FLOATING CHARGES AND PRIORITY DEBTORS AFTER JD BRIAN

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On 9 July 2015, Laffoy J gave judgment on behalf of a three-judge Supreme Court in the case of In the Matter of JD Brian Limited (in Liquidation) t/a East Coast Print and Publicity (JD Brian).[1] In finding that a valid notice of crystallisation had been delivered by Bank of Ireland over the floating charge at issue, and thus overturning the 2011 decision of the High Court, the floating charge was deemed by the Court to be a fixed charge which took precedence over priority debtors, including the Revenue Commissioners.

The delivery of this judgment brings to an end a legal and judicial interregnum in which the priority status of crystallised floating charges in the context of a winding up remained unclear. However, the comments of Laffoy J, particularly in light of the relative silence of the Companies Act 2014 (the 2014 Act), demonstrate a clear dissatisfaction with the current position of the law. It can be argued that, although the interpretation of the law as it stands may be correct, we are now left in a position that is at odds with modern legal and economic trends.

Finlay Geoghegan J, in the High Court, reasoned that a correct construction of section 285(7) of the Companies Act 1963 (the 1963 Act) gave preferential debts priority over the claim of the bank, irrespective of any crystallisation that may have occurred prior to winding up. In doing so, she refused to follow contrary lines of authority from the UK, such as Re Griffin Hotel [2] and

[1] [2015] IESC 62.
[2] [1941] Ch 129.

Re Brightlife.[3] In a supplementary judgment on the outstanding issue of the effect of crystallisation, it was determined that a proper interpretation of the provisions of the debenture document in question, the floating charge could not be said to have been converted into a fixed charge.

The Supreme Court, in contrast, held that the relevant clauses of the debenture displayed an intention on the part of each party, upon crystallisation, to restrict the ability of the company to use the property and assets concerned. A clause under which the company covenanted to carry on the business in a proper and efficient manner did not conflict with established law on crystallisation.[4] On the second matter, that of the effect of section 285(7) of the 1963 Act, Laffoy J expressed the view that to interpret the provision as entitling preferential creditors to priority over a floating charge which validly crystallised prior to winding up would be to rewrite the section itself, as it was clear that the operative time for assessing priority was the time of winding up; any finding to the contrary would, in her opinion, conflict with the will of the Oireachtas.

It should be noted that although this decision follows the previously rejected line of authority in the UK, the position in that jurisdiction has since been legislatively reversed; in particular the Insolvency Act 1986 ensured that crystallised floating charges do not get priority over preferential creditors. This was followed by the Enterprise Act 2002, which abolished the right of the crown as a preferential creditor generally. This reversal follows recommendations regarding the abolition of priority debtors dating back to the opinion of the Cork Committee in 1982.[5]

Despite the clarity with which Laffoy J articulated the operation of the law, the learned judge also highlighted the dissatisfactory result which derived from this interpretation of section 285(7). She highlights the potential of this decision to allow for the creation of a false form of crystallisation, which would secure priority for the debts whilst still allowing the debtor to trade in its assets. As well as this, the judgment draws attention to a lack of transparency arising from

[3] [1987] Ch 200.
[4] See the decision of the Supreme Court in *Re Keenan Bros Ltd* [1985] IR 401 for an articulation of these principles.
[5] In its report, the Committee expressed the view the crown preference caused hardship to the general body of creditors whilst producing a relatively insignificant benefit for the State.

the absence of a need to register floating charges which have crystallised, transparency being a crucial principle underpinning the operation of company charges and insolvency law generally.

The enactment of the 2014 Act provided the legislature with an opportunity to resolve this issue by more clearly enunciating the rules regarding the status of floating charges post-crystallisation, particularly as against priority debtors. It also provided the chance to review the necessity of statutorily-protected priority debtors in the first place, given the abolition in England of crown preference (as discussed above). Consideration should have been given to the view, more prevalent in modern times, that offering priority to certain debtors does not accord with the desire to equitably distribute funds on a winding up, or with the need to protect smaller creditors who may suffer more during these events.[6]

However, section 621(7) of the 2014 Act repeats the wording of its predecessor in its entirety. Whilst this may appear to offer little insight into the current thinking of the Oireachtas on this matter, G Brian Hutchinson believes that, rather being an indication of a lack of consideration of the matter, this verbatim repetition could represent a conscious decision to prioritise the effective operation of floating charges over any other policy.[7]

Whilst this may be the case, the concerns of Laffoy J regarding the current legal position remain outstanding and need to be addressed. It may be appropriate, in light of this decision, the changed approach in England, and the recent overhaul of company law generally, to review not only the expression of the current principle in section 621(7), which is patently dissatisfactory, but also the reasoning behind the existence of such priority debtors at all. Although Laffoy J's legal interpretation of section 285(7) in this case may be correct, it is up to the legislature to decide if it gives the most desirable outcome.

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Sarah Slevin

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[6] See, for example, the comments of Lynch-Fannon and Murphy on the disadvantages of giving priority to special classes of debtors; Irene Lynch-Fannon and Gerard Murphy, *Corporate Insolvency and Rescue* (2nd edn, Bloomsbury Professional 2012) ch. 8.

[7] G Brian Hutchinson, 'Conversion of Floating Charges and Revenue Priority' [2015] 7 CLP 166.