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.

This was offered as a description and not a definition. The first two characteristics are typical of a floating charge but they are not distinctive of it, since they are not necessarily inconsistent with a fixed charge. It is the third characteristic which is the hallmark of a floating charge and serves to distinguish it from a fixed charge. Since the existence of a fixed charge would make it impossible for the company to carry on business in the ordinary way without the consent of the charge holder, it follows that its ability to [do] so without such consent is inconsistent with the fixed nature of the charge.

Also see the *Spectrum* decision at **[12.20]**.

[12.05] Illingworth v Houldsworth [1904] AC 355 (House of Lords)

This is the appeal to the House of Lords of the decision in *Re Yorkshire Woolcombers Association*, cited by Lord Millett at **[12.04]**.

EARL OF HALSBURY LC: In the first place you have that which in a sense I suppose must be an element in the definition of a floating security, that it is something which is to float, not to be put into immediate operation, but such that the company is to be allowed to carry on its business. It contemplates not only that it [the security] should carry with it the book debts [the charged assets] which were then existing, but it contemplates also the possibility of those book debts being extinguished by a payment to the company, and that other book debts should come in and take the **(p. 607)** place of those that had disappeared. That … seems to me to be an essential characteristic of what is properly called a floating security …

LORD MACNAGHTEN: I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp …

[12.06] Evans v British Granite Quarries Ltd [1910] 2 KB 979 (Court of Appeal)

The facts are immaterial.

BUCKLEY LJ: A floating charge is not a future security; it is a present security which presently affects all the assets of the company expressed to be included in it … A floating security is not a specific mortgage of the assets plus a licence to the mortgagor to dispose of them in the course of his business, but it is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some act or event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security …

[12.07] Re Bond Worth [1980] 1 Ch 228

The case concerned an unsuccessful attempt to give a supplier of goods the benefit of a retention of title clause (discussed at ‘Retention of title agreements’, pp 632ff).

SLADE J: There is, however, one type of charge (and I think one type only) which, by its very nature, leaves a company at liberty to deal with the assets charged in the ordinary course of its business, without regard

to the charge, until stopped by a winding up or by the appointment of a receiver or the happening of some other agreed event. I refer to what is commonly known as a 'floating charge'… Such a charge remains unattached to any particular property and leaves the company with a licence to deal with, and even sell, the assets falling within its ambit in the ordinary course of business, as if the charge had not been given, until it is stopped by one or other of the events to which I have referred, when it is said to 'crystallise'; it then becomes effectively fixed to the assets within its scope.

… This description of a floating charge shows that it need not extend to all the assets of the company. It may cover assets merely of a specified category or categories …

… The critical distinction in my judgment is that between a specific charge on the one hand and a floating charge on the other. Vaughan Williams L.J. pointed out in the *Woolcombers* case [1903] 2 Ch. 284 that it is quite inconsistent with the nature of a specific charge, though not of a floating charge, that the mortgagor is at liberty to deal with the relevant property as he pleases. He said, at p 294:

> I do not think that for a 'specific security' you need have a security of a subject matter which is then in existence. I mean by 'then' at the time of the execution of the security; but what you do require to make a specific security is that the security whenever it has once come into existence, and been identified or appropriated as a security, shall never thereafter at the will of the mortgagor cease to be a security. If at the will of the mortgagor he can dispose of it and prevent its being any longer a security, although something else may be substituted more or less for it, that is not a 'specific security'.

(p. 608) Floating charges: creation and effect

Creation of floating charges and impact of failure to register

It is possible for a floating charge to arise even though the parties never contemplated that this might be the result of their actions.[16]

[12.08] Re Cosslett (Contractors) Ltd [1998] Ch 495 (Court of Appeal)

This case went on appeal to the House of Lords, but not on this issue: [2002] AC 336.

Cosslett had contracted with the Mid-Glamorgan County Council to carry out land reclamation work which involved the washing of large amounts of coal-bearing shale, and for this purpose it brought two coal-washing plants onto the site. A clause in the contract empowered the council, if the company abandoned the work: (i) to use the plants to complete the job, or (ii) to sell the plants and use the proceeds towards the satisfaction of any sums due to it from Cosslett. Before the work was completed, the company abandoned the site, leaving the plants behind. The company then went into administration. The council applied to the court for an order requiring the administrator to deliver the plants to it; the company contended that the clause in the contract created a charge which was a floating charge and void because it had not been registered. At first instance, Jonathan Parker J held that there was a charge, but that it was a fixed charge. On appeal, it was held that although no charge was created by paragraph (a) of the clause in question, a floating charge was created by paragraph (b); but that non-registration of (b) did not stand in the way of the council's right to enforce (a).

