# The anatomy of a company charge: addressing the unresolved challenges to characterisation

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**Abstract**

The characterisation of a company charge remains an important issue. Not only does the type of charge determine the priority status of a creditor, but it also affects their rights in relation to the debt. Recent case law has however shown that characterisation can be a complex process. This article is concerned with three critical unresolved issues that need to be addressed. First, there needs to be clarity on the correct interpretation of dicta made by judges in *Re Spectrum* and *Agnew*. Second, specific concepts that help determine characterisation need to be given due consideration. Concerted efforts need to be given to distinguish control and consent to deal, and a distinction should be applied between ordinary and commercial control. Third, the increasingly complex nature of security documents needs to be placed in context with commercial realties, and this requires a new perspective on how characterisation should be approached. In response to these challenges, this article proposes a tier structure to characterisation where charge attributes can be placed on a scale to determine the proper characterisation of company charges.

**Keywords:** company law; floating charge; fixed charge; statutory interpretation; priority

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## Introduction

In the context of English law security,[2] how the courts may characterise a company charge is quite simple. If the charge is not fixed, then it must be floating.[3] In theory, the simplicity of this approach

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[2] For a detailed examination of floating charges in Scotland, see J Hardman and A DJ MacPherson, *Floating Charges in Scotland: New Perspectives and Current Issues* (Edinburgh University Press, 2022).

[3] See *Illingworth v Houldsworth* [1904] AC 355, at 358, where Lord Macnaghten said, "I should have thought there was not much difficult in defining what a floating charge is in contrast to what is called a specific charge".

leaves little scope for challenge since the characteristics of a charge are well established in case law.[4] Yet there is a steadily growing number of cases where characterisation has proven to be more complicated because several non-specific facts present variables that don't naturally conform with recognised convention. This can be seen in the recent decisions of *Re Avanti Communications Ltd* (hereafter *Avanti*),[5] and *Re UK Cloud Ltd (hereafter UK Cloud*),[6] which are examined at length in this article. The variables present in these cases demonstrate that there remain three unresolved challenges to characterisation that need to be addressed to enhance commercial certainty.

First, there needs to be clarity on the correct interpretation of dicta made by judges in the leading House of Lords decision in *Re Spectrum*,[7] and the Court of Appeal decision in *Agnew.*[8] Judicial interpretation on frequently used vocabulary in different contexts has over time led to varied interpretations of the authoritative statements made by judges. This is both unfortunate and problematic for several reasons. Variations may indicate that either there is common agreement, despite how the argument has been expressed, or the legal text has been misconstrued. Indications of this was evident in *Avanti*,[9] and the effect of this can create confusion and lead to incorrect legal application. This is particularly a concern given that the source of this misunderstanding often relates to the dicta of Lord Scott and Lord Millet in *Spectrum* and *Agnew*.[10] While there is some commonality in the concepts used to facilitate characterisation, unusual types of asset and the varied application of control dependent on the charged asset have ensured that they have not been applied with the same cohesion.[11]

Linked to these issues that concern the interpretation of judicial dictum, the second unresolved challenge concern the significance of specific concepts that determine characterisation. This article will refer to these concepts as characteristic determinants, with several to note. It is apparent from the varied interpretations in both case law and the academic literature that there is not only a need to distinguish control and consent to deal, but to also establish a distinction between ordinary and

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This however has proved to be somewhat optimistic in light of recent case law, particularly in the context of a charge over book debts.

[4] See Romer LJ in *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, at 295; Lord Scott in *Re Spectrum Plus Ltd (in liquidation)* [2005] UKHL, at [111].

[5] *Re Avanti Communications Ltd* [2023] EWHC 940 (Ch) (hereafter *Avanti*).

[6] *Re UK Cloud Ltd (In Liquidation)* [2024] EWHC 1259 (Ch) (hereafter *UKCloud*).

[7] *Re Spectrum Plus Ltd (in liquidation)* [2005] UKHL (hereafter *Re Spectrum*).

[8] *Agnew v Commissioners of Inland Revenue* [2001] 2 AC 710 (hereafter *Agnew*).

[9] *Avanti*, at [108]-[133]. This will be examined in parts two and three.

[10] Specifically, the issue tends to focus on whether total prohibition on dealings is required for a fixed charge. I relation to these cases, the focus is often on the meaning of Lord Scott's reference to "finally appropriated" in *Re Spectrum*, at [111], and the proper application of the two-stage enquiry as set by Lord Millet in *Agnew*, at [32].

[11] For example, see *Re Cimex Tissues Ltd* [1994] BCC 626, at [635], an earlier authority that Johnson J in *Re Avanti* at [43] examined. The relevance of *Re Cimex* post *Re Spectrum* and *Avanti*, are later examined.

commercial control.[12] On the issue of control there is a further need to determine whether types of asset impact the degree of control that can be exercised. This issue has gained attention due to the general growth in charges being placed on intangible assets,[13] and in particular the dicta by Johnson J in *Avanti*.

Third, while commercial practices must be reflected in how charges are approached, there is a concern that security documents are too complex.[14] The security provisions in *Avanti* and *UKCloud*, illustrate this point. In the former case, it is an example of what could be perceived as excess coverage. The inclusion of specific carve-outs in respect to permissions and exceptions for chargors; attempts being made to apply certain exceptions which were not considered compatible to intangible assets.[15] and the willingness to explore the relevance of post contractual conduct all contributed to difficulties in establishing characterisation.[16] In the latter case, the judge had to determine whether a type of asset fell within the description of a charge over 'all licences, consents and authorisations', [17] despite no specific reference to IP addresses in the charging clause. While it was determined that the word 'authorisations' was sufficient to establish intent to create a fixed charge,[18] an over reliance on judicial interpretation to assist in these matters rather a dependence on the language used poses a risk to commercial certainty, even if judicial input is deemed to be common practice.

These unresolved issues are significant as they create commercial uncertainty, and this poses the potential risk that if a type of charge is called into question, it could be recharacterised. For the purposes of this article, recharacterisation has two meanings. First, where the charge does not follow the label given to it (mischaracterised charge), and second, where the drafting goes beyond a label in attempting to create a fixed charge but the court or an insolvency practitioner concludes that the relevant consent/control provisions are insufficient to meet the intentions of the parties (purported

[12] It is suggested that between ordinary and commercial control, a scale that informs characterisation can be formed. This is developed in part 2(v)(d).
[13] This includes digital assets such as crypto currencies, which may become important as collateral in the future, see L Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 7th edn (London: Sweet & Maxwell, 2023), at para 1-62.
[14] "The modern drafter of debentures can be inclined to go for the overkill, driven by a desire to obtain the most effective security for his or her client's advance", see L Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 7th edn (London: Sweet & Maxwell, 2023), at para 4-08.
[15] See *UK Cloud,* at [50]-[55]; and *Avanti*, at [97]-[98], where the use of an obsolete exception in the security document is unlikely to be applied to intangible assets; a factor that should be considered when the nature of the asset is being determined.
[16] While considered an irrelevant factor, post-contractual conduct could be useful to determine whether an agreement may be held to be a sham. See, L Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 7th edn (London: Sweet & Maxwell, 2023), at para 4-22. On this point, the judge in *UKCloud*, followed the nuanced approach as developed in *Avanti*. This is explored below.
[17] *UKCloud,* at [58].
[18] Ibid*,* at [39].

fixed charge). Recharacterisation is problematic for two reasons. First, the type of charge determines priority when a company is insolvent.[19] In most cases, the insolvent company will not have assets that could satisfy all of its liabilities and therefore priority ranked creditors are in the best position to make a recovery, whereas those with weaker or no security are likely to suffer severe financial loss. Second, if the three challenges remain unresolved, simplicity would give way to further difficulties as attempts are made by drafters to mitigate the risk associated with the uncertainties. This would only bring an undesired additional level of complexity in security documents.

