Interest is paid by means of coupons attached to the debenture, these coupons being in effect an instruction to the company's banker to pay the bearer of the coupon a stated sum on presentment to the bank after a certain date. The company can communicate with the holders of bearer debentures only by advertisement, and it is often provided that the holders of such debentures may exchange them for registered debentures.

Irredeemable debentures

A debenture which is issued with no fixed date of redemption is an irredeemable debenture, though such debentures are redeemable on a winding-up, and the liquidator is empowered to discharge them. In addition, irredeemable debentures always empower the debenture holders to enforce their security should the company, for example, fail to pay interest on the loan and such enforcement will result in the payment of the debenture debt. CA 2006, s 735 provides that such debentures may be issued, and this provision is necessary because otherwise the general rule of equity, that redemption of a mortgage cannot be postponed for too long a time, would apply. The result is that a company can create long mortgages over its land and other property by means of debentures, whether irredeemable or for a long contractual period prior to redemption.

Knightsbridge Estates Trust Ltd v _Byrne_ [1940] AC 613

The claimants owned a large freehold estate close to Knightsbridge. This estate was mortgaged to a Friendly Society for a sum of money which, together with interest, was to be repaid over a period of 40 years in 80 half-yearly instalments. The company wished to redeem the mortgage before the expiration of the term, because it was possible for it to borrow elsewhere at a lower rate of interest.

Held – by the House of Lords – the company was not entitled to redeem the mortgage before the end of the 40 years because the effect of what is now the Companies Act 1985 was to remove the application of the equitable doctrine of no postponement of the right of redemption from mortgages given by companies. Therefore, Knightsbridge was not entitled to redeem the mortgage except by the half-yearly instalments as agreed.

A debenture with no fixed date for redemption, but which gives the company the right to repay it at its option, is properly called a *perpetual* and not an irredeemable debenture (CA 2006, s 739).

Acquisition of debentures

Debentures may be acquired either from the company itself or by transfer or transmission.

Issue by the company

A company may issue debentures either individually or in a series. The provisions of the Companies Act 2006 forbidding the allotment of shares at a discount do not apply to debentures,

and accordingly they may be allotted at par, at a discount, or at a premium, unless this is forbidden by the company's articles. However, if debentures are issued at a discount together with a right to exchange them for shares at par value, the debentures are good but the right to exchange is void (***Mosely* v *Koffyfontein Mines Ltd*** [1904] 2 Ch 108). The share premium provisions do not apply to an issue of debentures and so if they are issued at a premium there is no need to open the equivalent of a share premium account.

If a person agrees to take a debenture from the company in return for a loan, the contract may be enforced by both the lender and the company by *specific performance*. CA 2006, s 740 gives this right because, in the absence of such statutory provision, equity would not specifically enforce a loan.

A private company cannot offer securities including debentures to the public.

The company must have certificates ready within two months after allotment or transfer, unless the terms of issue otherwise provide. (But note the position on transfer through the Stock Exchange system – see Chapter 12.)

See p. 243

Transfer

Registered debentures are transferable in accordance with the method laid down in the terms of issue, usually a stock transfer form as for shares. The company cannot refuse to register a properly stamped transfer, provided the terms of issue allow transfers and contain no restrictions, but a proper instrument of transfer must be produced to the company except, for example, in cases of transmission. Where the company refuses to register a transfer, it must send a notice to this effect to the transferee within two months of the transfer being lodged.

Certification by the company of an instrument of transfer has the same effect in the case of debentures as it has in the case of shares, i.e. it is a representation that documents have been produced to the company which show a prima facie title in the transferors.

In the case of bearer debentures, transfer is by mere delivery and the company is not involved.

Transmission

As in the case of shares, debentures pass by operation of law (a) to the holder's personal representatives on *death*, and (b) to the holder's trustee on *bankruptcy*, and the rights of such persons are similar to their rights when shares pass by operation of law (see Chapter 12).

See p. 243

The trust deed

When debentures are offered for public subscription, the company enters into a trust deed with trustees, being a trust corporation such as an insurance company. The charge securing the debentures is made in favour of the trustees who hold it on trust for the debenture stock holders. The trustees are usually appointed and paid by the company to act on behalf of the debenture stock holders.

