

House of Lords landmark ruling in Re Spectrum Plus Limited (In Liquidation) – a standard bank debenture will only create a floating charge on book debts

On 15 January 2004, the Vice Chancellor determined that the purported fixed charge over book debts in a standard bank debenture was in fact a floating charge since there was no real restriction on the manner in which the proceeds of book debts were used by the customer after those proceeds were paid into the account. *Siebe Gorman & Co v Barclays Bank plc (1979)* was wrongly decided. Not so, said the Court of Appeal on 26 May 2004, it being bound to follow its earlier decision in *Siebe Gorman*. Whether a charge was fixed or floating depended not on the manner in which the charge was described in the agreement but on the nature of rights and obligations granted by the parties to each other. Where there was some inconsistency the court would consider whether there were any 'dominant' characteristics which caused it to be classified as a floating charge. The ability of the company to use the proceeds of the book debts as it saw fit did not weaken the obligation not to sell, factor or pay the debts into another account. That freedom to deal was insufficient to persuade the court that the charge was in fact floating charge over book debts and not a fixed one. Accordingly the charge was upheld as a fixed charge and *Siebe Gorman* was followed.

In the House of Lords today their Lordships overturned the decision of the Court of Appeal and held that the decision in *Siebe Gorman* was incorrectly decided. The House of Lords also refused to make its ruling prospective. The Crown preferential creditors have already indicated that they will not seek to claw back payments made to banks prior to the decision in *Re Brumark (2001)*. However, plainly where they have retained their preferential status they, and also employees, can now require the payment of book debt proceeds to them as a floating charge asset in priority to the bank.

While this decision finally resolves a long standing issue for banks, preferential creditors and insolvency practitioners, areas of uncertainty still remain. While the court referred to a 'blocked' account as being the mechanism by which the banks could ensure that it had sufficient control of the monies, no indication was given as to how this might operate in practice which may give rise to further litigation. Further while the Crown preferential creditors may have issued a statement concerning their attitude towards claw back, employees may also have been prejudiced and it is not beyond the realms of possibility that employees either through a trade union or individually may (subject to issues on limitation) seek repayment of sums paid away to banks years ago under the fixed charge which recovery would enable their preferential claims to be paid in full.

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