To address these unresolved challenges to characterisation this article begins with an examination of the nature of security and the characteristics of the fixed and floating charge. The unresolved issues associated with the characterisation process are then critiqued. The article concludes that while the law in this area has become overly complex, it is within the complexities that simplicity can be found. An accurate depiction of the dicta and the determinants referred to in this article, will reduce the overall complexity associated with security documents. The solution applies a tier structure to characterisation, where charge attributes are assessed on a scale that helps to determine with greater ease the proper characterisation of company charges, and with it, deliver some much needed certainty in future case law and literature.

## 1. Assessing the nature of security

In order to meet their funding obligations, many companies may grant a debenture to the lender in order to raise finance.[20] The debenture, if it contains security, may also be referred to a security document, and the most common form of security offered by a company is the charge.[21] In general terms, a charge merely represents a security interest in or over a particular asset(s) by their owner (the 'chargor') in favour of the creditor (the 'chargee'), by which it is agreed that that property shall be appropriated to the discharge of a debt or other obligation.[22] In the discharge of the debt there is no transfer of title,[23] and the chargee's rights are considered proprietary even though the exact

[19] The order of priority is summarised in the Supreme Court decision in *Lehman Brothers International (Europe) and others* [2017] UKSC 38, at [17]. Lord Neuberger referred to his previous decision in *In Re Nortel GmbH* [2014] AC 209, at [39], where the priorities were listed.

[20] The term 'debenture' means an 'instrument [that] imports an obligation or covenant to pay… [which is] in most cases…accompanied by some charge or security', see *Edmonds v Blaina Furnaces Co* (1887) 36 Ch D 215, at 219. Chitty J, went on to note that the debenture is an 'acknowledgement of a debt' and can be secured or unsecured.

[21] These charges are examined below. The other forms of consensual security in English law are the mortgage, the pledge, and the contractual lien.

[22] S Worthington and A Agnew, *Sealy & Worthington's text, cases and materials in company law* (OUP, 2022), at 742.

[23] *Carreras Rothmans Ltd v Freeman Mathews Treasure* [1985] Ch. 207, at 227.

nature of the floating charge is contested.[24] To counter issues that may arise from this uncertainty, the extent of these rights is created by contract and are usually listed in detail in the debenture.[25] While there is an emphasis on the contractual obligations created by the debenture, it is crucial to note that this does not necessitate an analysis cast solely in contractual terms.[26] These broader issues are examined in parts two and three of this article.

Once a charge is created, an immediate security interest is formed. But the exact point when an asset is appropriated is dependent on the type of charge that has been granted. This may be important to the creditor, particularly if the company subsequently becomes insolvent and there is a scarcity of assets. Assets that are subject to a fixed or specific charge are permanently appropriated on creation of the charge or the debtor has acquired rights in the asset to be charged.[27] Typically, a fixed charge is one that 'fastens on ascertained and definite property or property capable of being ascertained and defined'.[28] The nature of the fixed charge restricts the chargor's power to dispose of or otherwise deal with the property without the chargee's consent.[29] There have been some disagreement on whether a total prohibition on the chargor to deal with the property was required, but this has subsequently been confirmed not to be the case.[30] Varied degrees of control may be exercised without a risk that the charge be recharacterised as floating, but the extent of the 'degrees' has resulted in some confusion as to where the pivot between the two charges rest. This is examined in part two, with a particular focus on the distinction between the chargor's control of the asset(s), and the consent required to deal.

In terms of the relationship between the fixed and floating charge, it is peculiar since they are not a separate species of security and are in fact created and registered in the same way.[31] This is however where the similarities end. A Floating charge is defined in s.251 of the Insolvency Act 1986 as a

[24] In *Re Spectrum* at [139], Lord Walker stated that 'the chargee has a proprietary interest, but its interest is in a fund of circulating capital, and unless and until the chargee intervenes (on crystallisation of the charge) it is for the trader, and not the bank, to decide how to run its business'. Yet in the same paragraph his reference to the work of Professor Worthington indicates that a floating charge is an ineffective fixed charge. On the contested proprietary nature of the floating charge also see R Nolan, 'Property in a Fund' *(2004) 120 LQR 108*, at 117, where it is argued that a floating charge is a charge over a fund of assets in the sense that the charge has an immediate security interest in identified assets owned by the chargor but 'subject to, and restricted by, the superior but limited power of the chargor to manage and alienate those assets free of the charge's interests'.
[25] There must however be real consideration, see *Re Earl of Lucan* (1890) 45 Ch D 470.
[26] See R Stevens, 'Contractual Aspects of Debt Financing' in D. Prentice and A. Reisberg (eds), *Corporate Finance Law in the UK and the EU* (2011), pp 219–223.
[27] *Re Spectrum*, at [138].
[28] *Illingworth v* Houldsworth [1904] AC 355, at 358 (Lord Macnaghten).
[29] This can include future property, as long as it is sufficiently identified and described.
[30] This is examined in detail in part two below.
[31] R Calnan, 'Floating charges again', (2024) 39(9) *JIBFL* 583, at 584.

charge, which, as created, was a floating charge.[32] Creation in this context is not concerned with how a charge is described or its label, but its characteristics in the 'classic and frequently cited'[33] definition of a floating charge by Romer LJ. While the property subject to the charge should still be identified, it is floating if it is '(1)…on a class of assets of a company present and future; (2) 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 future 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'.[34]

Of the characteristics, in *Re Spectrum*, it was held that it was the third characteristic of Romer LJ's that is the 'hallmark of a floating charge and distinguishe[s] it from a fixed charge'.[35] This places attention firmly onto the control that is exercised in relation to a charged asset, with the ability to remove a charged asset enough to render a charge floating and not fixed.[36] It is on this point, specifically the degree of control that may be exercised by the debtor, where confusion has occurred as the exercise of some control would not be inconsistent with the fixed nature of a charge.[37] While the scope of this control may be limited,[38] the parameters have not been defined other than to render charges as floating where permission is not first required before a debtor may deal with an asset. To improve commercial certainty, an examination of both control and consent to deal are required to ensure the correct approach to characterisation.[39]

