating there is “no rule of law which precludes parties to a debenture creating a floating charge agreeing, as a matter of contract, that the floating charge will crystallise upon the happening of an event”.⁸⁸

It was further claimed in *Re Brightlife* that public policy required restrictions on what parties could stipulate as crystallising events. This was because traditional crystallising events such as a liquidation order or the appointment of a receiver are public events to be noted on the register. In contrast, crystallisation by notice was a private event which changed the nature of the charge which could affect the likelihood of third parties, in this case Customs and Excise, receiving satisfaction of their debt. Hoffman J refused to be persuaded by public policy arguments concluding that it was not open to the court to further restrict the parties’ contractual freedom given that the legislature had already intervened in the area.

The public interest requires a balancing of the advantages to the economy of facilitating the borrowing of money against the possibility of injustice to unsecured creditors. These arguments for and against the floating charge are matters for Parliament rather than the courts and have been the subject of public debate in and out of Parliament for more than a century.....These limited and pragmatic interventions by the legislature make it in my judgment wholly inappropriate for the courts to impose additional restrictive rules on grounds of public policy.⁸⁹

The relevant context has changed significantly since these arguments were advanced in *Re Brightlife*. Since this statement, the legislature has again intervened to extend the protection afforded to preferential and unsecured creditors. Further, the express crystallisation of a floating charge is not a basis for avoiding the statutory encroachments that now apply to every charge which is created as a floating charge. Therefore, express crystallisation has now a very limited effect on third party creditors.⁹⁰ Given these limitations, and that the legislature has continued to intervene in this area and has declined to place any limitations

⁸⁶ *Illingworth v. Houldsworth* [1904] AC 355; *Re Crompton & Co* [1914] 1 Ch. 954.

⁸⁷ *Re Brightlife* [1987] Ch 200, 213.

⁸⁸ *Re JD Brian Ltd* [2015] IESC 62, [28] agreeing with the position of Finlay Geogoghan J in the High Court

⁸⁹ *Re Brightlife* [1987] Ch 200, 215.

⁹⁰ The potential impact of the triggering of an express crystallisation on third party creditors is limited to common law liens over chattels (See, W Gough, “The Floating Charge: Traditional Themes and New Directions” in Finn (ed) *Equity and Commercial Relationships* (1997), 262) and certain execution creditors (See, Noel McGrath, “The Floating Charge in Ireland after *Re JD Brian Ltd*” (2012) 35(1) *Dublin University Law Journal* 306, 312). It may also impact subsequent floating charges over the same assets, but which were validly created. See, *Griffiths v Yorkshire Bank plc* [1994] WLR 1427; *Re Automatic Bottle Makers Ltd* [1926] Ch 412; *Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800.

on the use of express crystallisation clauses, there is no basis to argue that such clauses are not valid as a matter of law.

The Effectiveness of Express Crystallisation Clauses

There are two schools of thought on the effectiveness of crystallisation by notice clauses. The first is that if the terms of a contract provides for crystallisation on a given event and this event occurs, then the charge crystallises because it has been agreed in the contract and such clauses are legally valid. Because the charge has crystallised, it is then inferred that the company can no longer deal with the charged assets. The restrictions on the company flow from the fact that the charge has crystallised.

The alternate approach is that express crystallisation should be subject to the same two-stage process used when classifying a charge as fixed or floating. Under this view, because crystallisation changes a floating charge into a fixed charge, changing the interest to the same as a fixed charge, then it must meet the legal criteria necessary to create a fixed charge *ab initio*. The label crystallisation and the parties intention for the charge to crystallise are secondary considerations to the legal criteria necessary to establish a fixed charge. Those criteria are express contractual restrictions on the company's ability to trade with the charged assets, which would come into effect after the express crystallisation clause has been triggered.

