THE HIGH COURT

[2020] IEHC 592

[Record No. 2019/235 COS]

IN THE MATTER OF LATZUR LIMITED (IN RECEIVERSHIP)

AND

IN THE MATTER OF THE COMPANIES ACT 2014

JUDGMENT of Mr. Justice Mark Sanfey delivered on the 20th day of November, 2020

Introduction

1. By originating notice of motion of 24th June, 2019, Mr. Ken Fennell ('the receiver') applied to this Court for an order pursuant to s.438 of the Companies Act 2014 ('the Act') giving directions in relation to certain matters arising in the course of the receivership of Latzur Limited ('Latzur' or 'the company'). Mr. Fennell was appointed receiver and manager of the company's assets by a Deed of Appointment of 28th November, 2013 by Chelsey Investissements SA ('Chelsey'), a limited company incorporated under the laws of Luxembourg, on foot of a debenture of 24th May, 2012 between Chelsey and the company (hereafter referred to as 'the debenture').

2. In his grounding affidavit of 29th May, 2019, the receiver avers that, as of that date, there is approximately €1,405,660 before deduction of receivership costs and expenses available for distribution. The receiver wishes to distribute these funds, conclude the receivership and have himself discharged as receiver. However, he considers that, before he can do so, he requires directions as to whether his appointment as receiver is pursuant to a fixed charge or a floating charge, as the resolution of this issue will determine who the appropriate recipient of the funds will be.

3. The protagonists for this issue are Chelsey and the Revenue Commissioners ('Revenue'). If the receiver is deemed to have been appointed pursuant to a crystallised floating charge – accordingly, a fixed charge – the funds in the receivership will be paid to Chelsey. Alternatively, if the receiver's appointment is deemed to be on foot of a floating charge, the funds will be distributed among the preferential creditors of the company, of which Revenue is by far the largest.

4. The receiver therefore notified Chelsey and Revenue of his application, and they have each taken the opportunity to submit affidavits and very detailed written submissions supporting their respective positions. When the matter came on for hearing on 17th September, 2020 before this Court, I was informed that the receiver, having put the matter before the court, did not intend to take an active part in the hearing. It is clear from the receiver's grounding affidavit that he has adopted a neutral position in relation to the matter, and will abide ultimately by the directions of this court.

5. A second issue was addressed in the affidavits and submissions before the court. In the event that the court decided that the floating charge in favour of Chelsey had not crystallised into a fixed charge in the manner claimed, it was maintained by Chelsey that certain of the company's assets were in any event subject to a fixed charge. The affidavits and submissions canvassed the respective viewpoints as to whether various of the assets could be considered the subject of a fixed charge. However, counsel for

Chelsey and Revenue informed me at the commencement of the hearing that they were agreed, subject to the court, that this issue should await judgment as to the first issue. I agreed to this proposal, which seemed appropriate in all the circumstances.

6. This judgment, then, concerns the issue of whether the floating charge in the debenture was converted into a fixed charge by either automatic or express crystallisation in the manner in which I will set out in some detail below. Chelsey's contentions in this regard were strenuously resisted by Revenue, who submitted that any such purported crystallisation was wholly ineffective, so that the appointment of the receiver on 28th November, 2013 by Chelsey – immediately after the ending of a period of court protection as a result of the company being in examinership – must be deemed to have been pursuant to a floating charge.

Background

7. The company was incorporated on 6th February, 2012. The receiver avers in his grounding affidavit that the principal activities of the company were *"the operation of textile retail outlets selling women's fashion under the A-Wear Brand"*. The company acquired the business and assets of A-Wear Limited from the receiver appointed to that company on or about 16th February, 2012.

8. In the debenture, the company charged all of its assets and undertaking in favour of Chelsey. Clause 3.3 of the debenture creates a first floating charge over all of the company's assets "*whatsoever and wheresoever, both present and future*". Clause 3.4 deals with the circumstances in which the floating charge may be converted into a fixed charge, whether "*by notice*" or by "*automatic conversion*". I will refer to the detail of these provisions later in this judgment.