On the creation of a floating charge an immediate security interest is formed, but until crystallisation, no specific asset is appropriated to the security and the chargor is free to deal with the asset in the ordinary course of its business. The mere presence of a floating charge is not enough for the security interest to attach; an event is required, which in most cases will usually be when a company enters insolvency.[40] When crystallisation occurs, the assets attached to the security interest solidifies,

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[32] This also includes a floating charge within s.462 of the Companies Act (Floating Charges) (Scotland) Act 1961.
[33] *Re Spectrum*, at [99].
[34] The characteristics were formulated by Romer LJ in *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, at 295.
[35] *Re Spectrum*, at [106]. See also *Agnew*, at [32], and *SAW (SW) 2010 Ltd v Wilson* [2017] EWCA Civ 1001, [2018] Ch 213, at [23].
[36] *Re Spectrum*, at [107] and [139].
[37] See *Russell-Cooke Trust Co Ltd v Elliot* [2007] EWHC 1443 Ch, where a charge was held to be fixed, despite being described as floating because the rights of the chargor to deal with the assets subject to the charge were restricted.
[38] L Gullifer, *Goode & Gullifer on Legal Problems of Credit and Security*, 7th edn (Sweet & Maxwell 2022) at para 4-23; J Payne, 'The Characterisation of Fixed and Floating Charges', in J Getzler and J Payne (eds), *Company Charges: Spectrum and Beyond* (OUP, 2006), at 51.
[39] This is examined in detail in part two of this article.
[40] The phrase "the onset of insolvency" contained in IA 1986, s.240(3), has caused much confusion since it strongly implies insolvency is concerned only with a company's financial state. This is incorrect as the only

ending the chargor's ability to deal with the assets and converting the chargee's security interest into a fixed interest from where the chargee acquires an interest in the property covered by the charge. [41]

Where confusion may emerge is when types of asset are not assigned to the typical charge for that kind of property. Though a floating charge is often taken over property where a fixed charge would not be appropriate, it is not confined to circulating assets. Likewise, it is possible for a fixed charge over property that is circulating on the condition that the chargee has sufficient control over the chargor's ability to deal with the said asset.[42] In practice, two issues should be noted. First, the fluidity in the type of charge that may be applied to some assets can make it difficult to establish characterisation purely on the nature of the asset. Following *Re Spectrum,* assumptions may be made that if the assets are circulating, the charge is presumed floating and that the debtor may deal in the ordinary course of business, and if fixed, consent would be required from the chargee if the chargor wished to dispose or alter the asset, but the focus is not on the circulating or non-circulating nature of the asset, but the degree in which control or consent to deal is required. On the second issue, because a fixed charge has priority over all other creditors on the debtor's insolvency, including those with a floating charge, a fixed charge will tend to be applied on fixed assets such as land, and a floating charge on circulating assets. This does not however avoid the difficulties noted in the issue above.

## 2. The unresolved issues with the characterisation process

To determine whether a charge is fixed or floating, a two-pronged test described by Lord Millett in *Agnew* is considered relevant.[43] The first prong of the test draws attention to the construction of the security document; specifically, the intention of the parties from the language used to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. The second prong requires that it be determined whether, as a matter of the law, the rights and obligations relating to the charged asset are comparable to a fixed or floating charge.[44] For

relevant question in this context is whether an insolvency procedure, such as administration or liquidation has been "commenced". See, IA 1986, s. 245(3)-(5).

[41] *N W Robbie & Co Ltd v Witney Warehouse Ltd* [1963] 3 All ER 613.

[42] See *Re Spectrum.*

[43] *Agnew*, at [710].

[44] Given the nature of the test, it is often applied retrospectively since characterisation is an issue that is only likely to be reviewed upon a future event such as insolvency.

the drafters of security documents, the test can be used to inform practices and help construct the terms of the charge to accurately reflect the intentions of the chargor and chargee. In theory this should reduce the threat of charges being recharacterised – whether as mischaracterised or as a purported fixed charge, but this would ignore some of the practical issues that arise in a commercial context. The application of this two-pronged test can also overly simply what can be a complex process. While it is often described as two-pronged, there are some notably other factors that inform characterisation. Some of these factors are contentious, and concern the correct application of legal reasoning in cases like *Spectrum*, what significance should be placed on terms such as control and consent to deal, what consideration should be given to non-fact specific factors, the relevance of post contractual conduct, and the ex ante costs of drawing up charge documents, and how should the security market deal with the ever growing complexity of commercial practice, and the difficulties of dealing with new or novel assets that have been applied to rules not specifically designed for them.[45] This section provides some solutions to address these unresolved issues.

### a) Construction of the security document and the nature of the assets

In broad terms, the labels that parties assign to charges can provide some useful insight into what security the parties objectively intended to create, even if this was not determinative.[46] Language can express intent, particularly if the natural and ordinary meaning of the words used in the security document are sufficient.[47] This may be possible in non-complex security documents that deal with traditional based assets such as land, since there is less scope for complications to arise as there are documented templates to follow when it comes to standardised practices. But it has long been the case that reliance on the language alone is not enough. Before a charge can be properly characterised, it is necessary to determine what rights and obligations did the parties intend to grant each other in relation to the charged asset.[48] The second part of the *Agnew* test makes it clear that *intent* and *rights* are not the same, and rights and obligations are not merely concerned with the expressed terms in the debenture, but whether the rights match the terms that have been used.[49] Since rights can change over time, whether through agreement or subsequent conduct, it is the latter that has caused concern for the courts with their approach being one to limit its use so as to not undermine contractual certainty.[50] This is not to say that subsequent conduct is entirely

[45] See *Avanti* and *UKCloud.*
[46] *Arthur D Little v Ableco Finance LLC* [2002] EWHC 701 (Ch), at [31].
[47] *Agnew*, at [32].
[48] *Agnew*, at [32].
[49] *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch), at [181].
[50] This is explored below.

irrelevant, as it will be noted shortly, but it is part of wider considerations that concern the construction of the security document. This brings five associated issues to attention.

### i. Should the asset be specifically referenced for a charge to be fixed

Intent, properly understood from the language used in the debenture, may prove to be inconsistent with the nature of a fixed charge, and as such it could not be a fixed charge however it is described. The subjective intention of the parties are secondary considerations to the legal criteria which must be satisfied to establish a specific type of proprietary interest.[51] As such, labels may indicate intent, but they may also mislead. Further confusion may arise where the court is asked to determine whether an asset falls within the broader definition of certain specific categories. For example, in *Re UKCloud*, the court was asked to determine whether IP addresses fell within the charge over 'all licences, consents and authorisations'. [52] Despite no specific reference to IP addresses in the charging clause, the judge thought the word 'authorisations' was sufficient to establish intent to create a fixed charge.[53] This was despite an argument that the lack of an express reference in the security document strongly implied the creation of a floating charge. While the judge accepted that this was a pointer to the intention of the parties, it was ruled not conclusive.[54] To resolve issues on establishing intent and to prevent the occurrence of inconsistent outcomes by the courts, there is little reason why a restrictive approach that focuses on both the labels and the subjective intent of the parties cannot infer the type of charge.[55] The courts focus on the objective assessment of rights and obligations as expressed in the debenture has created needless confusion.

