

IT'S ALL IN THE NAME: FLOATING CHARGE SECURITY FOR CLOUD COMPUTING COMPANY

*Re UKCloud Ltd (in liquidation)*¹ is another first instance case which considers whether security is fixed or floating, following closely after *Re Avanti Communications Ltd (in administration)*². In the context of Internet Protocol (IP) addresses, it helpfully confirms the process for characterising security as fixed/floating and provides further colour on the factors relevant to the analysis. In this briefing note, we consider the key points and takeaways from the case.

BACKGROUND

UKCloud provided cloud computing services and used IP addresses to allow its customers to access the services. Through its parent company, it raised finance governed by a loan agreement made between its parent and the lender and it granted a debenture in support of the loan over its assets. Under clause 3.2(d) of the debenture, UKCloud granted a first fixed charge over "all licenses, consents and authorisations (statutory or otherwise) held or required in connection with the Company's business or the use of any Secured Asset, and all rights in connection with them" and a floating charge over any assets not subject to a fixed charge. While the IP addresses were not expressly referenced, the Judge considered that they would be captured by the natural and ordinary meaning of the words used in the debenture.

As is common in debentures, the debenture also contained a number of undertakings by UKCloud in respect of the assets secured by the debenture (the "Secured Assets"), including undertakings not to: (i) create any security over the Secured Assets, other than security permitted under the loan agreement; (ii) dispose of the Secured Assets, other than disposals permitted under the loan agreement; and (iii) not to create or grant any interest in the Secured Assets in favour of a third party. The lender was also entitled under the debenture to require the deposit with it of any deeds and documents of title relating to the Secured Assets.

The case was brought by the Official Receiver ("OR", who was appointed as liquidator) under section 168(3) of the Insolvency Act 1986 which enables a liquidator to apply to court for directions in relation to any matter arising in the winding up. The OR, who took a neutral stance, sought directions on whether

Key points

- Characterisation involves a two-stage process, taking into account a combination of factors
- The nature of the assets is a key factor but not conclusive: non-fluctuating assets can still be subject to a floating charge e.g. if there is no control exercised over them
- The mere existence of documentary provisions providing for control is not enough: they have to actually be adhered to
- Care should be taken around the drafting of charging clauses in view of the "all or nothing" approach endorsed by the case

¹ [2024] EWHC 1259 (Ch)

² [2023] EWHC 940 (Ch). See our [briefing](#) on the case.

the security over the IP addresses was fixed or floating to determine the application of proceeds from their sale. If the security was floating, the proceeds would be used to defray in part expenses incurred in the liquidation.

The Judge reached the conclusion that the security was floating.

TWO STAGE TEST AND INTANGIBLE ASSETS

The Judge started by adopting the two-stage process set out in *Agnew v Commissioners of Inland Revenue*³ for determining whether security is fixed or floating (see text box), which was also followed in *Re Avanti*.

As part of the first stage, it was argued that the lack of an express reference to the IP addresses pointed towards a floating charge as the parties could easily have made express reference to them if they had intended to create a fixed charge over them. The Judge acknowledged that this was a pointer to the intention of the parties, but not conclusive. This is helpful in the context of security over intangibles where umbrella terms are often used to encapsulate a wide range of legal rights (although see the risk of this approach below in relation to the "all or nothing" principle).

He also noted that in *Re Avanti* (where the assets under consideration were a satellite payload and its related tangible and intangible infrastructure (including certain satellite network filings and ground station licenses)), permissions and rights were treated as rights capable of being subject to fixed security, which gave support to the ability to create a fixed charge over the IP addresses. The consideration of security over different types of intangible assets in both cases is helpful in the age of digital assets.

NATURE OF ASSETS NOT CONCLUSIVE

It was also argued that the IP addresses formed part of UKCloud's circulating capital, with the effect that the security over them was floating rather than fixed.

The Judge did not agree that the IP addresses were "circulating" or "fluctuating": UKCloud was not able to sell or dispose of the IP addresses and then replenish the gap created as would be the case with stock or some other asset dealt with as part of the "churn" of business conducted by a shop or similar concern. However, he noted that it did not follow from the absence of this characteristic typical of a floating charge that the charge over the IP addresses was fixed and regarded that point as inconclusive.

In *Re Avanti*, the relevant assets were also not part of the circulating capital or fluctuating assets of the chargor and the security in that case was held to be fixed. However, this indicates that the nature of the assets is only one of several factors to take into account in the second stage of characterisation, another key factor being control over the charged assets (see below). The Judge followed the nuanced approach advocated in *Re Avanti* (informed by prior case law) where a combination of factors is taken into account.