> MILLETT LJ:… There are only four kinds of consensual security known to English law: (i) pledge; (ii) contractual lien; (iii) equitable charge and (iv) mortgage. A pledge and a contractual lien both depend on the delivery of possession to the creditor. The difference between them is that in the case of a pledge the owner delivers possession to the creditor as security, whereas in the case of a lien the creditor retains possession of goods previously delivered to him for some other purpose. Neither a mortgage nor a charge depends on

the delivery of possession. The difference between them is that a mortgage involves a transfer of legal or equitable ownership to the creditor, whereas an equitable charge does not.

In the present case the council's rights in relation to the plant and materials are exclusively contractual, and are not attributable to any delivery of possession by the company. When the company brings plant and materials onto the site they remain in the possession of the company to enable it to use them in the completion of the works. There is no question of the company delivering possession at that stage, either by way of security (i.e. as a pledge) or otherwise (i.e. by way of lien). The council comes into possession of the plant and materials when it expels the company from the site leaving the plant and materials behind. But this does not amount to a voluntary delivery of possession by the company to the council. It is rather the exercise by the council of a contractual right to take possession of the plant and materials against the will of the company.

In my judgment, therefore, the council's rights are derived from contract not possession and, in so far as they are conferred by way of security, constitute an equitable charge …

Is the charge a fixed or floating charge?

In my judgment the three characteristics of a floating charge which were identified by Romer L.J. in *In re Yorkshire Woolcombers Association Ltd.; Houldsworth v. Yorkshire Woolcombers Association Ltd.* **(p. 609)** [1903] 2 Ch. 284, 295 are all present. There is no difficulty in regard to the first two characteristics. Plant and materials become subject to the charge as they are brought onto the site and cease to be subject to it as they are removed from the site. Accordingly the charge is a charge on present and future assets of the company which, in the ordinary course of the business of the company, would be changing from time to time. The dispute has centred on the third characteristic. The administrator submits that, until the council takes steps under clause 63(1) to enter upon the site and expel the company therefrom, the company is free to carry on its business in the ordinary way with the plant and materials on the site. The judge accepted the council's submission that this was not so, because of the council's absolute right under clause 53(6) to refuse to permit the company to remove from the site plant and materials immediately required to complete the works, and its qualified right to refuse permission for the removal of plant and materials not immediately required for this purpose provided only that it acts reasonably. I am unable to agree with him.

The judge held that it is of the essence of a floating charge that until the charge crystallises the chargor should retain an unfettered freedom to carry on his business in the ordinary way. He relied for this purpose on two passages, one in the judgment of Vaughan Williams L.J. in the *Yorkshire Woolcombers* case, at p 294, and the other in the judgment of Slade J. in *In re Bond Worth Ltd.***[12.07]** [1980] Ch. 228, 266. The first passage reads as follows:

> 'If *at the will of the mortgagor* he can dispose of [the asset] and prevent its being any longer a security, although something else may be substituted more or less for it, that is not a "specific security."' (My emphasis.)

The second passage reads:

> 'It is in my judgment quite incompatible with the existence of an effective trust by way of specific charge in equity over specific assets that the *alleged trustee*should be free to use them as he pleases for his own business in the course of his own business.' (My emphasis.)

But with respect the converse does not follow. The chargor's unfettered freedom to deal with the assets in the ordinary course of his business free from the charge is obviously inconsistent with the nature of a fixed charge; but it does not follow that his unfettered freedom to deal with the charged assets is essential to the

existence of a floating charge. It plainly is not, for any well drawn floating charge prohibits the chargor from creating further charges having priority to the floating charge; and a prohibition against factoring debts is not sufficient to convert what would otherwise be a floating charge on book debts into a fixed charge: see in *In re Brightlife Ltd*.**[12.12]** [1987] Ch. 200, 209, per Hoffmann J.