### ii. The 'all or nothing' principle

The 'all or nothing' approach in theory is quite simple. Where there are different types of assets within a debenture, and some are specifically listed whereas others are not, to eradicate or at least limit attempts to evade certain legal rights or obligations, the principle provides that "it is all or nothing'.[56] Either the clause 'creates a fixed charge over all of the assets to which it refers or it creates a fixed charge over none of them'.[57] While the authorities on the 'all or nothing' approach

[51] See J Quinn, 'The crystallisation of floating charges: rethinking the conceptual framework' (2020) 1 *JCLS* 179, at 183.
[52] *UKCloud,* at [58].
[53] Ibid*,* at [39].
[54] Ibid, at [32].
[55] See *Re Spectrum* at [119]; J Quinn, 'The crystallisation of floating charges: rethinking the conceptual framework' 1 *JCLS* 179, at 184.
[56] *Re Beam Tube Products Limited* [2006] EWHC 486 (Ch), at [33]. This is examined above.
[57] See *Re GE Tunbridge Ltd* [1994] BCC 563; *ASRS Establishment Ltd (In Administrative Receivership and Liquidation)* [2002] BCC 64; *Re Beam Tube Products Limited* [2006] EWHC 486 (Ch); *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend CBC* [2001] UKHL 58.

had expressed reservations about such an approach, it had not been overruled.[58] In fact, based on the recent decision in *UKCloud* it remains well established despite the judge's misgivings.[59] The criticism of the principle extends to its narrow application as it gives little consideration to the label(s) used by the parties in the security document, arguing this often does not reflect what has occurred in practice.[60] While it was determined in the previous section that labels do not establish intent, to permit parties to express their subjective intent could eradicate or at least reduce the importance of the all or nothing principle.

Further difficulties with the 'all or nothing' approach have ensued because the principle did not form part of the ratio of the decisions from which it derived its purported authority.[61] Instead, what appears to have occurred is a misconception that the approach was binding, even if the judge considered them nothing more than a general tendency.[62] The inability to deviate from this approach has resulted in charging clauses being construed as a whole, even if the language used in the debenture did not evince an interest to create such a charge. Attempts to overcome this difficulty and tailor individual assets within a bundle has not been permitted,[63] despite its apparent feasibility as a credible solution. Since it is unlikely that the courts would reverse this stance anytime soon, an alternative measure to counter the criticisms of the 'all or nothing' principle would be to ensure that critical assets are specifically identified under their own charges within the security documents. If this was not feasible, it may be possible to associate future assets with existing assets in a security document, whereby new assets can be compared with other assets and similar traits can help classification on that basis.

### iii. Circulating versus non-circulating assets

In respect to the nature of the assets, the most notable of the unresolved issues concerns the terminology used and its application to assets that do not neatly fall into the definitions. While distinctions are often made between circulating capital and its non-circulating capital,[64] much of the issues derive from distinguishing circulating capital or fluctuating asset or body of assets. Complexities are created as there are no absolute definitions for these terms, and instead reliance is

[58] See, *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58, which was followed in *Re Beam Tube Products Ltd* [2006] EWHC 486 (Ch).
[59] *UKCloud,* at [73].
[60] *The Russell Cooke Trust Company Limited v Elliot* [2007] EWHC 1443 (Ch).
[61] *UKCloud*, at [47]-[48].
[62] Ibid.
[63] *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 *Re Beam Tube Products Ltd* [2006] EWHC 486 (Ch).
[64] *Spectrum*, at [139].

often placed on aspects or features within the 'circulating' or 'fluctuating' description. Specifically, it is understood that if the asset is part of the company's circulating or fluctuating asset or body of assets, or 'trades in the ordinary way the constituents of the charged fund are in a state of flux', then the charge will be floating.[65] However, caution must be applied. Reliance on this conceptual approach, where all assets that fluctuate are rendered floating is not only likely to result in inconsistent outcomes, it is a fallacy in reasoning that was noted in *Siebe Gorman*.[66] More accurately, the distinction between circulating and non-circulating assets requires greater scrutiny and it appears to rest on one particular feature – it is possible for circulating assets to be disposed of and replaced without permission first sought from the chargee.[67] It would be undesirable, but not without exception, to place a fixed charge on circulating assets/capital as this would paralyse a company's business, and thus be unworkable as security.[68] Where the exception has been applied,[69] the rights envisioned by the parties would need to be examined in accordance with the law, [70] but this is not without its difficulties. It has been previously suggested whether this should have been a possibility post *Re Spectrum* but the opportunity to address the doctrinal and practical issues was not taken.[71] Instead what has emerged post *Re Spectrum*, are authorities that attempt to deal with fixed assets on circulating capital by creating permissions that limit control so that the charge is workable in practice. This has taken on the form or commercial consent, which is examined in the latter parts of this article.

### iv. Intangible assets

In relation to the previous three issues, what consideration should be given to the nature of the asset is debatable. While some authorities like *Agnew* provide that it is the rights and obligations that essentially determine the charge,[72] *Avanti*, with reference to *Agnew*, places importance on the nature of the asset.[73] Here a distinction is made between circulating and non-circulating capital, as discussed in the previous section, but the relevance of the nature of assets is said to be limited

[65] See Romer LJ in *Yorkshire Woolcombers* [1903] 2 Ch 284, at 295.
[66] See Slade J in *Siebe Gorman* [1979] 2 Lloyd's Rep 142; *Agnew*, at [19].
[67] *UKCloud*, at [53]. There could be an express power for the chargor to dispose of the asset, see *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch), at [183].
[68] *Agnew*, at [7].
[69] The exception has often concerned book debts, otherwise known as trade receivables, which is examined below in part 2(d).
[70] *Agnew,* at [32]; J Armour, 'Floating charges: all adrift?' (2004) 63(3) *Cambridge Law Journal* 560, at 562.
[71] Ibid. In regard to book debts, it has been noted that 'it is somewhat disappointing that the House of Lords did not go further and effectively rule that fixed charges over book debts were either theoretically impossible or could only be taken in circumstances where they would be so commercially unattractive that they would not be contemplated', see D Capper, 'Spectrum Plus in the House of Lords: the victory of substance over form in personal property security law', (2006) 6 *Journal of Corporate Law Studies* 447, at 462.
[72] *Agnew*, at [32].
[73] *Avanti*, at [35].

where there is an express power for the chargor to dispose of the assets in question.[74] Where there is not, then the nature of the asset is said to be 'significant'.[75] Yet when it comes to intangible assets, there is little guidance on the position to take, particularly in relation assets such as software and databases, research and development, mineral exploration, and artistic originals. While many of these types of intangible assets may not readily fall under the 'circulating' or 'fluctuating' description, they may nevertheless not automatically be rendered as a fixed charge.[76] Some assistance may be drawn from *Re Spectrum*,[77] but as it was shown in *UKCloud* it is not easily applied to assets like IP addresses. While the asset is not particularly novel, it may be unusual enough to cause some issues. As a solution, reliance on the nature of the charged asset to inform intention for the purposes of characterisation may be useful, but without carefully set parameters it may lead to inconsistent results. What is required is expressed categories whereby specific types of assets can be automatically grouped by the asset traits or characteristics upon its inclusion in the debenture as a charged asset. This is of similar note to the solution raised in relation to the all or nothing principle.

