



August 2017

Validity of joint administrators' appointment confirmed

SAW (SW) 2010 Ltd & Anor v Wilson & Ors [2017] EWCA Civ 1001 (25 July 2017)

The Court of Appeal has held that the validity of a floating charge (and the appointment of joint administrators under that floating charge pursuant to paragraph 14 of Schedule B1 to the Insolvency Act 1986) does not depend on the existence of uncharged assets of the company at the time of its creation, nor upon the power of the company to acquire assets in the future.

BACKGROUND

Property Edge Lettings Limited ("**PELL**") was acquired by SAW (SW) 2010 Limited ("**SAW**") in December 2007.

SAW and Neil Wilson Accountancy Limited, the latter being a creditor of PELL, were the appellants in this case (the "**Appellants**").

On 18 December 2007 Capital Homes Limited ("**CHL**") granted PELL a £1.25m facility secured by various mortgages and a floating charge (collectively, the "**CHL Charge**"). By clause 4.2 of the Mortgage Conditions incorporated within the CHL Charge, PELL covenanted not to create or permit any security interest in the property subject to the charge without CHL's consent. Clause 9.11 of the Mortgage Conditions provided that:

"9.11. If, without the prior written consent of the Lender, the Borrower encumbers howsoever the property subject to the floating charge, or any person levies or attempts to levy any distress, sequestration or other process against the said property **the said floating charge shall automatically without notice operate and have effect as a fixed charge instantly such event occurs.**"

In May 2008 Nationwide Building Society ("**Nationwide**") granted PELL a £3.9m facility secured by various fixed and floating charges (the "**Debenture**"). Neither PELL nor Nationwide obtained the consent of CHL to the grant of the Debenture, but in January 2012 CHL consented to Nationwide's appointment of joint administrators (Simon Wilson, Anne O'Keefe and Fraser Gray of Zolfo Cooper (as then was)) in respect of PELL under the Debenture.

TRIVERS SMITH

The Appellants challenged the validity of the Administrators' appointment on the bases that:

- the grant by PELL of the Debenture had the effect, pursuant to Clause 9.11 of the CHL Charge, of crystallising the security comprised therein
- there was not in May 2008, nor at any time thereafter, any asset, property or right of PELL to which the floating charge purportedly created by the Debenture could attach, so that the Debenture could not in substance create a floating charge, even if it purported to do so in form
- a company could not grant floating charge security if, by reason of the crystallisation of a prior floating charge, it neither had un-charged assets to which the new purported floating charge could attach, nor the power to acquire such assets in the future, for as long as the prior crystallised charge remained outstanding.

ANALYSIS

Section 251 of the Insolvency Act 1986 Act defines a Floating Charge as follows:

"Floating Charge" means a charge which, **as created**, was a floating charge ..."

In *re Yorkshire Woolcombers Association Limited* [1903] Romer LJ described the essential characteristics of the floating charge thus:

"I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some further step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."

DECISION

The Court of Appeal unanimously rejected the Appellants' case, holding, among other things, that:

- the validity of a floating charge does not depend on the existence of uncharged assets of the company creating it at the time of its creation, or upon the power of the company to acquire assets in the future
- even if the entirety of PELL's assets were subject to fixed charges caused by the crystallisation of the floating charge granted to CHL, nonetheless the Debenture was a qualifying floating charge at the time of its creation because, on its true construction, it manifested the essential characteristics identified by Romer LJ in *re Yorkshire Woolcombers Association Limited* [1903]
- it was in any eventful doubtful whether in these circumstances (the grant of further security without consent) the crystallisation of the existing security would take place simultaneously with such grant (rather, per Arden LJ, it would happen "forthwith or immediately upon" the further security being granted; that is to say, crystallisation would occur after the subsequent charge was created, not at the same time)
- even in circumstances where there are no present and/or free assets of value comprised in a second floating charge, that floating charge would nevertheless 'bite' on the equity of redemption in any prior security.

COMMENT

The outcome is sensible, and provides reassurance to stakeholders that subsequent floating charges will not be deemed invalid and/or unenforceable by the existence of any prior security (even absent the prior security-taker's consent). Regrettably it is unclear from the judgment (and from the judgment of the first instance decision) why the Appellants were opposed to the joint administrators' appointment and/or whether, had there

TRAVERS SMITH

been any doubts as to the validity of the Debenture prior to the joint administrators' appointment, CHL would have been minded to appoint joint administrators itself pursuant to the CHL Charge.

FOR FURTHER INFORMATION, PLEASE CONTACT

10 Snow Hill
London EC1A 2AL
T: +44 (0)20 7295 3000
F: +44 (0)20 7295 3500
www.traverssmith.com



Peter Hughes

Partner

E: peter.hughes@traverssmith.com
T: +44 (0)20 7295 3377



Edward Smith

Partner

E: edward.smith@traverssmith.com
T: +44 (0)20 7295 3482



Douglas Hawthorn

Senior Counsel

E: douglas.hawthorn@traverssmith.com
T: +44 (0)20 7295 3301



Natalie Scoones

Associate

E: natalie.scoones@traverssmith.com
T: +44 (0)20 7295 3356