Debenture stock holders, unlike debenture holders, are not creditors of the company. Thus, in ***Re Dunderland Iron Ore Co Ltd*** [1909] 1 Ch 446 it was held that the holder of debenture stock secured by a trust deed could not present a petition to wind up the company since

he was not a creditor. The trustees are the creditors for the whole debenture debt, and the stockholder is an equitable beneficiary of the trust on which they hold that debt. Consequently, his remedies are against the trustees, but by suing them, on behalf of himself and the other debenture holders, to compel them to exercise their remedies against the company, he can indirectly enforce the same remedies against the company as the holder of a single debenture can enforce directly.

The creation of a trust deed has the following advantages:

(a) *It enables a legal or equitable mortgage on specific assets of the company to be created*. The deeds of property can be held by the trustees, and where there is a legal mortgage the legal estate can be vested in them. It could not be vested in hundreds or possibly thousands of debenture holders because, since the property legislation of 1925, the legal estate in land cannot be vested in more than four persons.

(b) *There is also the matter of priorities*. A mortgage, in general terms, ranks in the order of its creation, so without a trust deed, in an issue to the public, the holder of the first certificate to be issued would rank in front of the second and so on. Holder number one would be entitled to payment from the company's assets *in full* before the second certificate holder got anything. Certificate holder, say, 1,000 might get nothing if the company's assets were insufficient. Under the trust deed the trustees have the charge and can, for example, sell the company's assets and distribute the proceeds equally so that all the stockholders get the same amount even if it is not a payment in full. Distribution is *pari passu*, which is a term commonly used of this procedure.

(c) *The interests of the debenture holders are better safeguarded* by the employment of a professional trust corporation, or by a small number of expert trustees, than they would be if left to the debenture holders themselves. The latter are often widely dispersed and often lack the knowledge required to safeguard their interests properly.

    Trustees usually have the power to call meetings of the debenture holders to inform them of matters of particular concern to them.

(d) *The trust deed usually gives the trustees power to sell the property charged* without the aid of the court, and to appoint an administrative receiver should the company default, for example, in the payment of interest or repayment of the principal sums borrowed.

(e) *The trust deed usually gives the trustees power to see that the security is properly maintained and repaired and insured*.

Where debentures are issued under a trust deed, the debentures themselves refer to the deed and thereby incorporate its terms.

Contents of the trust deed

The main clauses of a trust deed are as follows:

(a) *The nature of the security*. Details of the assets charged are given, and it sets out the powers of the trustees to deal with them on default by the company and on a winding-up.

(b) *The nature of the charge*. The deed will state whether the charge is a fixed or a floating charge. Usually there is a combination of both, i.e. a fixed charge on certain of the company's assets and a floating charge on the rest. There will also be a provision relating to the company's power to create other charges ranking equally with, or in priority to, the present charge.

(c) *The kind of debentures to be issued*. This clause will state whether the debentures are to be registered or bearer, or whether debenture stock is to be issued; and if stock, the minimum amount which can be transferred.

(d) *The method of redemption*. The clause will state whether there is to be an ordinary redemption by the company, or whether redemption is to be made by drawings or in the market, and when the redemption is to take place. This clause will also give details of any fund which the company proposes to set up to provide for the redemption of the debentures.

A copy of any trust deed for securing any issue of debentures must be forwarded to every holder of any such debentures on payment of a fee.

The Act prevents a trust deed from exempting the trustees from liability for breach of trust on grounds of negligence. It can, however, permit subsequent release from such liability by a majority of not less than three-quarters in value of the debenture holders present and voting at a meeting summoned for the purpose.

Company charges

Part 25, CA 2006, ss 860–894 covers company charges.

Debentures may be secured by a fixed or by a floating charge, or by a combination of both types of charge. The expression 'mortgage debenture' normally denotes a debenture secured by a fixed charge.