#### v. Whether restrictions in the document were observed in practice

If the court is of the view that the security document was not adhered to in practice, then there is a chance it may held to be a sham and rendered void.[78] The implications of this would not just affect the charge holder, but also the company since the debt will still exist despite the security document having no legal effect. This may result in the charge holder attempting to take other expedient measures to recover the debt much sooner than initially agreed. This poses the risk of litigation if the company does not comply with the demands. The immediate request for the debt to be paid may also create needless financial distress in the company and at worse this could result in the company entering insolvency.

### b) Relevance of subsequent conduct

A relevant consideration to what happens in practice concerns subsequent conduct by the parties. While a review of such conduct could be said to be supported in Lord Millet's dictum in *Agnew*,[79] there are generally strong arguments against the use of such information, both in light of general law

[74] *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch), at [183].
[75] Ibid.
[76] *UKCloud*, at [53].
[77] At [139].
[78] *Avanti*, at [38]; followed in *UKCloud*, at [67].
[79] *Agnew,* at [31].

and, specifically in light of s.251 as examined above.[80] This position has been revisited in recent years as the courts are asked to explore the conduct which is, or is perceived to be, contrary to the provisions set out in the security document. But confusion persists on the correct approach, largely because this is reflected in the case law. In *Re Beam Tube Products Ltd*[81] subsequent conduct did not alter the nature of the charge, whereas in *Re Harmony Care Homes*[82] some regard was given to post contractual conduct but only for the purpose of reinforcing the conclusion the decision the judge would have otherwise reached. Why in instances consideration can be given only if it confirms the already held view is neither clear nor does it provide for certainty since this position indicates that where a judge holds an opposing view, subsequent conduct should not be relied upon. More recently, this position has waned as greater judicial discretion has led to subsequent conduct being more commonly reviewed. This was confirmed in *UKCloud*, where the judge considered subsequent conduct for the purpose to determine the degree of control that has been exercised by the chargor.[83] This is both fair and pragmatic, even if the end result produces no clearer answer.[84] What this position recognises is that all relevant variables that could influence characterisation are taken account. This is not a radical alteration from what currently exists, since if a debenture permits the exercise of control, but subsequent conduct reveals that this was never exercised, nor was in enforced in practice, then the court will likely conclude that the agreement was a sham, and the charge was floating. A review of subsequent conduct enhances commercial certainty; it does not undermine it.

### c) Litigation expenses and ex ante costs of drawing up security documents

Often overlooked, the ex ante costs of drawing up security documents can be significant as the terms of the debenture attempt to deal with an array of issues that may arise. The complexity of clauses within security documents have been normalised by drafters as they seek to counter future issues that may result in litigation. In addition, the on-going costs related to the management of these documents, and the potential legal costs associated with a charge being recharacterized, illustrates some of the grounds why security documents have grown in complexity. Yet, it is within this very complexity that can create the opportunity for characterisation to be challenged. While detailed clauses can contribute to clarity as to if and when a charged asset is to be deposed of, at the time when the clause becomes relevant its application may not be as well defined on the specific facts that are now evident. While such clauses may have been tested in case law elsewhere, a prevalent

[80] The section provides that a "floating charge" means a charge which, as created, was a floating charge.
[81] [2006] EWHC 486 (Ch).
[82] [2009] EWHC 1961 (Ch).
[83] At [67], [72].
[84] A Berg, 'The Cuckoo in the Nest of Corporate Insolvency: Some Aspects of the *Spectrum* Case', (2006) *JBL* 22.

issue in characterisation is that the specific facts of the case may impact how that clause is interpreted. In essence, only when a clause is assessed in its present circumstances can it be properly determined how the clause will be interpreted and applied.

Broadly speaking, there are further issues associated with costs and the security market that should be noted. First, charging a levy on particular types of secured credit has distorted the market. Instead of lending on overdraft against receivables - which in practice is relatively simple and cheap - transactions can be structured as sales of receivables in order to avoid the levy. This may be useful for companies, but it complicates the transaction and adds to the costs of the security. Second, securitisations have moved in favour of true sales. An issue with this approach is that it also tends to use a special purpose vehicle (SPV), and while it can help to isolate financial risk, securitise assets, and perform separate financial transactions, it ultimately reduces the necessity for effective security since the SPV will simultaneously issue debt securities to investors and use the sale of proceeds from the issuance to fund its purchase of the receivables.

### d) The distinction between control of assets and consent to deal

After the construction of the security document has been examined, characterisation is not merely a semantic issue, instead the rights and obligations identified at stage one of the *Agnew* test are now read in context with the position developed at common law.[85] A review of the case law and literature shows that this has not been without its challenges. At this stage, two of the three unresolved challenges that were highlighted in the introduction are relevant and need to be addressed. This requires both the correct interpretation of dicta by judges to be determined, and for the correct characteristic determinants to be established. To assist with this task, it is necessary to focus on two terms which have since become the source of tension: the control of assets, and consent to deal.[86]

#### i. The significance of Re Spectrum

To assess the significance of these two terms a natural stating point is with the highly significant House of Lords decision in *Re Spectrum.* This case came at the end of a long line of authorities that attempted to determine whether certain standard form documentation created a fixed or floating

[85] For this purpose, there are a select number of decisions which are often relied upon to provide the framework for the characterisation process, namely *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, *Agnew, Re Cimex Tissues Ltd* [1994] BCC 626, *Re Spectrum*, and *Avanti.*
[86] In particular, the works by Professor Sarah Worthington will be noted.

charge over book debts.[87] Book debts as a type of asset is not unusual. In fact, save for one notable exception,[88] most cases in this area have largely concerned this asset. In contrast, the sort of asset classes found in the more recent cases of *Avanti* and *UKCloud* were more unusual. The type of assets in these cases when read in conjunction with the respective debenture documents for the purpose to determine characterisation, made this task more complex for reasons already noted. Here, the issue is whether the approach taken in respect of book debts in *Re Spectrum* is readily compatible to non-book debts type of asset classes.[89] The lack of judicial commentary, specifically on how courts may categorise non-book debts when control or consent to deal are live issues has left the issue unresolved. Before this is explored, some points of contention must be clarified.