9. The company does not appear to have fared well. The receiver avers that Chelsey advanced loans of some €6.1m to the company but eventually the company petitioned this Court for protection on or about 8th October, 2013. This step was taken pursuant to the "*decision*" of 3rd October, 2013 of Vangas Management SA, the sole member of the company, "*…pursuant to Regulation 9 paragraph 3 of the European Communities (Single Member Private Limited Companies) Regulations 1994… that Latzur Limited forthwith petition the High Court for the appointment of an Examiner, including on an interim basis…*", and that Mr. Jack Stein "*be authorised to swear the affidavit grounding the said petition and to execute any other documents and to take any others [sic] actions required in connection with the said petition"*. The decision was signed by Mr. Stein "*as authorised attorney and proxy of Vangas Management SA".*

10. Mr. Fennell was appointed as interim examiner on 8th October, 2013, and was confirmed as examiner of the company by order of this Court of 21st October, 2013. Unfortunately, it did not prove possible to source the investment necessary to formulate proposals for a compromise or scheme of arrangement which would have ensured the survival of the company. Accordingly, court protection was terminated by the court as of 12 noon on 28th November, 2013 at Mr. Fennell's request. At 12.10pm on that date, Mr. Fennell

accepted an appointment as receiver and manager of the company by Chelsey pursuant to its powers under the debenture.

The debenture

11. Clause 3 of the debenture contains the charging provisions at issue in this application. Clause 3.1 refers to the purported creation of fixed charges over a range of assets of the company. Chelsey and Revenue disagree as to whether any valid fixed charge is created under this section. They are however agreed that it only becomes necessary for this Court to form a view as to the operation of the clause if I am of the view that the floating charge held by Chelsey under the debenture has not crystallised into a fixed charge. I do not therefore require to consider this aspect of the matter in this judgment.

12. The floating charge is created by Clause 3.3 of the debenture as follows: -

"3.3 Floating charge

The Chargors hereby charge unto the Chargee by way of first floating charge, all of their assets and undertaking whatsoever and wheresoever, both present and future and the property and assets referred to in clauses 3.1 (Fixed charges) and 3.2 (Security Assignment) above (if and in so far as such mortgages, charges and/or assignments in this Deed shall be ineffective as fixed charges/security assignments)."

13. This clause is followed by the following clause dealing with the circumstances in which the floating charge may be converted into a fixed charge:

"3.4. Conversion of a floating charge

"3.41 Conversion by notice

The Chargee may, by notice in writing to the Chargors, convert the floating charge created under this Deed into a fixed charge as regards all or any of the assets of the Chargors if:

(1) an Enforcement Event has occurred;

(2) the Chargee considers, in good faith, that the Secured Assets (or any of them) are in danger of being seized or sold under or pursuant to any form of distress, attachment, execution or other legal process or otherwise to be in jeopardy; or

(3) the Chargee considers such conversion to be necessary or desirable to protect the priority of the Security;

and such fixed charge shall apply to all assets the subject of the floating charge as specified in the notice.

3.4.2 Automatic conversion

The floating charge created under this Deed shall, (in addition to the circumstances in which the same will occur under general law) automatically be converted into a fixed charge (without notice) as regards all assets which are subject to the floating charge if:

(1) The chargor creates (or attempts or purports to create) any Security Interest on or over any of the Secured Assets without the prior written consent in writing of the Chargee;

(2) any person levies or attempts to levy any distress, execution, sequestration, attachment or other legal process against the Secured Assets (or any of them);

(3) if a receiver and/or manager is appointed over the Chargor or any of its assets;

(4) if a petition is presented for the appointment of a liquidator, Examiner or other analogous insolvency official to, or the protection of the court is sought by, the Chargor;

