Re Spectrum Plus Ltd

In *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 3 WLR 58 (HL) the House of Lords, to the disappointment of lenders, declared that the form of charge that had been held to be fixed charge in *Siebe Gorman & Co Ltd v Barclays Bank Ltd* [1979] 2 Lloyd's Rep 142 (Ch), and which had provided a precedent for countless subsequent lending agreements, was only effective to create a floating charge. The case represents the latest of a series of seismic shifts in the entitlements of creditors in insolvency that has been to the disadvantage of the charge holder. Uncertain times lie ahead for banks in respect of the value of the security that they hold because, although the case resolves some issues in this controversial line of case law, more guidance might have been given as to how a fixed charge over book debts may be created. The case is also of wider interest because it contains discussion of whether it is possible for a ruling to be limited to prospective effect only, although ultimately such an approach was not taken.

The distinction between fixed and floating charges is of great practical significance for lenders. The claims of the floating charge holder rank behind those of preferential creditors in the scheme of asset distribution in insolvency. In addition, for charges created after 15 September 2005, a ring-fenced fund for the benefit of unsecured creditors will be created out of floating charge assets where the company's net property is over a prescribed minimum amount: Insolvency Act 1986, s 176A, (hereafter 'IA 1986'). In contrast the fixed charge holder will be among the first to be paid since this security attaches to specified property. The floating charge is also potentially vulnerable under IA 1986, s 245 if it was created on the eve of insolvency and it does not secure fresh consideration. However the main significance lies in the greater level of control that a fixed charge holder may exert over the insolvency proceedings and the greater amount of confidence that a holder of a fixed charge will have in respect of the value of the security. Notably the level of control brought by a floating charge has shrunk since the power to appoint an administrative receiver has been restricted to holders of floating charges created before 15 September 2003, except in narrow exceptional cases: IA 1986, s 72A. The charge holder may only appoint an administrator where he holds a charge created after that date: IA 1986, Sch B1, para 14. Moreover the floating charge holder runs the risk of the assets covered by the charge being diminished by the payment of the expenses of administration, in particular since the administrator does not require the consent of the floating charge holder for the sale of floating charge assets: IA 1986, Sch B1, para 70. In contrast, the fixed charge holder retains the ability to appoint a receiver and the assets covered by the fixed charge may not be sold by the administrator without the permission of the court: IA 1986, Sch B1, para 71. For these reasons a lender will prefer for as much security as possible to take the form of a fixed charge, with the floating charge being employed as a fall back. The higher the proportion of the company's assets that are subject to fixed charges, the greater the level of control for the lender in corporate rescue cases in relation to financing, since other lenders will only wish to lend against unencumbered assets.

The debts owed to the company, and their proceeds, represent a valuable asset over which the lender will wish to take security. There is no doubt that, as a basic proposition, a fixed charge over present and future book debts is permissible: this aspect of the *Siebe Gorman* decision was not questioned and was confirmed in the *Spectrum* case [2005] 3 WLR 58, [80] and [136]. The difficulty for the charge holder lies in retaining sufficient control to give rise to a fixed charge but not so much control that the arrangement is commercially impractical for the borrower, who will undoubtedly require the use of any proceeds of book debts in running his business.

In *Siebe Gorman & Co Ltd v Barclays Bank Ltd* Slade J held that the clause at the centre of the case created a fixed charge over present and future book debts. The controversy of the *Siebe Gorman* case has surrounded the extent to which the chargor can be permitted to deal with the book debts once collected. The debenture considered in the case was expressed to be a fixed charge over book debts and included a clause that provided that the company should pay into its account with the bank any monies that it received in respect of book debts and should not, without the consent of the bank, charge or assign the monies. Slade J considered that the key issue was whether the company had an unrestricted right to deal with the monies in the ordinary course of business. Both the company and the bank had intended that the debenture would restrict the ability of the company to dispose of the book debts, even without the bank taking any steps to enforce its security. The clause considered in *Siebe Gorman* subsequently formed a template for fixed charges over book debts in countless instances, including the charge in the *Spectrum* case.