These two alternate views were at issue in the Irish case of *Re JD Brian Ltd*.⁹¹ The facts were similar to those in *Re Brightlife*. The debenture contained a clause which gave the charge holder, a bank, the power to convert the floating charge into a fixed charge by issuing notice. The bank issued notice, the consequence being, if effective, the bank would rank ahead of preferential creditors, the Revenue Commissioners, under the law as it then stood. The High Court⁹² held that the service of a crystallisation by notice clause was not automatically effective in crystallising the charge:

It appears to me, similarly, where a debenture expressly provides that a chargee may, by service of a notice, effect a crystallisation of a floating charge over all the assets or specified assets, the mere fact that the debenture so provides does not of itself mean that the service of the notice, has the intended effect i.e. that the floating charge crystallises. In the words of McCarthy J [in *Re Keenan Brothers*⁹³] “mere terminology” used by the parties is not determinative of achieving the stated purpose”.⁹⁴

The bank argued that because notice of crystallisation was served, and that this was provided for in the contract, the restrictions on the company's ability to deal with the charged assets existed “by necessary implication”. Finlay Geoghegan J, relying on a statement from Lord

⁹¹ *Re JD Brian Ltd* [2011] IEHC 113; *Re JD Brian Ltd* [2015] IESC 62.

⁹² *Re JD Brian Ltd* [2011] IEHC 113.

⁹³ *Re Keenan Brothers Ltd* (1985) IR 401 (SC) page 4 McCarthy J.

⁹⁴ *Re JD Brian Ltd* [2011] IEHC 113, [60].

Scott in *Re Spectrum Plus*, stated that this argument “put the cart before the horse”. The relevant quote from *Re Spectrum Plus* is as follows:

“Mr Moss indeed argued that a debenture expressed to grant a fixed charge thereby limited by necessary implication the ability of the chargor to deal with the charged assets....This limitation was, he said, an inevitable result of the grant by the debenture of the fixed charge. This argument, my Lords, puts the cart before the horse”.⁹⁵

The above quote from *Spectrum* was in the context of classifying a charge as fixed or floating. The High Court held that the process for classifying charges should also be the process for determining whether an express crystallisation clause is effective. As a result, the High Court concluded that an express crystallisation by notice clause would only be effective in crystallising the charge if the debenture contained express restrictions on the company’s ability to deal with the assets coming into effect after the service of notice. Finlay Geoghegan J stated that there was nothing “expressed in the debenture that the company should after the service of the crystallisation notice be restricted in its use of the property subject to that notice”.⁹⁶ Therefore, the court ruled that the company could still deal with the charged assets after the notice had been served and that ability is inconsistent with the existence of a fixed charge and so the crystallisation by notice clause was ineffective.

The Supreme Court overturned this decision, holding that the classification of charges and the crystallisation of charges are different questions and the law of one is not applicable to the other. In reaching this conclusion, the Supreme Court attached great weight to a passage from *Re Keenan Brothers*,⁹⁷ which was described as “of particular significance” given that it describes the “legal effect of the crystallisation of a floating charge”.⁹⁸ The passage from *Re Keenan Brothers* describes a floating charge as a security interest where the company is free to deal with the charged assets

until the happening of some event, such as the appointment of a liquidator, which shows that the company is no longer in business, or until the chargee intervenes. At that point, the floating charge is said to crystallise and the rights of the chargee become the same as if he had got a fixed charge; thereafter the company cannot deal with the assets in question except subject to the charge.⁹⁹

The Supreme Court stated that the quotation from *Re Keenan Brothers* conclusively answered the question of the effectiveness of express crystallisation clauses as “the effect of the crystallisation of a floating charge is clearly stated there as that the company cannot deal with

⁹⁵ *Re Spectrum Plus Ltd* [2005] UKHL 41, [119].

⁹⁶ *Re JD Brian Ltd* [2011] IEHC 113, [19].

⁹⁷ *Re Keenan Brothers Ltd* (1985) IR 401 (SC).

⁹⁸ *Re JD Brian Ltd* [2015] IESC 62, [38].