Fixed (or specific) charge

Such a charge usually takes the form of a legal mortgage over specified assets of the company, e.g. its land and buildings and fixed plant. The mortgage is usually created by a charge by deed expressed to be by way of legal mortgage under s 85(1) of the Law of Property Act 1925. The major disadvantage from the company's point of view is that it cannot dispose of the asset or assets subject to the charge without the consent of the debenture holder. However, there is a major advantage for the directors in a fixed charge because they will almost always have personally guaranteed the company's overdraft, and in an insolvency it is important to them that the bank gets as much as possible from the debenture securing the overdraft so that their liability is extinguished or reduced. In this connection it is worth noting that a fixed charge is not postponed to preferential creditors and other creditors as is a floating charge, and the bank will get more from the security on realisation. This will not apply if the fixed charge is, by agreement between lenders, to rank behind a floating charge, in which case the second ranking fixed charge is subject to the floating charge and ranks after it *and the claims of the preferential debts, e.g. wages and salaries, upon it* (see ***Re Portbase (Clothing) Ltd, Mond* v *Taylor*** [1993] 3 All ER 829).

Where the company has no land, buildings or fixed plant, a bank can be asked to take a fixed charge over book debts.

The words used by the parties are not conclusive. If the court finds on the facts that the charge is a floating charge, it will not be persuaded that the charge is a fixed charge merely because the parties have said that it is (***Re ASRS Establishment Ltd*** [1999] *The Times*, 17 November).

Floating charge

This is a charge which is not attached to any particular asset(s) identified when the charge is made. Instead it attaches to the company's assets as they then are, if and when the charge crystallises. The company is in the meantime free to dispose of its assets, and any new assets which the company may acquire are available to the debenture holder should the charge crystallise. Because such a charge does not fix at the time of its creation upon any particular asset it is equitable by nature, and this is relevant when considering the question of priority of charges when more than one has been created over the assets of the company.

Fixed charges over book debts

The advantage to the directors, and to the bank as debenture holder, of such a charge has already been considered. However, since a charge over book debts is over after-acquired property, the legal position was not absolutely settled, though it had been held in England that such a charge was valid (see ***Siebe Gorman & Co Ltd* v *Barclays Bank Ltd*** [1979] 2 Lloyd's Rep 142), and this decision was affirmed by the Irish Supreme Court in ***Re Keenan Bros Ltd*** [1985] 1 RLM 641, and again by the English Court of Appeal in ***Re New Bullas Trading Ltd*** [1994] 1 BCLC 485.

There are procedures to be set up by the bank in order to safeguard its position as a fixed charge holder but these are not considered here because they are a matter for the bank's legal advisers. Those advising the company can only suggest the fixed charge and point out to the directors its advantage to them in terms of their guarantees to the bank.

It is, however, of interest to note that the High Court has held that the terms of a debenture which contained provisions for a lending bank to have control of the borrowing company's book debts and other debts over which it had taken a specific charge, were essential to protect the validity of such a charge. Although the terms restricted the company's commercial use of its book and other debts, they were not anti-competitive, nor contrary to Arts 81 and 82 of the Treaty of Rome (***Oakdale (Richmond) Ltd* v *National Westminster Bank plc*** [1997] 1 BCLC 63).

A major difficulty arose in connection with fixed charges over book debts following the ruling of the Privy Council in ***Agnew* v *Inland Revenue*** [2001] All ER (D) 21 (the ***Brumark*** case).

This ruling came out of an appeal from New Zealand and represented the usual sort of challenge to the fixed charge. If it is a fixed charge it will, as we have noted, rank before the preferential creditors. HMRC (formerly Inland Revenue) is now no longer a preferential creditor but ranks with the unsecured trade creditors but the Revenue often tried to attack the fixed charge over book debts hoping that it would be regarded as a floating charge which is postponed to preferential creditors.

The difficulty with ***Brumark*** was that the Privy Council ruled that the lender must have systems in place to exercise control over the book debts both collected and uncollected. In ***Brumark*** the charge left the company free to collect and use the book debts in the ordinary course of its business. This in the view of the Privy Council made the charge floating not fixed by reason of the lender's lack of sufficient control.