Rival lines of authority emerged in subsequent caselaw. The *Siebe Gorman* case was followed in *Ex p Copp* [1989] BCLC 13 (Ch) and referred to in other first instance decisions. However the case was distinguished in *Re Brightlife Ltd*[1987] Ch 200 (Ch). In that case the chargor had been free to collect the book debts, to pay them into its account and use them as it wished. *Siebe Gorman* was distinguished on the basis that the debenture holder in the *Brightlife* case was not a bank and there was no requirement equivalent to the requirement in *Siebe Gorman* that the monies be deposited into an account with the debenture holder. However in *Re New Bullas Trading Ltd* [1994] 1 BCLC 485 the Court of Appeal reversed the first instance decision of Knox J, who had followed *Re Brightlife*, and upheld an arrangement that purported to create a fixed charge over book debts but a floating charge over their proceeds. On the other hand *Brightlife* was followed by Millett LJ in *Re Cosslett (Contractors) Ltd* [1998] Ch 495 (CA).

In the New Zealand case of *Supercool Refrigeration and Air Conditioning v Hoverd Industries Ltd* [1994] 3 NZLR 300 (NZ HC) Tompkins J declined to follow *Siebe Gorman*, while noting that the terms of the agreement in the *Supercool* case were for practical purposes the same as those in *Siebe Gorman*. The *Siebe Gorman* case was not cited before the Supreme Court of Ireland in *Re Holidair Ltd* [1994] 1 ILRM 481, in which a clause in the *Siebe Gorman* form was held to be a floating charge. Most significantly *New Bullas* was criticised by the Privy Council in *Re Brumark Investments Ltd, Agnew v Inland Revenue Commissioner* [2001] 2 AC 710 (PC). That case concerned an agreement in substantially similar form to the agreement in *New Bullas*. Lord Millett, in giving the judgment of the Privy Council, held that *New Bullas* had been wrongly decided. The proposition in *Siebe Gorman* that a fixed charge could be created over book debts was accepted and the case was not expressly declared to be wrong. It was treated as a case where Slade J had found sufficient restrictions to warrant a finding that a fixed charge had been created. Lord Millett commented that a term which restricted the disposition of book debts but permitted the collection and free use of their proceeds was not consistent with the nature of a floating charge. The *Brumark* case was greeted with significant interest by the legal profession will have encouraged the Crown to attack the *Siebe Gorman* fixed charge in the *Spectrum* proceedings.

The *Spectrum* case concerned a charge that had been granted to Spectrum Plus Ltd ('the company') to NatWest ('the bank') to secure an overdraft of £250,000. The charge was over all present and future book debts and the terms of the charge provided that the company should not 'sell factor discount or otherwise charge or assign' the book debts without the consent of the bank and required that the proceeds of collection should be paid into an account with the bank. No restrictions on the operation of the account were specified. The account was never in credit but the company did not exceed the overdraft limit.

At first instance the Vice Chancellor held that only a floating charge had been created, since it was clear that the proceeds were under the control of the company. The only restrictions imposed by the lender related to the collection of the proceeds, since it forbade their factoring, block discounting and collection through another bank. The Vice-Chancellor had been of the view that the *Brumark* case had undermined *New Bullas* and that *Siebe Gorman* had been wrongly decided. The Vice Chancellor's decision was surprisingly overruled on appeal. Three reasons were given: (i), disapproval by the Privy Council did not provide a suitable basis for the Vice Chancellor to decline to follow *New Bullas* and the Court of Appeal could only decline to follow one of its previous decisions in the circumstances set out in *Young v Bristol Aeroplane Co Ltd* [1944] KB 718 (CA); (ii) the company could not in fact have used the proceeds for its ongoing business since the account was overdrawn; and (iii) it would be wrong to overrule *Siebe Gorman* since it had been relied upon by both banks and customers over many years and through customary usage the charge had acquired the meaning and effect that Slade J had attributed to it. Subsequently grounds (ii) and (iii) were met with substantial academic criticism.