The essence of a floating charge is that it is a charge, not on any particular asset, but on a fluctuating body of assets which remain under the management and control of the chargor, and which the chargor has the right to withdraw from the security despite the existence of the charge. The essence of a fixed charge is that the charge is on a particular asset or class of assets which the chargor cannot deal with free from the charge without the consent of the chargee. The question is not whether the chargor has complete freedom to carry on his business as he chooses, but whether the chargee is in control of the charged assets. …

Accordingly … I hold the charge to be a floating charge.

What are the consequences of the want of registration?

Of all the contractual rights which the council enjoys only one, the power of sale, constitutes a charge of a kind which is registrable under section 395 of the Companies Act 1985 [CA 2006 s 859A]. The section provides that the failure to register a charge makes the charge (that is to say the registrable charge) void as a security against a liquidator or administrator of the company [now see CA 2006 s 859H]. The effect of this is to entitle the liquidator or administrator to deal with the company's assets free from the security created by the charge in question.

In my judgment, therefore, the failure to register the charge renders the security created by the power of sale void as against the administrator, but does not affect any other right of the council **(p. 610)** which is not a security and which does not require registration. In particular, it does not invalidate the council's contractual right to retain possession of plant and materials and use them to complete the works. But after the completion of the works the council's right to continue in possession [and certainly to sell] is referable to a security which is void against the administrator and cannot prevail against him …

Limitations on the assets which may be made subject to a floating charge

If a company has a proprietary interest in an asset, then it is usually assumed that the asset can be charged by the company as security for an obligation.

The possible limits to this assumption were tested in the House of Lords. The issue arose from a practice adopted by banks in attempting to enlarge the security they take from borrowing customers. Banks typically take fixed and floating charges over all a customer's fixed assets and stock-in-trade. But what of any sums of money the customer might have on deposit with the bank? Put in contractual terms, these are sums of money that the bank owes to the customer. The customer 'owns' a debt owed to it by the bank. Can the bank take a charge over this asset to secure a loan it might make to its customer? The issue has now been resolved in favour of this form of security, as illustrated by the following extract.

[12.09] Re Bank of Credit and Commerce International SA (No 8) [1998] AC 214 (House of Lords)

The facts are immaterial.

LORD HOFFMANN: The doctrine of conceptual impossibility was first propounded by Millett J in *In re Charge Card Services Ltd*. [1987] Ch 150, 175–176 and affirmed, after more extensive discussion, by the Court of Appeal in this case. It has excited a good deal of heat and controversy in banking circles; the Legal Risk Review Committee, set up in 1991 by the Bank of England to identify areas of obscurity and uncertainty in the law affecting financial markets and propose solutions, said that a very large number of submissions from interested parties expressed disquiet about this ruling. It seems clear that documents purporting to create such charges have been used by banks for many years. The point does not previously appear to have been expressly addressed by any court in this country. Supporters of the doctrine rely on

the judgments of Buckley L.J. (in the Court of Appeal) and Viscount Dilhorne and Lord Cross of Chelsea (in the House of Lords) in *Halesowen Presswork Assemblies Ltd. v. Westminster Bank Ltd*. [1971] 1 Q.B. 1; [1972] A.C. 785. The passages in question certainly say that it is a misuse of language to speak of a bank having a lien over its own indebtedness to a customer. But I think that these observations were directed to the use of the word 'lien', which is a right to retain possession, rather than to the question of whether the bank could have any kind of proprietary interest. Opponents of the doctrine rely upon some 19th century cases, of which it can at least be said that the possibility of a charge over a debt owed by the chargee caused no judicial surprise.

The reason given by the Court of Appeal [1996] Ch. 245, 258 was that 'a man cannot have a proprietary interest in a debt or other obligation which he owes another.' In order to test this proposition, I think one needs to identify the normal characteristics of an equitable charge and then ask to what extent they would be inconsistent with a situation in which the property charged consisted of a debt owed by the beneficiary of the charge. [Lord Hoffmann then considered the general attributes of charges, and continued:]