To begin, what is the legal nature of book debts. In *Agnew*, Lord Millet noted that the nature of book debts prevents them being enjoyed in specie. [90] The focus in *Re Spectrum* therefore fell on the on the contractual arrangements or the scope of the security that governed the chargee's control of the collections.[91] On the construction of the security document, the contractual arrangements in *Re Spectrum* were clear. It prevented all dealings with book debts other than their collection and required the collected proceedings to be paid into 'a designated account' with the chargee (the bank). As there were no restrictions on the use that the chargor could make of the balance in the designated account,[92] and that the chargor was free to use the assets subject to the charge and withdraw them from security, this was compatible in nature with a floating charge, not a fixed.[93]

This decision provides for three key observations that are to be applied for the purpose of charge characterisation. What restrictions were in place on the chargor's ability to deal with the asset; what benefits did the chargor receive;[94] and what was the overall control afforded to the chargor.[95] These questions have not been fully addressed by the courts, but there are some useful pointers. First, there is now a consensus that the legal rights and obligations provided for in the security document

[87] See *Siebe Gorman* [1979] 2 Lloyd's Rep 142; In *Re Brightlife Ltd* [1987] Ch 200; In *Re New Bullas Trading Ltd* [1994] 1 BCLC 485, and *Agnew*.
[88] *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58, which concerned two very large coal washing plants.
[89] Despite some initial worries from the banking community that major changes could occur to how book debts were to be approached, the decision in *Spectrum* did not cause too many difficulties in practice, see D Milman, 'Company charges and security: an overview of the present position' (2006) 9 *Co LN* 1, at 2.
[90] *Agnew,* at [46]. Lord Millet stated that 'a debt of a receivable; it is merely a right to receive payment from the debtor. Such a right cannot be enjoyed in specie'.
[91] W Day, 'Fixed and Floating Charges: A Question of Consent Or Control' (2023) 82(3) *CLJ* 381, at 383.
[92] *Re Spectrum*, at [117].
[93] *Siebe Gorman* overruled, Hoffmann J's decision in *Re Brightlife Ltd* [1987] Ch 200 was confirmed.
[94] This accords with the view expressed by Professor Worthington, the test "does not require a fixed charge agreement to ban all dealings wite charged assets, it only requires the agreement to ban removal (or consumption or depletion) of the charged assets for the benefit of the chargor". See, S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 583.
[95] *Re Spectrum,* at [83] per Lord Scott.

will largely determine the charge type. While subsequent contractual conduct may be considered, even if its degree of relevance remains arguable, prominence is firmly placed on what the chargee could do with the charge asset. This includes whether the chargor has exercised control, or if consent was required to deal with an asset, or the chargor had failed to exercise control or sought to do so.[96] As noted, the consequences of a mischaracterised charge or a purported fixed charge is likely to be significant,[97] particularly if the company is insolvent. It is therefore necessary that efforts are made to define characterisation with greater care, beginning with two core terms: control, and consent to deal.

The distinction between control of assets and consent to deal is important, despite the common confusion as to the correct application of these terms. On the issue of control, confusion was sowed in *Siebe Gorman*, where Slade J had unfortunately misconstrued the effect of the arrangements in relation to the bank account. Incidentally, these arrangements involved the same contractual wording that was under consideration in the subsequent case of *Spectrum*.[98] In both of these cases, the proper construction of the bank's debenture was under consideration, and it was to be determined what was the meaning of 'no restrictions' on the use of the balance in the designated account by the chargor.[99] In *Re Spectrum*, no importance is placed on whether the account were in credit or debit, only whether the chargor could draw on the account.[100] This is the correct approach since an account in debit would be a blocked account until the drawing rights were restored, and characterisation based on this position would be susceptible to the fluctuations of the balance on the account, not the rights of the parties. To permit such an approach would have reduced characterisation to a game of chance and further increased commercial uncertainty.

Recent practice has shown to favour complex security documents that details the rights of parties. These are commonly expressed through restrictions or permissions on the chargor in relation to the charge assets. Despite the obvious practical benefits that can be achieved through such clauses, its comprehension can invite several interpretations based on its complexity and the context in which it is read. When the more unusual assets in *Avanti* and *UKCloud* are applied to the legal principles developed in *Re Spectrum*, the dicta may not be applied with such ease. Yet, when it is apparent that

[96] *UKCloud*, at [67]-[72].
[97] It is not a concern whether attempts are made to subsequently convert a floating charge to one that is fixed by the creation of a blocked account; the debenture at the time of the chargee's creation would indicate this was not the intention. See *Re Beam Tube Products Limited* [2006] EWHC 486 (Ch), at [49]-[50]. This follows the 'all or nothing' approach, see at [33]. This is examined above in part three A
[98] *Re Spectrum,* at [142] (per Lord Walker) and at [61] per Lord Hope.
[99] Ibid*,* at [117] per Lord Scott.
[100] Ibid, at [117].

there are some inconsistencies in the way that the *Re Spectrum* principles have been applied, it is important that these misconstrued works, which will now be explored, are not repeated in error.

### ii. Control or consent to deal distinguished

The exercise of control is often considered a key determinant to characterisation, but the case law also reveals that it is necessary to note the presence of consent to deal as a separate significant factor that can inform characterisation. Broadly conceived, control is concerned with the power that is exercised in relation to the charged assets, while consent to deal relates to the permissions granted to how the asset may be used with the charge is in place. While specific facts in case law will establish the context in which control and consent to deal are to be determined, it is also a base in which dissimilar approaches may be formed as to how the terms are interpretated and applied.

On the correct legal application of control, discrepancies have emerged in case law because of the context and variation in which control may be exercised. In some instances, control has been misconstrued because all too often it is seen as an 'on/off' switch',[101] with little regard to subtilities that may be necessary within a commercial environment. Attributes of this can be seen in academic works prior to the decision in *Avanti.* Much has been made of the works by Professor Gullifer, who on the issue of control stated that 'only total prohibition of all dealings and withdrawal without permission is enough to create a fixed charge'.[102] This viewpoint derived from a reading of *Spectrum*, that referred to assets under a fixed charge being 'finally appropriated'[103] or 'permanently appropriated'[104] as security for the payment of the debt. Similar statements to this effect have also been noted elsewhere.[105] If this understanding is correct, then a debenture that permits certain dealings in the security document could not be a fixed charge.[106]

In contrast, Professor Sarah Worthington and Ina Mitchkovska not only argued that 'total prohibition' was not a necessary feature of a fixed charge, but this never required on an accurate reading of *Spectrum*. On this view a charge could remain fixed since all that was required was that the chargor 'preserve[s] the charged assets, or their permitted substitutes, for the benefit of the charge. Without

[101] S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 583.
[102] L Gullifer, *Goode & Gullifer on Legal Problems of Credit and Security*, 7th edn (Sweet & Maxwell 2022) at para 4-023.
[103] *Re Spectrum,* at [111].
[104] Ibid*,* at [138].
[105] For example, H Beale et al., *The Law of Security and Title Based Financing*, 3rd edn (OUP 2018), para 6.129; and S Worthington and I Mitchkovska, 'Floating charges: the current state of play' (2008) 9 *JIBFL* 467.
[106] *Avanti*, at [50] and [108]. On this point, Professor Worthington agrees, but with respect, does not think the contrary assertion accurately reflects the tenor of the relevant sections of the Beale, Bridge and Gullifer texts. For a full review of this argument see, S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 583.

this requirement, the charge is floating.'[107] It is the subtly of this argument that has been lost, and one that was not appreciated by Johnson J in *Avanti*. Rather than recognise the distinction between a chargor that preserves a charged asset, but who may exercise some control over it, and one that is prohibited from dealing or withdrawal without consent, both statements were taken to advocate for a total prohibition.[108] This is not the case.