In the House of Lords the *Siebe Gorman* point was the subject of reasoned judgments by Lords Hope, Scott and Walker. Lords Nicholls, Scott and Hope delivered reasoned judgments on the issue of prospective overruling, a point on which Baroness Hale and Lords Brown, Steyn and Walker also briefly commented. Baroness Hale was the only judge to discuss a third issue, relating to precedent.

Lord Scott undertook an analysis of the distinction between fixed and floating charges. The classic guiding statement as to the characteristics of a floating charge is that of Romer LJ in *Re Yorkshire Woolcombers Ltd* [1903] 2 Ch 284 (CA), 295. Romer LJ had commented that it was normally characteristic of a floating charge that (i) the charge concerns a class of assets of a company present and future; (ii) that the class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (iii) the borrower should be permitted to carry on its business in the ordinary way until such time as steps were taken by the lender to enforce the security. Lord Scott agreed [107] with Lord Millett in the *Brumark* case [13] that the first two characteristics will not tend to be distinctive of a floating charge and the third of the characteristics will tend to be the key element. Lord Scott opined that the essential characteristic of a floating charge was that the asset subject to the charge is not finally appropriated to the charge until the occurrence of some future event and in the meantime the chargor may deal with the asset and remove it from the security [111].

The approach of all three judges who gave reasoned judgments on the nature of the charge was to examine the substance of the agreement rather than the label attached to it: [55], [119], [141]. This approach echoed that of Lord Millett in the *Brumark* case. Lord Millett had outlined a two-stage process that the court should engage in when determining a charge is fixed or floating in nature. At stage one, the language of the instrument should be construed to determine the intentions of the parties regarding the nature of the rights and obligations granted to each. The object was not to determine whether the parties intended to create a fixed or floating charge. At stage two, the courts should engage in a process of categorisation, in light of the rights and obligations so created. The court here would not be concerned with the intentions of the parties as to categorisation. Therefore if the parties have described their arrangement as a fixed charge but rights and obligations identified in step one are inconsistent with this then the charge will be regarded as floating.

Therefore, as in other branches of law, such as the *Street v Mountford* [1985] AC 809 (HL) distinction between leases and licenses in land law, the label that the parties attach to the charge that has been created is less important than an examination of the substance. The court will have regard not only to what the contract indicates regarding the entitlements of the charger and chargee but also how the charge is actually operated, since a clause that is simply included to give the impression of a fixed charge but which is not actually acted upon cannot be persuasive. Although the freedom of contract of the parties is curbed by such an approach, the public policy reflected in the scheme of asset distribution in insolvency is upheld.

Lord Scott considered that the restrictions that had been imposed under the *Spectrum* charge on dealings with the uncollected book debts did little to support the conclusion that the charge was a fixed charge. Rather, it was the extent of the restrictions on dealings with sums received as payments that were important. It was insufficient that the sums received had to be deposited into the account with the chargee, since the important factor was whether the chargor was restricted in the use that he could make of the credits reflecting the sums that were deposited. On the facts of the case there were no such restrictions. Although Slade J in the *Siebe Gorman* case had considered that it might make a difference whether the account was in debit or in credit Lord Scott was unpersuaded since the chargor would retain a right to draw on the account. On the other hand his Lordship considered that if there was no right to draw on the account it would be a blocked account, as in *Re Keenan Brothers Ltd* [1986] BCLC 242 (Sup Ct, Irl). Lord Scott was dismissive of arguments that great importance should be attached to the labels that the parties used for the charge that they had created, a matter that had been persuasive in *Siebe Gorman* and *New Bullas*. The key consideration was the rights of the charger and chargee in relation to the assets that were subject to the charge.