⁹⁹ *Re Keenan Brothers Ltd* (1985) IR 401, 418 (SC).

the assets in question except subject to the charge”.¹⁰⁰ It was on this basis the court concluded that the classification of charges and crystallisation were separate issues and that there was no requirement for express restrictions on the company’s ability to deal with the charged assets to effect crystallisation, instead such restrictions flowed from crystallisation. In a direct rebuttal to the High Court’s reasoning, the Court stated that restrictions on the company’s ability to deal with the charged assets “flowed from the action of service of the notice. This is not a case of putting the cart before the horse”.¹⁰¹

The reasoning adopted by the Supreme Court is problematic. Firstly, the argument that the classification of charges and crystallisation are separate issues is only true of automatic crystallisation because the ability to deal with the charged assets is not in issue under automatic crystallising events. The fact that the ability to deal is not an issue in automatic crystallisation is the historical difference between the classification of charges and crystallisation. However, the use of, and the legal validity of express crystallisation, means this historical difference is no longer true. Under express crystallisation clauses, the company’s ability to deal is just as relevant a factor as it is when charges are created.

Secondly, the quote from *Re Keenan Brothers* accurately describes the consequences of a charge having crystallised. However, the the question posed by the High Court was whether the service of notice, under an express crystallisation by notice clause, caused crystallisation, a point which the *Re Keenan Brothers* did not address. Further, the judgment from *Re Keenan Brothers* was delivered in 1985, before *Re Brightlife* and before express crystallisation by notice clauses were widely used. It is at least plausible that the quote was made without having considered express crystallisation and was intended for application to automatic crystallisation only, where effectiveness of crystallisation is not an issue.

Because charges create proprietary interests that are enforceable against third parties, insolvency law limits the number of charges to two and requires both charges to have a basic level of standardisation. To achieve this limitation and standardisation, certain legal requirements must be met before a charge will be classified as fixed or floating. To create a fixed charge, it is necessary to include express contractual restrictions on the company’s ability to deal with the charged assets in the ordinary course of business. This legal requirement takes precedence over the labels used and the subjective intention of the parties to create a specific type of security. It is unclear why express crystallisation, an event which alters the proprietary interest vested in the charge holder to that of a fixed charge, should be an exception to these well-established principles of insolvency law. The only reason for exceptional treatment in crystallisation is that the crucial factor of the company’s ability to deal is no longer relevant. While this is true of automatic crystallisation, it is not true for express crystallisation.

¹⁰⁰ *Re JD Brian Ltd* [2015] IESC 62, [65].

¹⁰¹ *Ibid*, [73].

The majority of theories of the floating charge agree that the proprietary interest in all fixed charges are the same, regardless of whether it was originally created as a fixed charge or because it became fixed through crystallisation. Because the proprietary interest is the same, it is inconsistent to allow this interest to arise through crystallisation in the precise circumstances which it would have been judged to have failed to establish that interest when the charge was created. Yet this was exactly the outcome of the Irish Supreme Court's decision in *Re JD Brian* by allowing an express crystallisation clause to crystallise a floating charge in the absence of any express contractual restrictions.

Conclusion

In *Re BCCI (No. 8)* Lord Hoffmann stated that the law relating to charges “is fashioned to suit the practicalities of life and legal concepts such as ‘proprietary interest’ and ‘charge’ are no more than labels given to clusters of related and self-consistent rules of law”.¹⁰² This article has argued that the self-consistency of insolvency law noted by Lord Hoffman, is in question if the decision of the Irish Supreme Court in *Re JD Brian* is applied in the future or is followed in other jurisdictions. Express crystallisation clauses are valid as a matter of law. However, their validity does not mean that they must always be effective in crystallising the charge if the debenture has failed to meet the legal criteria necessary to establish the interest of a fixed charge.

¹⁰² *Re BCCI (No. 8)* [1998] AC 214. 227.