Practical reasons will often result in some control being explicitly provided for in the security document, even though the charge was intended to be fixed. This may be a necessity from a commercial perspective as it would be peculiar for the chargor to retain their legal title but not have any benefits of ownership.[109] If the asset is preserved and the benefits of the charge remain, then the presence of control alone is not enough to defeat a fixed charge. Instead, the question is concerned with the degree of control exercised, and whether this interferes with the beneficial interests of the chargee. This provides the possibility that varied characteristics may exist in a fixed charge, and what precisely may defeat a fixed charge can be contextualised with greater accuracy. This necessitates a review of the literature that has relied upon in the case law. A much lower threshold than total prohibition was advanced by the editors of *Lightman & Moss on the Law of Administrators and Receivers of Companies*,[110] who argued that '[a]ny unfettered or significant commercial freedom in the chargor to deal with a fluctuating class of assets without the consent of the chargee will be inconsistent with the existence of a fixed charge over those assets'.[111] This position appears to leave no room for any degree of control, but an important distinction should be noted. Significant freedom in this context is not synonymous with total prohibition, since some control can be exercised as long as it is within a permitted range of what could be deemed as insignificant. What may pose difficulties is the phrase 'any unfettered…commercial freedom'. In comparison to Worthington's argument, it is unlikely that control exercised within the restraints that the asset is preserved for the benefit of the chargee would fall outside of the significant threshold as it still permits unfettered freedom. Further, the inclusion of 'without the consent of the chargee' raises the question whether the real issue concerns the need for consent, rather than the specific control that is exercised. Yet it is possible to grant permissions that deal with both consent and control, and still the charge can remain fixed. The lower threshold approach also fails to appreciate

[107] See, 'Floating charges: the current state of play' (2008) 9 *JIBFL* 467. As stated in *Re Spectrum* at [107] per Lord Scott, [138]-[139] per Lord Walker.
[108] *Avaniti*, at [108].
[109] S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 585.
[110] 6th edn., (Sweet & Maxwell 2017).
[111] Ibid, at [3-021]. Cited with approval in *Avanti,* at [28] and [117].

the necessity of some control being exercised by the chargor; after all they still enjoy some benefit in the charged asset.

Despite the commercial certainty that could have been achieved with adopting Worthington's approach on the issue of characterisation,[112] it was ultimately rejected in *Avanti*. However, Johnson J's reasoning, which referred to key passages made by Lord Scott and Lord Walker in *Spectrum*,[113] indicate that it may have been rejected because it was wrongly construed as support for 'total prohibition', and *Re Spectrum* did not support an 'absolute approach'.[114] With reference to Lord Scott's interpretation, it was concluded that some control could be in the hands of the chargor as long as the chargor did not remove the charged assets from the ambit of the security for its own benefit.[115] This is in fact an accurate reflection of Professor Worthington's argument, but in *Avanti* Johnson J went further to include a multiplicity of other relevant factors that must form part of the control discussion.

Within this discussion, both the specific facts and the degree of control are essential components that will determine whether the charge operated within the permitted range associated with a fixed charge. This range has been presented as a 'range of possibilities',[116] with a scale that includes opposites and examples that sit comfortably in the respective fixed and floating charge classification. On the extreme ends of the spectrum there would be a "total freedom of management", and on the other, "a total prohibition on dealings of any kind".[117] In most cases these are unrealistic as they ignore some of the more practical issues, but it does however have one clear benefit - it helpfully moves on the issue of control from an 'on/off switch' discussion,[118] to one that highlights the true complexities and possibilities associated with characterisation. Then there are some cases that are more straightforward. It may not be possible to take a fixed charge, and in others, commercial practices and not the parties' intent, will shape the issue of characterisation.

In response to the more challenging circumstances, it will be of real practical importance if efforts are made to identify the points on the spectrum where a fixed charge gives way to a floating charge,

[112] S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 583.
[113] *Re Spectrum, at* [111]-[112].
[114] *Avanti*, at [29]-[30], and [115].
[115] This position is also stated in S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 584.
[116] L Gullifer, *Goode & Gullifer on Legal Problems of Credit and Security*, 7th edn (Sweet & Maxwell 2022) at para 4-23.
[117] *Avanti*, at [118].
[118] S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 583.

even if such an endeavour have been 'rendered not advisable'.[119] While there is a concern that specific criteria mapped within a spectrum could create a rigid precedent for characterisation, the main arguments for doing so is it is feasible and would go some way to promote commercial certainty. Between the hard choices of bringing reforms to insolvency law that simplify the distinction between a fixed and floating charge,[120] or efforts are made to carefully identify the tiers within the spectrum that determine the classification of a charge, it is clarity rather than further legislative reforms that would bring tangible benefits to this area of law.

### 3. Promoting certainty in a tier structured approach to characterisation

Between Worthington's test, and the factors referred to by Johnson J, a structured approach with reference to tiers can be formulated. While the preserved asset for the benefit of the chargee is necessary for a fixed charge, viewed in isolation to other relevant factors can create inconclusive results on the issue of characterisation. It is the consideration of these other factors that makes it necessary for a scale in which charge classification can be assessed.

To address the range, the extremes have already been noted. Next is to consider where there is not a total prohibition on the chargor, but the assets are subject to 'considerable restrictions',[121] and as such the chargor's ability to deal with the relevant assets can be said to be 'materially and significantly limited'.[122] Here, the issue is not with the presence of control as this is permitted,[123] this concerns the level of restriction on the chargor to enjoy the charged asset. If Worthington's test was applied in isolation, restrictions on the chargee's benefit could defeat a fixed charge. A more structured approach would be to review the extent of that restriction and consider the relative strength of the bargaining power of each party when determining whether the chargor can dispose of charged assets. The limited opportunities to make disposals of the relevant assets may not in itself be a critical issue,[124] but the extent of that permission may nevertheless inform on the balance of power between the chargee and chargor. Limits in this sense can provide the chargor with freedom to deal with the assets, and for the chargee to have control of those assets,[125] but it must ultimately reflect a bargain that both parties can agree. This leads us to consider the fundamental issue – it is not just what the chargor can do *ordinarily* with a charged asset without the consent of the chargee,

[119] *Avanti*, at [119].
[120] R Calnan, 'Floating charges again', (2024) 39(9) *JIBFL* 583, at 584.
[121] *Avanti*, at [89(1)].
[122] Ibid, at [125].
[123] Ibid, at [121].
[124] S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 586.
[125] *Re Cosslett (Contractors) Ltd* [1998] Ch 495, at [510] per Millett LJ.

but what control they *need* to exercise within *commercial* practice.[126] Within this context, the distinction between what is ordinary and what is commercial control has not been previously contextualised.