The ***Brumark*** decision was of course only persuasive as are decisions of the Privy Council but it added a new strand worrying to business because businessmen and women had always understood that if a debenture took a fixed charge over book debts under what was known

as the ***Siebe Gorman*** formula the court would treat it as a fixed charge. The ***Siebe Gorman*** charge merely:

- prohibits the borrower from disposing (as by sale) of its book debts before collection; and
- requires the proceeds of the book debts to be paid into an account with the lending bank. *It does not prevent use of the proceeds by the company in its business.*

In the latest case in the saga, ***In Re Spectrum Plus Ltd (in Liquidation)*** [2004] NLJR 890, the Court of Appeal refused to follow ***Brumark*** and restored the ***Siebe Gorman*** formula to validity. However, in June 2005, the House of Lords allowed the appeal, holding that it was possible to create a fixed charge over book debts. The essential characteristic of a floating charge is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime, the chargor is left free to use the charged asset and to remove it from the security, ***Brumark Investments Ltd, Re*** applied. Where the chargor remains free to remove the charged assets from the security, the charge should, in principle, be categorised as a floating charge. It was not possible to create a charge on book debts which was fixed while they were uncollected but floating in respect of the proceeds when collected, ***Re New Bullas Trading Ltd*** overruled. The House of Lords went on to overrule the decision in ***Siebe Gorman***.

Crystallisation of floating charges

A floating charge crystallises:

(a) In the circumstances specified in the debenture. This means that crystallisation can take place by agreement between the parties and the particular debenture must be looked at. However, most usually where the loan is repayable on demand, as in the case of an overdraft, the charge will crystallise automatically when the bank calls in the overdraft which the company cannot pay. The bank may then appoint an administrative receiver. However, the High Court has decided that where a bank has lent a company money that is repayable on demand with a security over the company's assets, the timing of the bank's appointment of an administrative receiver is governed, where the company has the means to repay by the time it needs to set the mechanics of repayment in motion. If the company has made it clear that it cannot pay, the bank may make the appointment straightaway as could any other secured creditor (see ***Sheppard and Cooper Ltd*** v ***TSB Bank plc*** [1996] 2 All ER 654). Other circumstances specified include failure of the company to pay interest or the principal sum when due as agreed. These may also result in automatic crystallisation. In some cases the charge may be stipulated to crystallise when the company exceeds a specified borrowing limit.

(b) Automatic crystallisation occurs on the appointment of a receiver under a fixed charge or an administrative receiver under a fixed/floating charge, or if the company commences to wind up and on cessation of its business (***Re Woodroffes (Musical Instruments)*** [1985] 2 All ER 908).

Once a floating charge crystallises, the assets subject to the charge pass into the eventual control of the receiver and pass out of the control of the company immediately. Any disposition of those assets by the company after the charge crystallises means that the purchaser from

the company takes the assets subject to the charge, i.e. the right of the debenture holder to proceed against them to satisfy the debt.

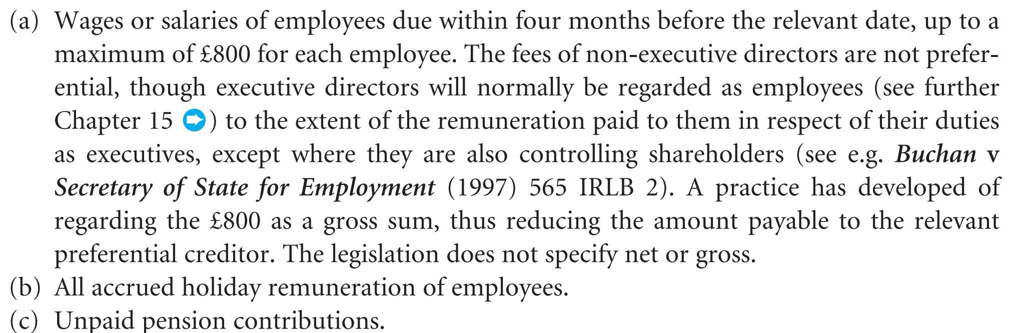
Note: The appointment of administrative receivers is now much restricted.

Postponement of floating charges

A person who lends money on the security of a fixed charge over the company's property is always entitled to repayment of his loan from the proceeds of sale of the mortgaged property before any other creditor, except a creditor with a prior fixed charge. A person who takes a floating charge is not so secure. There are cases in which his receiver will have to yield priority to other classes of creditors. The detailed law in this area is not considered because it is relevant only in an insolvency and is therefore more within the specialist province of the insolvency practitioner. It is not likely to be examined in detail in a general paper on company law. However, an outline of the position is given below.