(5) if any meeting of the directors or members of the Chargor is convened for the purposes of considering any resolution for its winding-up or liquidation or for appointing an examiner to the Chargor or other analogous insolvency procedure or with a view to a composition, assignment or arrangement with its creditors generally (or any class of its creditors) or any meeting is convened for the purposes of considering any event similar or analogous to the foregoing and such resolution is passed; or

(6) if the Chargor ceases to carry on business as a going concern…

3.4.4 Treatment of floating charge assets post conversion

The Chargor undertakes to the Chargee that, following the occurrence of any of the events set out in this clause 3.4 (Conversion of a Floating Charge), it:

(1) shall not sell, transfer, convey, lease, licence, assign (or enter into any agreement in connection thereto) or otherwise deal with or dispose of the Converted Assets;

(2) shall deliver as soon as possible to the Chargee or otherwise as agreed with the Chargee in writing, such information as the Chargee shall require to identify the Converted Assets including, for the avoidance of doubt, a full description (including serial/identification numbers in respect of plant and equipment and other tangible assets, account numbers, contract details etc) of all of the assets comprised in the Converted Assets; and

(3) shall deliver as soon as possible to the Chargee or otherwise as agreed with the Chargee in writing, all documents of title relating to such Converted Assets."

The notice of crystallisation

14. At para. 22 of his grounding affidavit, the receiver averred that "*by notice in writing dated 23 November 2013, which notice I am advised by Chelsey was hand delivered to the Company's registered office, Chelsey, in reliance on clause 3.4.1(3) of the Debenture, purported to convert the floating charge created thereunder to fixed security in respect of the assets referred to in the said notice ('the Notice of Crystallisation')*" [Emphasis in original]. The receiver pointed out that the notice was served during the period of protection under the examinership.

15. As the terms of the notice were the subject of detailed submissions, it is appropriate to reproduce the notice in full as follows:

"CHELSEY INVESTISSEMENTS SA

25a Boulevard Royal

L-2449 Luxembourg

DELIVERED BY HAND

November 23, 2013

The Directors

Latzur Limited

Creation House

Grafton Street

Dublin 2

Re: Debenture – Fixed and Floating Charges, dated May 24, 2012 ('the Debenture')

Notice of conversion to a Fixed Charge under Section 3.4.1 of the Debenture.

Dear Sirs,

We refer to the debenture described above.

This is a notice to you sent pursuant to Section 3.4.1 of the above noted Debenture, specifically subsection 3.4.1(3) thereof.

For greater certainty and clarity, the purpose of this notice is to convert the Floating Charge created under the Debenture to a Fixed Charge under said Debenture as regards to all or any of the assets listed below, all due to our consideration that this conversion is desirable to protect our Security, as that term is defined in the Debenture.

The assets subject to this notice are those listed in Section 3.2 of the above noted Debenture and defined in Section 1.1 of said Debenture as any Security, Security Interest, Secured Obligation and Secured Asset(s). In particular, the assets include:

- *the Material Contracts,*
- *the Insurances and Insurance Proceeds,*
- *the Intellectual Property.*
- *each Account together with all monies at any time standing to the credit of the Accounts and all interests and all other rights accruing or arising in connection with such accounts or monies,*
- *the leases,*
- *the Receiveables,*
- *the benefit of all Ancillary Rights, and*
- *any bill of exchange or other negotiable instrument held by it.*

Please note that you are, from your receipt of this notice on this date, restricted from using, disposing or otherwise dealing with the assets listed herein, and subject to the fixed charge.

Gentlemen, please govern yourselves accordingly.

Yours faithfully,

[signature]

Chelsey Investissements SA."