Similarly Lord Walker considered that in evaluating a charge the essentially practical question was whether the trader could continue to use his circulating capital, including any credit available under an overdraft, the ordinary course of business

[55]. His Lordship considered that Lord Phillips, in giving the judgment of the Court of Appeal [2004] Ch 337, [94] had viewed the matter as if it were a technical question of tracing in equity. In the relevant passage Lord Phillips had considered that it was at least arguable that a charge which required the proceeds of book debts to be deposited into an account with the chargee bank was a fixed charge regardless of the extent to of the chargor's contractual rights to draw out sums equivalent to the amounts paid in. Lord Phillips had therefore concentrated on the payment of the money into the account and not the withdrawal of equivalent sums. He had been dismissive of the idea that the categorisation of a charge should depend on the precise details of the bank's relationship with its customer.

Lord Hope considered that a key issue was whether a blocked account had been created. This issue could not be addressed without examining the contractual relationship between banker and customer. The presence of a blocked account had been identified by Lord Millett in *Brumark* as the critical feature that led the Irish Supreme Court in the *Keenan Brothers* case to characterise the charge in the case as fixed. Lord Hope agreed with this conclusion. However his Lordship considered that it was not possible to read the clause in *Siebe Gorman* as having the same effect. Although the charge restricted what could be done with the proceeds once collected, since they had to be paid into the specified account, the crucial factor was that the account was the company's current account which it could operate in the ordinary course of its business within its agreed overdraft limit. Lord Hope was for this reason not convinced by Slade J's finding that the bank could assert a lien over the account even if the account was in credit. Under the normal rules of banker and customer the bank was not permitted to refuse, without notice, to allow a customer to operate his account while the account was in credit or within the specified overdraft: *Westminster Bank v Hilton* (1926) 43 TLR 124 at 126. It was a misuse of the term lien to say that the bank could assert such a right over the proceeds. The continuing right of the customer was wholly destructive of the argument that a fixed charge had been created. Lord Hope was also not persuaded by Lord Phillip's ground (iii), above. As a first instance decision *Siebe Gorman* was no more immune from review by the House of Lords than any other decision and it was not possible to defend the case on any rational basis.

Aside from the finding that a charge of the *Siebe Gorman* model is a floating charge, the case also confirms that a charge of the *New Bullas* model is a floating charge, since Lord Scott agreed [110] with the views of Lord Millett in *Brumark*, commenting that it would be an internal contradiction in the formulation of a charge if it purported to be fixed in relation to a book debt but floating in relation to its proceeds. The chargee in the *New Bullas* case was not a clearing bank and this is the reason why the chargee only took a floating charge over the proceeds. The main consequence of the disapproval of *New Bullas* will be that such chargees have lost what was a workable arrangement and it will be more difficult for them to obtain a fixed charge over book debts without imposing extremely burdensome restrictions on the chargor.

Although the overruling of the *Siebe Gorman* and *New Bullas* cases resolves two issues in relation to the boundary between fixed and floating charges there are many areas in which further guidance would have been desirable. One question relates to the application of the case to charges over assets other than book debts. Might the

New Bullas finding be extended to any charge that is purported to be fixed in relation to property, such as shares or land, but floating in relation to the proceeds of the property? No indication was given that it would be extended in this manner and, indeed, a wide application of the finding would seem to be inappropriate. The objection to the *New Bullas* arrangement was that the essential value of the book debt lies in the money that can be obtained from the debtor as payment: [110]. Therefore if only a floating charge was granted over the proceeds of the book debts this would necessarily limit the nature of the charge over the book debts themselves. Similar reasoning might apply to other receivables and their proceeds, where the proceeds represent the entire value of the receivable. In contrast shares, for example, have value beyond the right to receive dividends so it should be possible to have a fixed charge over shares and a floating charge over their dividends. Similarly interests in land have value beyond the right to receive income. In these, and analogous, instances it should be theoretically possible to have a fixed charge on the asset and a floating charge on its proceeds.