Preferential creditors

Once a floating charge has crystallised the owner of the charge, e.g. the bank, is entitled to repayment of the loan out of the assets to which the charge has attached before the company's unsecured creditors. However, there is one statutory exception to this, which is that when a floating charge crystallises the claims which would be preferential in a winding-up rank in front of the debenture holder in respect of realisation of assets under the floating charge. The debenture debt is postponed only to preferential payments accrued at the date of the appointment of an administrator and not to those which accrue subsequently. Schedule 6 of the Insolvency Act 1986, as amended by the Enterprise Act 2002 applies, and there are no provisions for payment of interest on these debts until payment. Schedule 6 should be referred to if necessary for further detail, but the main preferential debts are as follows:



(a) Wages or salaries of employees due within four months before the relevant date, up to a maximum of £800 for each employee. The fees of non-executive directors are not preferential, though executive directors will normally be regarded as employees (see further Chapter 15) to the extent of the remuneration paid to them in respect of their duties as executives, except where they are also controlling shareholders (see e.g. ***Buchan* v *Secretary of State for Employment*** (1997) 565 IRLB 2). A practice has developed of regarding the £800 as a gross sum, thus reducing the amount payable to the relevant preferential creditor. The legislation does not specify net or gross.

See p. 289

(b) All accrued holiday remuneration of employees.

(c) Unpaid pension contributions.

It should be noted that if a bank has provided funds to pay wages and salaries *before* the administration that debt becomes preferential under the rule of subrogation. The justification for the subrogation principle which is contained in Sch 6, para 11 to the 1986 Act is that the protection it offers to banks and other lenders may encourage them to advance further money for the payment of wages at a critical time in the debtor company's affairs so as to enable it to continue trading and possibly avoid insolvency leading to the appointment of an administrator or liquidator.

The main advantage of being a secured or preferential creditor in an administration (administrative receiverships being largely abolished under Enterprise Act 2002 amendments to the Insolvency Act 1986) is that the administrator's proposals for achieving the purposes of the administration must preserve the rights of the preferential creditors to prior payment of their debts. The priority of secured creditors such as floating chargeholders in terms of payment must also be preserved though in this case payment is subject to a ring-fenced fund for payment of unsecured creditors of a percentage that shall not be distributed to floating chargeholders. These matters are further considered in the chapters on corporate insolvency.

Protection of employees

Under ss 167–170 of the Employment Rights Act 1996 (as amended), an employee who loses his job when his employer becomes insolvent can claim through the National Insurance Fund certain payments which are owed to him rather than relying on the preferential payments procedure. The administrative receiver will normally calculate what is due and obtain authorisation through the Department for Business, Innovation and Skills. In so far as any part of this payment is preferential, the rights and remedies of the employee concerned are transferred to the Department for Business, Innovation and Skills, which becomes preferential in respect of them. Major debts covered are:

(a) arrears of pay for a period not exceeding eight weeks up to a maximum of £350 per week;
(b) pay in respect of holidays taken and accrued holiday pay up to £350 per week up to a limit of six weeks in the last 12 months of employment;
(c) payments in lieu of notice at a rate not exceeding £350 per week up to the statutory minimum entitlement of a particular employee under the Employment Rights Act 1996;
(d) any payment outstanding in regard to an award by an employment tribunal of compensation for unfair dismissal, limited to the amount of the basic award;
(e) reimbursement of the whole or part of any fee or premium paid by an apprentice or articled clerk;
(f) certain unpaid contributions to an occupational or a personal pension scheme. The amount of £350 refers throughout to the employee's gross wage.

There is a provision in s 167 of the Employment Rights Act 1996 for the Department for Business, Innovation and Skills to make payments relating to redundancy direct to the employee where the employer is insolvent. The Department will normally claim against the employer, but such a claim is unsecured and does not concern the receiver in terms of preferential payments. There is no qualifying period of employment for claimants on the National Insurance Fund, though, of course, certain periods of employment will have been necessary before an award for unfair dismissal and redundancy would be made.

The Employment Appeal Tribunal has decided that in the above situation the statutory insolvency provisions apply including the right to set-off. Thus if the employee owes money to the employer, this must be set off against the payment and only the balance paid to the employee (see ***Secretary of State for Employment*** **v** ***Wilson*** (1996) 550 IRLB 5 – decided when the Employment Secretary was responsible for these payments).

Employees working outside the UK: who pays?