The depositor's right to claim payment of his deposit is a chose in action which the law has always recognised as property. There is no dispute that a charge over such a chose in action can validly be granted to a third party. In which respects would the fact that the beneficiary of the charge was **(p. 611)** the debtor himself be inconsistent with the transaction having some or all of the various features which I have enumerated? The method by which the property would be realised would differ slightly: instead of the beneficiary of the charge having to claim payment from the debtor, the realisation would take the form of a book entry. In no other respect, as it seems to me, would the transaction have any consequences different from those which would attach to a charge given to a third party. It would be a proprietary interest in the sense that, subject to questions of registration and purchaser for value without notice, it would be binding upon assignees and a liquidator or trustee in bankruptcy. The depositor would retain an equity of redemption and all the rights which that implies. There would be no merger of interests because the depositor would retain title to the deposit subject only to the bank's charge. The creation of the charge would be consensual and not require any formal assignment or vesting of title in the bank. If all these features can exist despite the fact that the beneficiary of the charge is the debtor, I cannot see why it cannot properly be said that the debtor has a proprietary interest by way of charge over the debt.

The Court of Appeal said that the bank could obtain effective security in other ways … All this is true. It may well be that the security provided in these ways will in most cases be just as good as that provided by a proprietary interest. But that seems to me no reason for preventing banks and their customers from creating charges over deposits if, for reasons of their own, they want to do so. The submissions to the Legal Risk Review Committee made it clear that they do …

Since the decision in *In re Charge Card Services Ltd*. [1987] Ch. 150 statutes have been passed in several offshore banking jurisdictions to reverse its effect … The striking feature about all these provisions is that none of them amend or repeal any rule of common law which would be inconsistent with the existence of a charge over a debt owed by the chargee. They simply say that such a charge can be granted. If the trick can be done as easily as this, it is hard to see where the conceptual impossibility is to be found.

In a case in which there is no threat to the consistency of the law or objection of public policy, I think that the courts should be very slow to declare a practice of the commercial community to be conceptually impossible. Rules of law must obviously be consistent and not self-contradictory; thus in *Rye v. Rye* [1962] A.C. 496, 505, Viscount Simonds demonstrated that the notion of a person granting a lease to himself was inconsistent with every feature of a lease, both as a contract and as an estate in land. But the law is fashioned to suit the practicalities of life and legal concepts like 'proprietary interest' and 'charge' are no more than labels given to clusters of related and self-consistent rules of law. Such concepts do not have a life of their own from which the rules are inexorably derived. It follows that in my view the letter was effective to do what it purported to do, namely to create a charge over the deposit in favour of B.C.C.I. …

➢ Questions

1. Is the analysis persuasive?

2. Is such a charge registrable? Lord Hoffmann, in **[12.09]**, suggested the asset was not a 'book debt', but the 2013 amendments have abolished the list of registrable securities, and CA 2006 s 859A simply refers to charges created by a company. On the other hand, there is no longer any *obligation* to register under the amended 2013 rules. Is it advisable to register such a charge in any event?

Dealings with assets subject to a floating charge

A vital feature of the floating charge is that, until the company defaults in its obligations, the charge authorises the company to deal with the charged assets in the ordinary course of business. It follows that, in the absence of specific provisions to the contrary in the charge document itself, the company may not only use, sell and buy such property during the currency of a floating charge, but may also create mortgages and fixed charges ranking in priority to the floating charge itself.

(p. 612) Permitting the company to continue buying and selling the charged assets is usually necessary to ensure the viability of the company's business, but specific constraints are generally inserted by way of what is commonly termed a 'negative pledge clause' or 'restrictive clause', to forbid the creation of later charges. These negative pledge clauses form part of the registrable particulars of a charge (s 859D(2)(c)), and so any subsequent debenture holder will have constructive notice of the restrictions, and its claim will not take priority.

In practice, and by way of further protection, floating charges generally provide for automatic crystallisation into a fixed charge in the event that the chargor attempts in any way to create a mortgage or fixed charge over any of the company's assets or undertaking the subject of the floating charge. (See **[12.12]**.)

A floating charge is also vulnerable to set-offs and other claims arising in favour of unsecured creditors while the company's power to trade continues.

This freedom to deal with the assets continues until the floating charge 'crystallises'. (We must ignore the mixed metaphor, which has been hallowed by a century's use.) On crystallisation, the charge becomes a fixed charge attaching to the company's assets at that point of time, and the company's freedom to trade and to incur cross-claims ceases; but until then, the security is subject to all the risks to which the assets may be exposed in the ordinary course of business.

A fixed charge (and other subsequent interests) may be created having priority over an earlier floating charge.