Some guidance as to the types of arrangements that would give rise to a fixed charge appears in the judgment of Lord Hope, who adopted the analysis of Professor Sarah Worthington in 'An Unsatisfactory Area of Law: Fixed and Floating Charges Yet Again' (2004) 1 International Corporate Rescue 175, 182. In this article four ways in which a lender could ensure that his charge would be characterised as fixed were identified. The first was to prevent all dealings with book debts so that they are preserved for the benefit of the chargee, although his Lordship noted that this would not tend to be a practical arrangement. Equally the second method, which would be to permit the collection of book debts but to require any monies received to be paid to the chargee to discharge the sums owing, would similarly impractical. The third option, payment into a blocked account, will be considered below. The fourth alternative would be to require the monies to be paid into an account with a third party bank and to take a fixed charge over that account. As Professor Worthington notes, each of these options 'is undoubtedly commercially unattractive'.

Future efforts are likely to centre on testing the boundaries of the blocked account concept. This type of account featured in the *Keenan Brothers* case and *William Gaskell Group Ltd v Highley* [1994] 1 BCLC 197 (Ch). Under the terms of the charges considered in these cases the chargors were required to pay the proceeds of the book debts covered by the fixed charges into a specified account and were only permitted to withdraw amounts from the accounts with the consent of the chargees. The withdrawals would be paid into an account which the chargor could use in its day to day business. However the precise level of control that the chargee must exert was not made clear, for example whether permission may be given on an ad hoc basis or periodically. A general license for the chargor to withdraw sums until notified otherwise would not seem to prevent the chargor from carrying on its business in the ordinary way. This lack of restriction would be consistent with characteristic (iii) under the *Yorkshire Woolcombers* guidance as to the features of a floating charge.

A subsidiary concern for a lender in exerting control over the operation of the current account would be potential liability as a de facto director or shadow director: *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340 (CA). The courts have, however, tolerated moderately high levels of monitoring by banks in the past without a finding of de facto directorship, for example in *Re PTFZM Ltd* [1995] 2 BCLC 354 (Ch), 368.

As Lord Millett noted in *Brumark*, it will be insufficient to provide in the charge agreement that the sums are to be paid into a blocked account if the account is not in fact operated as a blocked account, a point with which Lord Walker expressly referred in *Spectrum* [140] and [160], although not relevant on the facts of the case. Normally post-contractual behaviour, such as the practical operation of the account, must be disregarded in construing the contract: *James Miller and Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (HL), applied in the present context in the *William Gaskell* case and *Re Armagh Shoes Ltd* [1984] BCLC 405 (Ch). Lord Millett did not specify the basis on which it could be considered in interpreting the charge and is an issue that is likely to be subject of future caselaw. One basis was discussed in *Orion Finance Ltd v Crown Financial Management* [1996] 2 BCLC 78 (CA), 84 where it was said that the court should consider whether the documents are a sham intended to mask the true arrangement. It might be that the post-contractual behaviour could also be examined for the purposes of determining if the agreement is a mere pretence, or if the agreement has been varied or waived or if one party is estopped. Lord Walker referred to an article by Stephen Atherton and Rizwaan Jameel Mokal (2005) 26 Co. Law. 10 at 16-18 in which these issues are more fully explored.