The affidavits

16. In his grounding affidavit of 29th May, 2019, the receiver, having set out the background to the matter, and referred to the relevant parts of the debenture, averred that "*whilst I appreciate that it is ultimately a matter for this Honourable Court to determine, it would appear based on the information provided to me by Chelsey that the Notice of Crystallisation was served in accordance with the terms of the Debenture and should have had the effect of converting the security from floating to fixed in respect of those assets referred to in the Notice of Crystallisation*." [Paragraph 25]. However, he referred to the fact that the service of the notice of crystallisation was served during the examinership, and the advice from his legal advisors that Mr. Justice Blayney had held in *Re Holidair Limited* [1994] 1 IR 416 that the presentation of a petition to appoint an examiner had the effect of de-crystallising a crystallised floating charge. The receiver expressed the view that this Court was being requested to consider "*what would happen to a de-crystallised floating charge were the examinership to fail, which is ultimately what happened in the present case…*" [Paragraph 26]. The receiver set out his views on the various possible interpretations of the effect of service of the notice of crystallisation, and also as to the issues to be addressed by the court in coming to a determination. The receiver then summarised what he understood to be Chelsey's contentions as to these issues. No reference was made to any contention on behalf of Chelsey that automatic conversion of the floating charge had taken place in accordance with Clause 3.4.2 of the debenture. The receiver was unable to shed much light on the position of Revenue, other than to say that they "*do not accept the contention regarding re-crystallisation upon the termination of court protection*". This was a reference to the contention of Chelsey, as expressed by the receiver at para. 31 of his affidavit, that "*… the only sensible interpretation of Blayney J's decision therefore is that on the expiration of the Examinership Period, the floating charge, having decrystallised to assist the Company in its endeavour to survive, automatically recrystallised upon the lifting of court protection*".

17. Revenue's position was set out in detail in the affidavit of Mr. Tom Blake, an Assistant Principal in the Collector General's Division. It was stated that the receiver had informed Revenue in March 2016 that payment of €540,000 in relation to a preferential debt would be made, but that this had not occurred. The receiver indicated in November 2018 that a motion for directions would be issued, but Revenue was preparing its own motion in June 2019 to seek the discharge by the receiver of what Revenue considered to be the receiver's obligation to discharge preferential sums due pursuant to s.440 of the Companies Act 2014 ("the Act" or "the 2014 Act") when the present motion issued.

18. Mr. Blake's affidavit set out at length the correspondence between the receiver and Revenue, and was critical of what Revenue sees as the failure by the receiver to discharge preferential payments and respond to certain requests by Revenue for information which

Revenue deems necessary to allow it to estimate the dividend due to preferential creditors.

19. The affidavit also offered an analysis from Revenue's perspective as to the effect of service of the notice of crystallisation, summarising as follows:

> *"36. The question then, very simply, is what the effect of the service of the notice of crystallisation was at law, given that the Company was under the protection of the court at the time. In other words, could a secured creditor bring an enforcement measure, such as the service of a notice of crystallisation, on a Company during a period of court protection? The answer is, undoubtedly, no. If the crystallisation notice was to have any effect it was to deprive the Company of the ordinary use of the assets subject to the crystallisation notice, during the examinership. Such a measure would undermine the purpose of the examinership and would be inconsistent with the intention and object of the examinership legislation…[38] In the view of Revenue it would be contrary to the examinership legislation, the fundamental principles governing insolvency and indeed the decisions of the Supreme Court suggested by the Receiver, to deprive the preferential creditors of the Company of the benefits of Section 440 of the 2014 Act, on the basis of the service of the notice referred to in the Receiver's affidavit".*

20. By an affidavit of 18th September, 2019, Mr. Jack Stein set out Chelsey's position. Mr. Stein explained in the opening paragraph the capacity in which he swore the affidavit as follows:

> *"1. I am the authorised representative of Chelsey Investissements S.A. ('Chelsey'), pursuant to a Director's Resolution of Chelsey duly executed on 8th March 2019. I have been personally involved in the affairs of Latzur Ltd ('the Company') in Dublin since 2012, and I was personally involved in all in efforts [sic] to support that company and to find and implement plans to save the business and jobs. I was very familiar with the operations, the structure and debt of that company and I was intimately involved in the examinership with Ken Fennell, now the receiver ('the Receiver'), at that time. As such, I make this affidavit on behalf of, and with the authority of, Chelsey from facts in my own knowledge save where otherwise appears, and where so appears I believe the same to be true."*