[12.10] Re Castell and Brown Ltd [1898] 1 Ch 315 (Chancery Division)

In 1885, the company issued a series of debentures secured by a floating charge over all of its assets. The title deeds of various properties, which had been left in the possession of the company, were later deposited with the company's bank to secure an overdraft. The bank's charge was held to have priority over the earlier floating charge debentures.[17]

> ROMER J: In the first place, I cannot hold that there was any negligence on the part of the bank. When making its advances to Castell & Brown Ltd (which I will hereafter call the company), it found the company in possession of the deeds in question, and apparently able, as unincumbered owner, to charge the property.
>
> The company purported as such unincumbered owner to give a charge to the bank, and I think the bank was, under the circumstances, entitled to rely upon obtaining a charge free from incumbrance. It is suggested on behalf of the debenture-holders that the bank ought to have made some special inquiries of

the company. But it is not suggested that the bank wilfully abstained from making inquiries, and as the bank had no reason to suppose that the company was not fully able to give a valid first charge, and found the company in possession of the deeds, which showed no incumbrance, I think the bank was not bound to make any special enquiry …

And I now look to see how it was that the company retained possession of the deeds notwithstanding the issue of the debentures. The reason appears to me obvious. The debentures were only intended to give what is called a floating charge, that is to say, it was intended, notwithstanding the debentures, that the company should have power, so long as it was a going concern, to deal with its property as absolute owner. And I infer it was on this account that the company was allowed to, and did, retain possession of the deeds. In other words, the debenture-holders, notwithstanding their charge, and indeed by its very terms, authorised their mortgagor, the company, to deal with its property as if it had not been incumbered, and left with their mortgagor the deeds in order to enable the company to act as owner.

(p. 613) ➢ Notes

1. This decision gives rise to the following related conclusions:

(i) Can a company which has given a floating charge over its assets to A later give a fixed charge to B over part of those assets, having priority? Answer—yes: *Re Castell and Brown Ltd* **[12.10]**. It is immaterial whether B's charge is legal or equitable, or whether B has notice of A's charge.[18]
(ii) Can a company which has given a floating charge over its assets to A later give a fixed charge to B over all of those assets, having priority? Answer (it seems) yes; but if the class of assets affected is extensive the second transaction may not be 'in the ordinary course of business' and may therefore be outside the terms of the express or implied trading power. What impact will this have on third parties? Is knowledge relevant?
(iii) Can a company which has given a floating charge over its assets to A later give a *floating* charge to B over the *same* assets, having priority? Held—no, in *Re Benjamin Cope & Sons Ltd* [1914] 1 Ch 800: the equities being equal, the first in time prevails.
(iv) Can a company which has given a floating charge over its assets to A later give a floating charge to B over part of those assets, having priority? Held—yes, in*Re Automatic Bottle Makers Ltd* [1926] Ch 412, CA, where the first charge expressly empowered the company to do so. Where no such power is reserved, commentators generally agree that the first charge, being first in time, should have priority.

2. Where a company has created more than one charge over the same property, it is open to the charge holders to agree to vary the order of priority which would otherwise apply, and it is not necessary to obtain the company's consent: *Cheah Theam Swee v Equiticorp Finance Group Ltd* [1992] 1 AC 472, PC.

A floating charge does not operate as an assignment to the debenture holder of the company's book debts and other choses in action. Until the charge has crystallised, the company's unsecured creditors may set off debts due by the company against sums which they owe to it.

[12.11] Biggerstaff v Rowatt's Wharf Ltd [1896] 2 Ch 93 (Court of Appeal)

The respondent company had, to the knowledge of Harvey Brand & Co, issued debentures secured by a floating charge. A receiver was appointed, who took possession on 30 October 1894. On this date Harvey Brand & Co owed the respondent a liquidated sum for rent, while Harvey Brand & Co had a cross-claim against it for the price of 4,000 barrels at 3 *s* 6 *d* [17½p] each. Harvey Brand & Co was held entitled to set off its claim, on the ground that there had been no assignment of the respondent company's property to the debenture holders prior to the appointment of the receiver, so that Harvey Brand & Co had the earlier equity.

LOPES LJ: In the present case I think that Harvey, Brand & Co could sue for money had and received … There is a total failure of consideration as regards the barrels not delivered, and the demand is a liquidated demand which can be set off against the rent.