The relevance of post-contractual conduct is made murkier when it is considered that in the *Keenan* case there was evidence that the blocked account had not been set up immediately in May 1983 but only once the company's financial difficulties worsened in October of that year. Since the company only went into liquidation in November 1983 the blocked account operated for only one month. The effect of this delay was not discussed, nor was the extent of delay that would be permissible. Since the blocked account was only operated at the last minute this raises the possibility that a charge may contain a restrictive clause that is consistent with a fixed charge and that this clause is only acted upon at the last minute. Although it might be argued an agreement of this type was a sham or mere pretence, it would be required in such circumstances that the agreement does not represent the true nature of the parties rights and obligations: *Snook v London and West Riding Investments Ltd* [1967] 2 QB 786, 802 and *AG Securities v Vaughan* [1990] 1 AC 417, 462. If the chargee exercises the right to insist on the operation of a blocked account, albeit belatedly, this requirement of pretence would not seem to be met. The purpose of the exercise of rights would have to be investigated though, to determine whether it was merely part of the pretence.

Fixed charge precedents, adapted to take account of *Spectrum* will no doubt emerge. However Lord Walker noted, while acknowledging the convenience of standard form contracts, that there would normally be at least three documents that would be relevant: not only the debenture creating the charge but also the bank's facility letter and the bank's general terms and conditions and that it might be necessary to refer also to all this documentation in interpreting the nature of the charge: [158]. Such an approach creates further uncertainty but it might be otherwise difficult for the court to assess the rights and obligations of the chargor in relation to the charged property, as required under the two stage process set out in *Brumark*.

The bank had a further argument. It was contended that if the *Siebe Gorman* case, which had stood for 26 years, was found to be erroneous it should be overruled for the future only. Prospective overruling had not previously been recognised as a feature of English law: *Hindcastle Ltd v Barbara Attenborough Associates* [1997] AC 70 (HL), 95 per Lord Nicholls. Indeed in *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL), 378-9 Lord Goff had commented that, although a principle of prospective overruling had been adopted elsewhere, it had no place in the English legal system. Writing extra-judicially Lord Devlin commented that prospective overruling crossed 'the Rubicon that divides the judicial and legislative powers': (1976) 39 MLR 1, 11.

On the other hand, in *Jones v Secretary of State for Social Services* [1972] AC 944 (HL) both Lord Diplock (at p 1015) and Lord Simon (at p 1026) had been of the view that prospective overruling was worthy of consideration and in *R v Governor of Brockhill Prison, ex p Evans* [2001] 2 AC 19 (HL) the House of Lords had left the issue open, while deciding that it was not appropriate on the facts of the case which concerned a claim for false imprisonment. In that case Lord Hope had foreseen that, in light of the Human Rights Act 1998, the issue was likely to assume increased importance. Indeed some limited examples of prospective overruling can be identified in existing case law. In *Royal Bank of Scotland v Etridge* [2002] 2 AC 773 (HL) the House of Lords set out steps that would be applicable in the consideration of future surety transactions and these steps were not applied in assessing the transactions before the court. In the context of company law the judicial review of decisions of the Panel on Takeovers and Mergers is normally prospective only in order to minimise disruption to the Stock Market: *R v Panel on Takeovers and Mergers, ex parte Datafin* [1987] QB 815 (CA), 842. Effects similar to prospective overruling have been achieved through the practice of 'not following' for example in *Hall v Simons* [2002] 1 AC 615 (HL). In that case the House of Lords had considered, due to changes in the law of negligence, the functioning of the legal profession, the administration of justice and public perceptions it was necessary to reconsider the issue of the immunity of advocates from suit. The previous authority on the point, *Rondel v Worsley* [1969] 1 AC 191 (HL), was not followed, rather than overruled. Their Lordships considered that the principles of res judicata, issue estoppel and abuse of process were sufficient to prevent any action being maintained which would be unfair or bring the administration of justice into disrepute.