21. Mr. Stein indicated that he had been advised that there is "*clear law"* to the effect that a valid notice of crystallisation has the effect of converting the floating charge to which it relates into a fixed charge, and that the presentation of a petition to appoint an examiner has the effect of de-crystallising a crystallised floating charge. He expressed the view however that it is "*not clear*" as to "*what happens when the notice of crystallisation is served during the examinership and the examinership subsequently fails*" [Paragraph 7 – emphasis in original].

22. Mr. Stein offered a brief legal analysis in his affidavit supporting Chelsey's position. He stated that there was nothing in the Companies (Amendment) Act 1990 ("the 1990 Act"),

which governed examinerships in 2013 before the coming into force of the 2014 Act, that prevented the service of a notice of crystallisation while a company is in examinership, and pointed out that no steps were taken to realise the security by appointing a receiver until after the end of the period of protection. It was suggested that "*…it must be the position that, on the failure of the examinership, the floating charge, which was de-crystallised by the appointment of the examiner, re-crystallises on the cessation of protection. If not, the charge holder would be unfairly prejudiced by the failed examinership*" [para. 15].

23. In his affidavit, Mr. Stein also stated that he had been advised that, even if Chelsey was wrong as to the effect of the notice of crystallisation, Clause 3.4.2(3) of the debenture (set out at para. 13 above) "*operated to automatically convert the floating charge to a fixed charge on the appointment of the Receiver*", and that the case law made clear in any event that, as a matter of general law, "*the appointment of a receiver, and the taking in charge of the assets by that receiver, amounts to a crystallisation event*" [para. 17].

24. Mr. Blake responded by an affidavit of 11th October, 2019 on behalf of Revenue to Mr. Stein's affidavit. In the affidavit, Mr. Blake – as was the case with the affidavits of the receiver and Mr. Stein – offered a legal analysis of the respective positions of the parties. As I will deal below with the detailed written and oral submissions on behalf of the parties, I do not propose to dwell on what was represented as the parties' position on the law in the affidavits. It is sufficient to say that Revenue disagreed with the analysis set out in Mr. Stein's affidavit, suggesting that the conversion of a floating charge into a fixed charge in the course of an examinership was "*prohibited by Irish law, unless the Examiner consents. It therefore was invalid and of no legal effect whatsoever*" [para. 9].

25. It is important to note that, while Mr. Blake set out Revenue's position in relation to the notice of crystallisation if it had been validly served, he explicitly reserved Revenue's position as regards service as follows:

> "*17. I should add that it is of course for Chelsey to prove service of the purported notice, and such proof is awaited".*

26. The receiver submitted a further affidavit of 15th October, 2019 in which he exhibited certain correspondence between the parties in the period leading up to the issue of the motion. He explained that his staff "*as a matter of good practice, specifically queried with my legal advisors whether the security interests of Chelsey in respect of the assets and undertaking of the Company was fixed or floating. Having reviewed the underlying security (i.e. the Debenture), my legal advisors queried whether a notice of crystallisation had been served on the Company. This was subsequently raised with Chelsey. On 6 August 2018, by way of email from Jack Stein on behalf of Chelsey, Mr. Stein communicated to me that Chelsey had in fact served a notice of crystallisation under the Debenture which said notice was dated 23 November 2013…*" [para. 17].