But it is said that there is no right of set-off against an assignee of a chose in action where the person claiming the set-off had notice of the assignment when the debt due to him was contracted. That is quite true in ordinary cases; but a debenture differs from an ordinary assignment. If this doctrine were applied to debentures, no creditor of a company could ever get the benefit of a set-off **(p. 614)** where debentures had been issued. Now, it is the essence of a floating security that it allows the company to carry on business in its ordinary way until a receiver is appointed; and it would paralyse the business of companies to give to the issuing of debentures the effect now contended for. I am of opinion, therefore, that the set-off must be allowed …

KAY LJ: It is true that as against an assignee there can be no set-off of a debt accrued after the person claiming set-off has notice of the assignment. But does that apply to debentures such as these? Counsel hesitated to go so far as that, but said that there was no right of set-off, as no action had been brought in which it could have been asserted before 30 October 1894. I think that is not so. I think that if at the time of the assignment there was an inchoate right to set-off it can be asserted after the assignment, for the assignment is subject to the rights then in existence. The question is whether the assignment took place at the issue of the debentures or at the appointment of a receiver. The debentures contain provisions the effect of which is that the company is at liberty to go on with its business as if the debentures did not exist, until possession is taken under them. From that time the company cannot deal with its assets as against the title of the debenture-holders; up to that time it can deal with them in every legitimate way of business. Therefore the date to be regarded is the time of taking possession. A conclusion that set-off could not arise during the period before taking possession would be injurious to debenture-holders, for it would hamper the company in carrying on its business, and so injure the debenture-holders, whose interest is that the company should carry on a prosperous business. There was an inchoate right of set-off at the time when the receiver was appointed; and that, and not the time of issuing the debentures, is the time to be looked to. The debentures must be regarded as incomplete assignments which do not become complete until the time when the receiver is appointed …

LINDLEY LJ delivered a concurring judgment.

Crystallisation of floating charges

A floating charge will crystallise, and become a fixed charge attaching to the assets of the company at that time: (i) when a receiver is appointed; (ii) when the company goes into liquidation (since the licence to deal with the assets in the ordinary course of business will then necessarily terminate); (iii) when the company ceases to carry on business (see **[12.13]**) or sells its business (*Re Real Meat Co Ltd* [1996] BCLC 254); (iv) in the case where the debenture empowers the charge holder to convert the floating charge into a fixed charge by giving the company 'notice of conversion', and such a notice is given (see **[12.13]**); and (v) where an event occurs which under the terms of the debenture causes 'automatic' crystallisation.[19]

This last ground (automatic crystallisation) depends upon there being a provision in the document creating the charge which states that the charge will crystallise on the happening of some particular event—for example, if a creditor of the company should levy execution against its property, or if the company should give security over assets covered by the charge to a third party without the charge holder's consent.

Historically, these automatic crystallisation clauses generated considerable controversy, both as to their legality and as to whether, as a matter of policy, their use should be prohibited or subjected to restrictions by law.[20] However, they are now generally accepted as part of the architecture of floating charges (see *Re Brightlife Ltd* **[12.12]**).

(p. 615) ***A floating charge crystallises according to the terms of any automatic crystallisation clause.***

[12.12] Re Brightlife Ltd [1987] Ch 200 (Chancery Division)

HOFFMANN J:… [Counsel] said that public policy required restrictions upon what the parties could stipulate as crystallising events. A winding up or the appointment of a receiver [should this happen to the company during its lifetime] would have to be noted on the register. But a notice [of conversion of a floating charge to a fixed charge] need not be registered and a provision for automatic crystallisation might take effect without the knowledge of either the company or the debenture-holder. The result might be prejudicial to third parties who gave credit to the company. Considerations of this kind impressed Berger J in the Canadian case of *R v Consolidated Churchill Copper Corpn Ltd*[21] where the concept of 'self-generating crystallisation' was rejected.

I do not think that it is open to the courts to restrict the contractual freedom of parties to a floating charge on such grounds. The floating charge was invented by Victorian lawyers to enable manufacturing and trading companies to raise loan capital on debentures. It could offer the security of a charge over the whole of the company's undertaking without inhibiting its ability to trade. But the mirror image of these advantages was the potential prejudice to the general body of creditors, who might know nothing of the floating charge but find that all the company's assets, including the very goods which they had just delivered on credit, had been swept up by the debenture-holder. The public interest requires a balancing of the advantages to the economy of facilitating the borrowing of money against the possibility of injustice to unsecured creditors. These arguments for and against the floating charge are matters for Parliament rather than the courts and have been the subject of public debate in and out of Parliament for more than a century.