CONTROL

The Judge noted that the terms of the debenture provided for control to be exercised, however, there was no evidence that it was in fact exercised by the lender or that the lender sought to do so, which could be indicative of how the parties viewed the charge. UKCloud was able to carry on its business freely, providing the IP addresses to its customers, without reference to the lender: a

Two-stage process

- Firstly, construe the security document and ascertain the nature of the rights and obligations the parties intended to grant from the language of the document
- Secondly, categorise the security, which is a matter of law not depending on the intention of the parties

³ [2001] UKPC 28 [2001] 2 AC 710

hallmark of a floating charge. This serves as a reminder that control is ultimately a question of fact, not drafting.

The Judge also observed that it was hard to see how the control mechanisms in the debenture could apply at all in practice to the IP addresses. This may reflect the generic drafting of the control provisions, which contrasts with *Re Avanti* where there was a detailed scheme of restrictions on disposals of the relevant assets. It also reflects that it may be more difficult to exercise control over some assets than others (cf. shares where there are certificates or other documents of title to exercise control over) and more consideration may need to be given to the control mechanisms depending on the asset.

"ALL OR NOTHING" PRINCIPLE

Relying on four older cases⁴, it was argued that clause 3.2(d) fell to be construed as a whole and on an 'all or nothing' basis i.e. all assets that fell within the clause must be subject to *either* a fixed charge *or* a floating charge. While the lender argued that the "all or nothing" approach in the cases was not binding, the judge did consider himself bound, but acknowledged that even if he were not bound, there was plainly a strong tendency in the cases from which there was no reason to deviate in the present case.

He also noted that this point was not raised in *Re Avanti* which might indicate that the principle was not absolute in every case. In *Re Avanti*, there was one charging clause with a list of different assets in sub-clauses, rather than a separate charging clause for each asset class as in this case. While it seems an odd result that the structure of the charging clause(s) could influence whether a charge is fixed or floating, the safer course of action in view of the case may be to have a separate charging clause per asset class. Care may also need to be taken around the assets set out in each charging clause: if any are more of the nature of floating charge assets, this could risk undermining other assets more of the nature of fixed charge assets.

TAKEAWAYS

After a dearth of case law since the 2005 *Spectrum Plus* case⁵, this case and *Re Avanti* are helpful in providing an updated analysis of fixed/floating charges and adding further colour to the various factors at play. The consideration of security over different types of intangible assets in both cases is also helpful as digital assets and security over them become more prevalent.

This case is a good reminder of the priorities that arise in a liquidation, in particular the distinction between fixed and floating charges, where floating charges rank behind expenses of the liquidation, preferential creditors and a prescribed part of floating charge recoveries are made available for unsecured creditors. The recovery landscape for lenders looks very different where a charge is floating and not fixed.

If lenders are seeking to take a fixed charge, this case reinforces the need for careful drafting, not only in the charging clause but also in terms of control provisions. In the case of control provisions, such drafting is only the starting point and the provisions must actually be adhered to. This case is a reminder that control is ultimately a question of fact.

⁴ *Re G E Tunbridge Ltd* [1995] 1 BCLC 34; *Re ASRS Establishment Ltd* [2002] BCC 64; *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58; and *Beam Tube Products Ltd* [2006] EWHC 486 (Ch)

⁵ *National Westminster Bank plc v Spectrum Plus Ltd & Ors* [2005] UKHL 41

CONTACTS



Melissa Coakley
Partner,
London

T +44 207006 1963
E melissa.coakley
@cliffordchance.com



Avril Forbes
Knowledge Director,
London

T +44 207006 8278
E avril.forbes
@cliffordchance.com



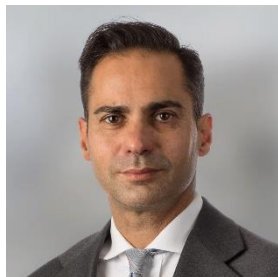
Philip Hertz
Global Head of
Restructuring and
Insolvency, London

T +44 207006 1666
E philip.hertz
@cliffordchance.com



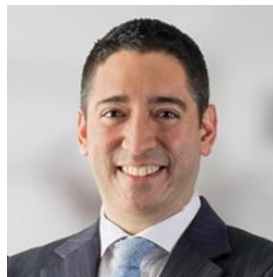
Julia House
Partner,
London

T +44 207006 2206
E julia.house
@cliffordchance.com



Faizal Khan
Partner,
London

T +44 207006 2158
E faizal.khan
@cliffordchance.com



Paul Landless
Partner,
London

T +44 207006 2368
E paul.landless
@cliffordchance.com



Gabrielle Ruiz
Knowledge Director,
London

T +44 207006 1615
E gabrielle.ruiz
@cliffordchance.com



Iain White
Partner,
London

T +44 207006 2825
E iain.white
@cliffordchance.com

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www.cliffordchance.com

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London, E14 5JJ

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