Ordinary control may be applied literally since it is expressed by the terms as agreed by the parties in the debenture. Commercial control is more elastic and can be exercised more broadly. It provides for an expansion on the terms subject to commercial needs and this may include control that is akin to significant freedom.[127] This level of control may naturally materialise over time and because of its organic development it may be wilfully ignored by the chargee if it did not adversely affect their interests at this time. Such behaviour, while more likely in micro, small and medium-sized companies where business needs may regularly change, may nevertheless provide an opening where the type of charges may be challenged. An example of the division between ordinary and commercial control can be demonstrated in relation to book debts. It may be the intention of the chargee to prevent the chargor from having any dealings with an asset like book debts, and this could be readily expressed in the debenture that would preserve the asset for the benefit of the chargee's security.[128] Such use of ordinary control may prove to be too restrictive in practice, as the chargor attempts to continue to trade but with reduced benefits on charged assets. If, in response to this restriction the chargor could deal and dispose of the assets without the need for consent, then commercial control would provide greater benefits for the chargor, but this would render the charge floating.

To counter a charged asset being rendered floating, it is important that measures are taken to retain the chargee's benefit of a charged asset. One way to achieve this is to include exceptions or carve outs that grant permission in respect of secured assets. Used correctly, it could provide for ordinary consent as expressed in the security document, but one that can accommodate commercial practices. This would have to be carefully approached since the inclusion of exceptions and permissions may make the reading of the debenture complex, which then requires a greater level of scrutiny to determine what is permitted.[129] Here the practical function of the charge – what the chargor can do with the asset – is more crucial than the rights or permissions as provided in the debenture.[130] This is because *how* the control has been exercised will be determinative to the charge type, and this includes any note of whether consent is required or provided. If the chargee permits

[126] This extends the issue identified by Worthington who stated that a key issue is what the chargor can do with a charged asset within the consent or the chargee. See, S Worthington, 'Fixed charges over book debts and other receivables' (1997) 113 *LQR*, 562, at 567.
[127] A similar point was made by the editors of Lightman & Moss, see above.
[128] S Worthington, 'An "Unsatisfactory Area of the Law" – Fixed and Floating Charges Yet Again' (2004) 1 *ICR* 175, at 182.
[129] *Avanti*, at [123].
[130] Wide ranging restrictions may apply to both fixed and floating charges, see *Re Cosslett (Contractors) Ltd* [1998] Ch 495, at 508.

the chargor to exercise control on a regular and consistent basis, and this was within the scope of the permissions in the security document, then the fixed charge is likely to remain intact. What complicates this position is where opposed authorities are considered. In *Cimex Tissues Ltd*, Stanley Burnton QC (as he was then) observed (underlined comments added):[131]

> Where the charged property is stock, or book debts - i.e., where the assets are naturally fluctuating - the court will readily conclude that a liberty for the chargor to deal with the charged assets is inconsistent with a fixed charge. Where, as in the present case, the assets are specific and do not necessarily fluctuate, some liberty to release the charged assets may not be inconsistent with a fixed charge. Conversely, however, on this basis a floating charge over present goods, not extending to future goods, is not a conceptual impossibility.

Reliance on this paragraph has been problematic. It provides for a restrictive understanding of a charge where no control is permitted, and the decisive factor is whether an asset naturally fluctuates.[132] It has been suggested that as *Cimex* predates *Re Spectrum* it cannot be considered guidance as it was created at a time when *Siebe Gorman* and *New Bullas* were leading authorities and their approach to characterisation was precisely the one overruled in *Spectrum*.[133] As such, the decision in *Re Cimex* is unlikely to remain good law.[134] This helps with the broader argument made by Johnson J that it was necessary to consider all of the circumstances; an approach that helped him to conclude that the relevant assets in *Avanti* 'could perfectly well have been the subject of a fixed charge as they were income generating assets, which were not themselves part of the circulating capital'.[135] Since separation can be drawn,[136] and the assets did not concern book debts,[137] the charged assets were not instantly rendered floating.

All considered, this brings the focus back to how the structured approach may be portrayed. This can be presented as a tier structure. To begin, attention must be given to the first-tier issues: control and permissions. With control there are two sub-divisions (tier-two), was the control exercised or not

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[131] *Re Cimex Tissues Ltd* [1994] BCC 626, at 635.
[132] See S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 584.
[133] S Worthington, 'Fixed and floating charges: still favouring absolutism over multi-factored nuance' (2023) 9 *JIBFL* 583, at 584.
[134] While not overruled, it is doubtful that it retains its importance following *Agnew* and Spectrum. This position is supported in a number of works, see L Gullifer, *Goode & Gullifer on Legal Problems of Credit and Security*, 7th edn, (Sweet & Maxwell 2022), at [4-12]; W Day, 'Fixed and Floating Charges: A Question of Consent Or Control' (2023) 82 *CLJ* 381, at 383; S Worthington and A Agnew, *Sealy & Worthington's Text, Cases and Materials in Company Law*, 12th edn (OUP, 2022), at 767.
[135] *Avanti*, at [132].
[136] L Gullifer, *Goode and Gullifer on Legal Problems of Credit and Security*, 7th edn (London: Sweet & Maxwell, 2023), at para 4-17.
[137] The issue with whether debt or other receivable can be separated was discussed by Lord Millet in *Agnew*, at [42] and [43].

exercised. With the former, was the control exercised in accordance with the terms of the debenture (ordinary consent) or was control exercised beyond the terms (commercial consent). These are the tier-three considerations. If the control was not exercised, then the case law is clear that this may be considered a sham, and a fixed charge could be rendered void. Once evaluated, attention must then turn to permissions. Tier two concerns whether the permissions were complied with, or were they breached. On the question of compliance, tier-three requires that it must be established whether the rights and obligations exercised by the chargor were compatible with the charged asset in question. If the permissions were breached at tier-two, it is then a question as to whether the chargee was responsive to those acts made by the chargor. The answers to the tier-three questions would consider the practical issues addressed above in part two, with significance placed on commercial practices and the need for greater freedom in the security industry to create charges that are a little more flexible but are still able to provide commercial certainty to the parties.

## 4. Conclusion

To enhance commercial certainty around the issue of characterisation, two steps were taken. First it was necessary to address three unresolved challenges, namely the need for clarity on the correct interpretation of dicta made by judges; the need to identify the key characteristic determinants that influence characterisation; and how to address the concern that security documents are too complex. These challenges have only prevailed because there has been an unwillingness to create a more structured approach that explicitly addresses these issues. Part of the concern is whether this would create rigidity and reduce some of the flexibility that currently exists. Another concern is the courts do not want to create a precedent that is incapable of evolving with commercial practices. These concerns are however unfounded since a structured approach can both inform and provide certainty as to the rights associated with charged assets, and the classification of that asset.

The second step was to create a structured approach that addressed the specific issues raised within the context of the unresolved challenges. This includes the construction of the security document and how the nature of the assets may help to determine characterisation; whether subsequent conduct is a relevant factor; what impact does litigation expenses and ex ante costs of drawing up security documents have on the construction of debenture documents; and what is the precise significance of control of assets and consent to deal in determining characterisation. Collectively, each play a role in characterisation, but the tier structure approach places the highest significance on control and consent to deal. Once considered, a framework is provided on how the other issues may be considered. This approach would aid commercial clarity and help to resolve disputes or to avoid them.