Parliament has responded, first, by restricting the rights of the holder of a floating charge and secondly, by requiring public notice of the existence and enforcement of the charge. For example, priority was given to preferential debts … [Hoffmann J continued with other examples of the restrictions imposed by statute on floating charge holders]…

These limited and pragmatic interventions by the legislature make it in my judgment wholly inappropriate for the courts to impose additional restrictive rules on grounds of public policy. It is certainly not for a judge of first instance to proclaim a new head of public policy which no appellate court has even hinted at before …

A floating charge crystallises when the company ceases to carry on business.

[12.13] Re Woodroffes (Musical Instruments) Ltd [1986] Ch 366 (Chancery Division)

The company had given a first floating charge to its bank and a second floating charge to Mrs Woodroffe. A provision in the latter instrument empowered Mrs Woodroffe, by giving notice to the company, to convert the charge into a fixed charge, and this she did on 27 August 1982. The bank appointed receivers on 1 September 1982. In this action, which was brought to establish the priorities as between the two debenture holders and the company's other creditors, Nourse J held that Mrs Woodroffe's notice did not have the effect of crystallising the bank's charge, as well as her own, on 27 August. He also ruled that the bank's charge would have crystallised if the company had ceased to carry on business at any time between 27 August and 1 September, but that there was not sufficient evidence that this had happened.

NOURSE J: On what date did the bank's floating charge crystallise? Mr Jarvis, for the bank, supported by Mr Marks, for Mrs Woodroffe, arguing in favour of 27 August, submit in the first instance that **(p. 616)** the effect of Mrs Woodroffe's notice of conversion was to crystallise not only her own charge, but also the bank's. They say that the notice, by determining Mrs Woodroffe's licence to the company to employ the assets subject to the charge in the ordinary course of its business, rendered any further use of those assets unlawful and impracticable, with the result that the company's business must be taken to have ceased at that time. Consequently, they submit that there was a crystallisation of both charges.

I find myself quite unable to accept that submission, which appears to me to run contrary to fundamental

principles of the law of contract. I do not see how the determination of Mrs Woodroffe's licence can in some way work a determination of the bank's, or produce the effect that the bank has had its charge crystallised over its head and possibly contrary to its own wishes. The relationship between the company and the bank was governed by the [bank's] debenture, which, although it contained a prohibition against creating any subsequent charge without consent—see clause 5—did not provide for the bank's floating charge to crystallise either on the creation or crystallisation of a subsequent charge.

On analysis it appears to me that the arguments of Mr Jarvis on this point are founded, and can only be founded, on an implied term in the [bank's] debenture … It does not seem to me to be at all clear that a term to the effect contended for by Mr Jarvis must be implied. Why should it be assumed that the bank and the company, in particular the bank, intended that the crystallisation of a subsequent charge should in all circumstances cause a crystallisation of the bank's? No doubt it might suit the bank's interests in the great majority of circumstances, but that does not mean that it can be assumed in all. For example, the bank might have taken the view that it was in its own interests that the business of the company should continue. Unless Mrs Woodroffe had either appointed her own receiver, or had applied for an injunction restraining it from dealing with its assets in contravention of her own fixed charge, I can see no reason why the company could not have continued to carry on its business. True it could only have done so in breach of its contract with Mrs Woodroffe, but the bank might have been prepared to indemnify it against that liability or even to pay off Mrs Woodroffe. I can see no ground for any species of implication to the effect contended for …

The question whether the cessation of the company's business causes an automatic crystallisation of a floating charge is one of general importance upon which there appears to be no decision directly in point. Such authorities as there are disclose a uniform assumption in favour of crystallisation. There is a valuable discussion of them in *Picarda on The Law Relating to Receivers and Managers*, pp 16–18. One of the questions there raised is whether there is any distinction for this purpose between a company ceasing to carry on business on the one hand and ceasing to be a going concern on the other. My own impression is that these phrases are used interchangeably in the authorities … but whether that be right or wrong, I think it clear that the material event is a cessation of business and not, if that is something different, ceasing to be a going concern.