Where within the EU an employee works in the UK for an Irish company which is wound up in Ireland, the BIS is responsible for the insolvency payments described above (see ***Everson*** **v**

Secretary of State for Trade and Industry [2000] All ER (EC) 29). The case is to the effect that the country in which the claimant works is the payee. This may depend, however, on the number of employees employed in the country alleged to be liable to pay. Where there is only an insignificant number of employees, the country in which the employing company is being wound up may be liable instead (see the ***Danmarks/Bosbaek Case*** [1998] All ER (EC) 112 where only one employee was involved). In ***Everson*** the Irish company had a registered branch at Avonmouth employing over 200 people. The above rulings are from the European Court, UK law being silent on the matter.

Retention of title clauses

These clauses have as their purpose the retention of the seller's ownership in goods supplied until the buyer has paid for them, even though the buyer is given possession of the goods and may resell them or use them in the manufacture of other goods which will be resold. These clauses may also extend to the proceeds of sale.

If the clause is valid and if the purchasing company goes into an administrative receivership (where this is still possible) or liquidation, then the seller may try to recover the goods which the purchasing company still has in stock, and sometimes even the proceeds of resale by the purchasing company, on the basis that the purchaser is a mere *bailee* of the goods and not the owner, the seller being the owner and bailor.

In an administration, a valid retention clause is subject to a stay on creditors' remedies under Insolvency Act 1986, Sch B1 so the creditors' rights under the clause cannot generally be enforced and the administrator may dispose of the retained property free of the proprietory interest of creditors with the consent of the court.

The *Romalpa* case

The decision in ***Aluminium Industrie Vaassen BV*** v ***Romalpa Aluminium*** [1976] 2 All ER 552 was the first UK decision to alert the accountancy and legal professions to the problems which these clauses might cause in insolvency practice. The claimants in that case were successful in recovering aluminium foil supplied under a retention clause, together with the proceeds of resale of the foil which the clause also covered.

It should be noted, however, that any interest which the seller may claim in the proceeds of resale will, in view of more recent case law, be regarded by the courts as a charge on book debts which will be void under CA 2006, ss 860 *et seq* if not registered at Companies House. The relevant authorities are ***Modelboard Ltd*** v ***Outer Box Ltd (in Liquidation)*** [1993] BCLC 623 and ***Compaq Computers Ltd*** v ***Abercorn Group Ltd (t/a Osiris)*** [1993] BCLC 603.

It does not matter what the seller's retention clause says, e.g. proceeds to be held 'on trust', the buyer acts as 'agent' of the seller, and so on. The courts have in recent times looked beyond the language to the reality and regarded the relationship as that of debtor (buyer) and creditor (seller), which is not an equitable fiduciary relationship, so that the equitable remedy of tracing is not available and recovery of the proceeds of sale is not possible without the creation and registration of a charge over what are, in effect, book debts. Those in equitable relationships, such as trustee and beneficiary, can trace trust property without the need for registration.

The recovery of the proceeds in ***Romalpa*** has been looked on in more recent times as not significant since the receiver in that case conceded the proceeds and did not contest their recovery, so the court did not have to rule on the matter.

Subsequent cases

Since the decision in the ***Romalpa*** case the courts have, broadly speaking, had to deal with two main types of actions, as follows:

(i) Those cases where the supplier has been solely concerned to implement that part of his retention clause to retain title over goods supplied under a contract of sale where the goods have not been changed or added to in a process of manufacture, as was the situation in ***Romalpa***. These actions will probably succeed and insolvency practitioners will normally release the stock to the supplier provided the goods can be identified with invoices unpaid. Otherwise, the insolvency practitioner faces an action in conversion by the supplier. However, should the insolvency practitioner believe that either the clause has not been properly communicated and is therefore not part of the contract of sale (see below), or that the goods have not been properly identified, he cannot be prevented from selling them as part of the realisation of assets. It is clear from the decision of the House of Lords in ***American Cyanamid Co* v *Ethicon*** [1975] AC 396 that an application for an injunction to prevent sale will fail because the supplier has an alternative claim for damages in conversion, if his contention that the retention clause is enforceable is correct.

(ii) Those cases in which the supplier is trying to use a retention clause to cover goods supplied to be used in manufacture, as in ***Borden (UK) Ltd* v *Scottish Timber Products Ltd*** [1979] 3 All ER 961 (seller's resin used in making chipboard and mixed with the company's material). In these cases the supplier may well have difficulty in recovering even those goods in stock and not yet used by the purchaser in the manufacturing process, because it is difficult to construe a bailment where the purchaser can use the goods in manufacture. This must give the company some sort of ownership of them. Without the relationship of bailment, there can be no recovery of the goods.