27. This email of 6th August, 2018 from Mr. Stein assumed some significance during the hearing in the context of whether or not Chelsey had proved service of the notice of

crystallisation. The text of the email, addressed to members of the receiver's staff, was, in as far as relevant, as follows:

> *"All,*
>
> *All parties on my side are now back from their annual vacations.*
>
> *We were able to find the Conversion Notice.*
>
> *I hope that this will assist in processing the file, bringing it to a conclusion, and allowing the Receiver to reimburse Chelsey the maximum amount possible, all under the February 2012 Loan Agreement, May 2012 Debenture and November 2013 Notice of Conversion and Demand letters.*
>
> *Please advise if you need anything else.*
>
> *Thanks, and please keep me advised of the progress in closing this matter.*
>
> *Regards,*
>
> *Jack"*

I was advised by counsel for Chelsey at the hearing that the statement "*we were able to find the conversion notice"* was intended to convey that Chelsey had found its copy of the notice of the conversion, and that it should not be inferred from the email that the conversion notice had not been served at all.

28. The receiver's affidavit addressed some of the criticisms which had been made of him by Revenue, which he characterised as "*unjustified*", and once again emphasised his neutrality in the dispute. An affidavit was also submitted by Mr. Michael Nugent, the solicitor for Chelsey, addressing what he called "*misguided criticism*" from the Revenue in relation to an alleged failure to respond to correspondence from Revenue requiring details of whether Mr. Stein was an officer or employee of Chelsey during the relevant period.

The affidavits relating to service

29. On 23rd January, 2020, the case was assigned a hearing date on 20th May, 2020. Junior counsel on both sides agreed dates for the exchange of written legal submissions, and Chelsey's submissions were delivered on 9th March, 2020, with Revenue delivering replying submissions on 6th April, 2020. These latter submissions made it very clear that Revenue would contend at the hearing that Chelsey had not proved service of the notice of crystallisation. Accordingly, affidavits were sworn on behalf of Chelsey by Mr. Judah Bendayan and Mr. Stein on 14th and 17th April, 2020 respectively. These affidavits were clearly intended to address the proof of service issue.

30. As matters transpired, the hearing of the receiver's application did not proceed on 20th May, 2020 due to reasons associated with the Covid-19 pandemic. When the issue of these affidavits was raised subsequently, counsel for Revenue indicated to the court that Revenue would be objecting to any application to file the affidavits in court, given that

they had been produced very late in the day, and effectively in response to the Revenue's written submissions. Reynolds J. directed that any application in relation to these affidavits should be made to the court on the new hearing date, 17th September, 2020.

31. Accordingly, counsel for Chelsey made application to this court at the outset of the hearing for liberty to file the affidavits in court. This application was opposed by counsel for Revenue, although counsel very fairly conceded that Revenue could not show prejudice as a result of the late delivery of the affidavits. Counsel also submitted that, if I were minded to grant liberty to file the affidavits, the evidential weight to be attributed to them was still a matter the court must consider, and that Revenue's position would be that the affidavits did not establish valid service.

32. In the event, I took the view that, given the relevance of the affidavits to a key issue between the parties, the lack of prejudice to Revenue and the fact that, due to the delay in hearing the matter, Revenue had had a further four months to consider the issue, I should grant liberty to Chelsey to file the affidavits in court.

33. Both of these affidavits were very short, and purported to establish service of the notice of crystallisation. Mr. Bendayan gave his occupation as "*Chief Financial Officer*" in his affidavit, and an address in Montreal, Quebec, Canada. The first two paragraphs of his affidavit were as follows:

> *"1. I was a director of Chelsey Investissements S.C.A., the registered office of which is at 25a Boulevard Royal, L-2449, Luxembourg, from 21st December 2011 until 21st December 2017, and I make this affidavit for and on behalf of Chelsey Investissements S.C.A. from facts within my own knowledge save or otherwise appearing and where so otherwise appearing I believe the same to be true.*
>
> *2. I say that I did serve the Notice of Conversion to a Fixed Charge under Section 3.4.1 of the debenture which is the subject matter of these proceedings, dated 23rd November 2013, on Latzur Ltd, by personally handing same to Jack Stein, a director of Latzur Ltd who had been notified to me as being the representative of Latzur Ltd authorised to deal with this matter and to receive the said notice, at my house at 6522 Merton, Côte-St-Luc QC, H4V1C5, Canada, on the 23rd November 2013."*