[His Lordship referred to a number of authorities, and continued:] It is unnecessary for me to examine any of those cases in detail, or to quote extracts from the judgments of the many judges who decided them. They all, to a greater or lesser extent, assume that crystallisation takes place on a cessation of business …

[His Lordship then held that the evidence did not support the view that the company had ceased business before 1 September.]

Relevant assets received by the company after the floating charge crystallises automatically become subject to the (now fixed) charge over the company's property.

[12.14] NW Robbie & Co Ltd v Witney Warehouse Co Ltd [1963] 1 WLR 1324 (Court of Appeal)

The plaintiff company had given a debenture, secured by a floating charge, to the Bank of Ireland. The bank put in a receiver, who continued to carry on the company's business. The **(p. 617)** company sold goods to the defendants worth in all £1,346, and in this action the receiver claimed payment of the price. The defendants had in the meantime taken an assignment of a debt of £852 due by the company to English Spinners Ltd, and claimed to be entitled to set off this sum against the £1,346 sued for. It was held that the claim failed, because the debenture holder's equity had priority. In particular, each debt accruing due to a company after a floating charge which affects its future property has crystallised becomes immediately fixed with an equity in favour of the debenture holder. No debt arising, or first coming into the hands of a creditor, after crystallisation may be set off by that creditor so as to give him priority over the debenture holder.[22]

RUSSELL LJ: The first question for consideration is whether on the true construction of the debenture the debt owed by the defendants as it arose became a chose in action of the company subject to an equitable

charge in favour of the debenture-holders.

I consider that it did.

The relevant clauses and conditions of the debenture have already been referred to … There is under clause 3 a charge on all future assets of the company without restriction: that amounts to an agreement for valuable consideration to charge all such future assets, which agreement enables equity to fasten a charge on those future assets when they arise: and every such equitable charge as it arises operates as an equitable assignment to the debenture-holders of that asset … The fact that [the floating charge has crystallised and is now fixed]… in no way justifies the conclusion that the field of the charge is in any way restricted: it only means that after this particular quality disappears equity will fasten the charge directly upon all assets thereafter coming into existence as soon as they do so …

If that be a correct view of the construction of the debenture, then the choses in action consisting of the debts now sued upon became as they arise subject to an equitable charge—an equitable assignment—to the debenture-holders …

Thus far, in my judgment, by force of the debenture charge an equitable charge attached in favour of the debenture-holders not only on the £95 debt existing at the date of the appointment of the receiver and manager, but also upon the other debts constituting the total of £1,346 as they came into existence on delivery of goods to the defendants after such appointment. These choses in action belonging to the company became thus assigned in equity to the debenture-holders, at times when the defendants had no cross-claim of any kind against the company and consequently no right of set-off. Before the defendants acquired by assignment this cross-claim the defendants must be fixed with knowledge of this equitable assignment to the debenture-holders (by way of charge) of the debt owed by the defendants to the company. A debtor cannot set off his claim against X against a claim by X against him which the debtor knows has been assigned by X to Y before the debtor's claims arose. Just as an assignee of a chose in action takes subject to an already existing right of set-off, so a debtor with no existing right of set-off cannot assert set-off of a cross-claim which he first acquires after he has notice of the assignment of the claim against him: here, for instance, no part of the £852 could have been set off against the £95.

Applying these considerations to the present case, at the time when the defendants first acquired the claim for £852, the choses in action sought to be enforced against the defendants had been assigned to the debenture-holders by way of charge, but the £852 claim in no way involved the debenture-holders …

SELLERS LJ delivered a concurring judgment.

DONOVAN LJ dissented.

(p. 618) ➢ Question

Contrast this case with the *Biggerstaff* case **[12.11]**, and also see *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] QB 1, CA. What is the essential difference that explains the contrasting outcomes?

Priorities as between the floating charge, even after crystallisation, and other interests are determined by the usual rules.

[12.15] George Barker Ltd v Eynon [1974] 1 WLR 462 (Court of Appeal)

The case concerned a priority dispute between the holder of a contractual lien and the holder of a floating charge. The claimants had a contractual lien over the goods of a meat-importing company whose indebtedness to a bank was secured by a mortgage debenture creating a floating charge. The debenture holder's rights crystallised on the appointment of a receiver, but the Court of Appeal held that the lien took priority because the contractual rights arose even earlier, before the appointment of the receiver and so before crystallisation of the charge. This was