As Lords Nicholls and Hope noted in the *Spectrum* case, a power to overrule retrospectively had been granted in cases where a devolved institution enacted legislation that was beyond its legislative competence: Scotland Act 1998, s 101, Government of Wales Act 1998, s 110 and Northern Ireland Act 1998,s 88(1). In addition the European Court of Justice had noted in *R (Bidar) v Ealing London Borough Council* Case C-209/03, [2005] 2 WLR 1078, 1112 that it had, in exceptional cases, limited the temporal effect of judgments where those concerned acted in good faith on the basis of the rules and where to do otherwise would cause serious economic difficulties. A basis for the development of a power to overrule prospectively might arise under the inherent power of the House of Lords to do whatever is necessary to serve the interests of justice. In *R v Bow Street Metropolitan Stipendiary Magistrate (No 2), ex parte Pinochet Ugarte* [2000] 1 AC 119 (HL), 132D-E Lord Browne-Wilkinson had commented that the inherent jurisdiction of the House of Lords to correct any injustice caused by an earlier order was unfettered.

The interpretation of the *Siebe Gorman* clause was important issue from the perspective of commercial certainty, since the *Siebe Gorman* case had been relied upon in the years since it was decided, not only by banks, but also by debtors who would have granted fixed charges over book debts and relied on the priority of such a charge ahead of preferential creditors in order to limit, or eliminate, their potential liabilities under personal guarantees. Countless liquidations would have proceeded in the past on the basis that a charge modelled on the *Siebe Gorman* clause was fixed not floating. Lords Nicholls [43] and Scott [122] treated arguments on this point with great scepticism, noting that a first instance decision could not be regarded as having settled a point of law with finality. Lord Scott added that argument that, on the facts of the present case, the terms of lending would have been significantly different if the bank had known that its charge over Spectrum's present and future book debts would only be interpreted a floating charge. It can be added that anecdotal evidence suggested that banks, while outwardly maintaining that they had created a fixed charge over book debts, were prepared, in light of *Brumark*, for the eventuality of *Siebe Gorman* being overruled in future and even issued internal advice that their purported fixed charge was ineffective: see for example Joanne Rumley and Graham Jeffries, '*Brumark*: Where Are We Now?' (2003) 16 Insolv. Int. 19 at 20. The practical impact of the House of Lords was also minimised because a large number of liquidations had been delayed pending the outcome of the case, as noted by the Vice Chancellor at first instance [2004] Ch 337, 342. Moreover, to have given the decision prospective effect only would have deprived the preferential creditors of the priority to which they were entitled under the Insolvency Act 1986, s 175(2)(b). Lord Scott was of the view that, since the case therefore concerned the rights of creditors under statute it would be an improper usurpation by the judiciary of the role of the legislator to deprive the preferential creditors of their entitlements by making a prospective ruling. In light of the retrospective effect of the decision the Crown may therefore, subject to the limitation rules, bring claims to recover sums that were paid out by liquidators on the basis of *Siebe Gorman* being good law. There is evidence that the Crown had given assurances, following *Brumark*, that they would not pursue such claims: *Re BHT (UK) Ltd* [2004] EWHC 201, [2004] BCC 301, [13] but it is unclear whether this policy will be continued. The impact for lenders who now hold floating charges as a result of the *Spectrum* decision is lessened to an extent by the earlier finding in *Re Leyland DAF Ltd, Buchler v Talbot* [2004] UKHL 9, [2004] 2 AC 298 (HL) that the expenses of liquidation are not payable out of floating charge assets.

Although ultimately the effects of the decision were not limited prospectively their Lordships commented on the need to keep open the issue of whether a court could limit the effects of a future ruling prospectively. Lords Scott [125] and Steyn [45] considered that there would be more difficulty where the point required statutory interpretation, although Lords Nicholls [39] and Hope [74] did not rule out the possibility of prospective overruling in such a circumstance.

Baroness Hale briefly touched upon the issue of whether the Court of Appeal, or even the High Court, could decline to follow a decision of the Court of Appeal which had, as in this case, been expressly disapproved by the Privy Council in considering laws in another jurisdiction that were identical to the laws of England on

Wales on the same point. Baroness Hale hoped that nothing which had been said in this case should be taken as ruling out such a possibility in the future [163].