Where the goods have been mixed with the purchaser's goods, or where the purchaser's workforce has added value by skill and effort, the clause will not work unless the retention clause is registered at Companies House as a charge over the purchasing company's assets. Such a charge is in fact registrable under the Companies Acts. An example is provided by ***Re Peachdart Ltd*** [1983] 3 All ER 204, where the seller's leather was converted into handbags by the skill of the purchaser's workforce and the purchaser supplied handles and other decoration. The stock of leather was not recoverable, nor were the finished handbags or work in progress, even though the retention clause purported to extend to finished products and work in progress.

Other points to be borne in mind regarding retention clauses are:

(a) the need to ensure that the clause has become part of the contract of sale. It is not enough to include the clause on an invoice, because the contract has already been made by the time the invoice is issued and new terms cannot be introduced unless there have been previous dealings, including retention clauses, which can be incorporated;

(b) the need to identify the goods which it is sought to recover. Where goods have been supplied over a period of time it is essential to be able, for example, by serial numbers on the goods and unpaid invoices, to identify which goods have not been paid for.

Fixed charges

A fixed charge, whether legal or equitable and whenever created, takes priority over the equitable floating charge on the asset(s) concerned. The only exception is where the floating charge expressly prohibits the creation of charges in priority to the floating charge (called

a negative pledge clause) and the person taking the fixed charge knew this to be so. At the present time this has to be actual knowledge, because registration of the charge at Companies House gives only constructive notice of the charge but not its particulars (see ***Wilson* v *Kelland*** [1910] 2 Ch 306). However, ss 860–877 of the CA 2006 provide that registration of the charge gives constructive notice also of its contents or particulars. The effect would be that the negative pledge clause would be constructively communicated and ***Wilson*** overruled.

There may be agreement between lenders that a particular floating charge shall rank in front of a particular fixed charge. Where this is so the first ranking floating charge remains subject to preferential debts and the second ranking fixed charge is subject to the prior ranking floating charge and the calls of the preferential debts on it (***Re Portbase (Clothing) Ltd, Mond* v *Taylor*** [1993] 3 All ER 829).

Other floating charges

If a company is to have power to create a second floating charge over its undertaking ranking before the first, the debenture securing the first charge must so provide. Otherwise floating charges rank for priority in the order in which they were created.

In this connection, it is worth noting that in ***H & K Medway Ltd, Mackay* v *IRC*** [1997] 2 All ER 321 the High Court decided that if a company grants two floating charges over its assets in favour of two different debenture holders and the second ranking debenture holder appoints a receiver first, the preferential creditors of the first ranking debenture holder are entitled to be paid before the first ranking debenture holder even though that debenture holder is not the person appointing the receiver.

Garnishee orders (now called third-party debt claims for procedural purposes)

A garnishee order *nisi* may be issued on behalf of a judgment creditor as a method of enforcing judgment. It may attach to debts owed to the judgment debtor by others. Service of a garnishee order nisi operates as an equitable charge on the debt preventing the debt from being paid to anybody except the judgment creditor. However, the judgment debtor's funds in the hands of a third party, e.g. a bank, cannot in law be actually paid over to the judgment creditor until the garnishee order is made absolute. Between order nisi and absolute the judgment debtor may bring evidence to the court as to why the funds should not be paid over to the judgment creditor, which will normally be difficult since the creditor has gone to judgment. If the funds are paid over while the order has not been made absolute, the third party, e.g. a bank, must replace the funds of the judgment debtor even though a debt of the judgment debtor has, in effect, been paid because the bank has no authority to make the payment (see ***Crantrave Ltd (in Liquidation)* v *Lloyds Bank plc*** [2000] 3 WLR 877, CA where a liquidator recovered a sum of money paid by the company's bankers to the judgment creditor at a time when the relevant garnishee order was not absolute).

Other postponements

Judgment creditors may, in certain circumstances, be able to retain the proceeds of sale of the company's goods taken in execution by bailiffs. Finance companies may be able to recover goods which the company has taken on hire-purchase.