34. Mr. Stein described himself in the opening paragraph of his affidavit as *"a director of Latzur Limited*", and stated that he made the affidavit on behalf of Chelsey. The remaining two paragraphs of the affidavit were as follows:

> *"2. In my capacity as a director of Latzur Ltd, I was responsible for managing its relationship with Chelsey Investissements S.A. (as it then was) including matters relating to the debenture of 24th May 2012 between Chelsey Investissements S.A. (as it then was) and Latzur Ltd, including accepting service of all documents in relation thereto on behalf of Latzur Ltd.*

3. I say that Judah Bendayan, a director of Chelsey Investissements S.C.A., did serve the notice of conversion to a fixed charge under Section 3.4.1 of the said debenture, dated 23rd November 2013, on Latzur Ltd, by personally handing same to me at his house at 6522 Merton, Côte-St-Luc QC, H4V1C5 Canada, on that date."

The law on priorities in receivership

35. All of the key events relevant to this application – the service of the notice of crystallisation, the examinership, the appointment of the receiver – occurred prior to the coming into force of the Act. Under the legal provisions that applied at the time, the issue of whether or not the floating charges in the debenture had crystallised at the time of the appointment of the receiver determines the priorities in the receivership, and thus whether the receivership funds go to Chelsey or Revenue.

36. Section 98(1) of the Companies Act 1963 ('the 1963 Act') is as follows:

> *"Where either a receiver is appointed on behalf of the holders of any debentures of a company secured by a floating charge, or possession is taken by or on behalf of those debenture holders of any property comprised in or subject to the charge, then, if the company is not at the time in course of being wound up, the debts which in every winding up are, under the provisions of Part VI relating to preferential payments to be paid in priority to all other debts, shall be paid out of any assets coming into the hands of the receiver or other person taking possession as aforesaid in priority to any claim for principal or interest in respect of the debentures."*

37. Thus, where a receiver was appointed on foot of a floating charge, preferential debts had priority in the receivership over debts secured by a floating charge. Section 98(1) was virtually identical, in relation to floating charges, to s.285(7) of the 1963 Act which provides that, in a winding up, preferential debts "*have priority over the claims of holders of debentures under any floating charge created by the company*".

38. As we will see, the Supreme Court in *Re JD Brian Limited (in liquidation)* [2016] 1 IR 131 held that s.285(7) did not apply to floating charges which had been converted to fixed charges prior to the commencement of the winding up. Applying this principle to s.98(1) and the appointment of a receiver, it would appear that the issue in the present proceedings as regards priority is whether or not the floating charge had crystallised prior to the appointment of the receiver.

39. Section 98(1) and s.285(7) were effectively re-enacted by s.400(1) and s.621(7) of the 2014 Act. Those sections were amended in turn by sections 92 and 98 of the Companies (Accounting) Act 2017 to apply to "*any charge created as a floating charge by the company"*. Therefore, under the current provisions, where a charge originally created as a floating charge is subsequently converted into a fixed charge, the preferential debts have priority over the converted floating charge.

40. However, given that the provisions as to priority of the 1963 Act govern priority in the present case, the key issue as regards priority is whether or not conversion of the floating charge into a fixed charge had taken place by the time the receiver was appointed.

Submissions of Chelsey

41. As I have indicated above, both Chelsey and Revenue delivered lengthy and detailed written submissions. Those submissions were then ably developed and augmented over the course of two days by Mr. Brian Kennedy SC for Chelsey, and Ms. Jacqueline O'Brien SC for Revenue. While I have carefully considered all of the submissions made, what follows is a non-exhaustive synopsis of the contentions of each party.

42. In its written submissions, Chelsey stated that its position was that the receiver "*was appointed on foot of entirely fixed charges"* and that this position was:

> *"based upon the following key submissions:*
>
> *A. The floating charges created by the Debenture were crystallised, i.e. converted into fixed charges, either automatically under the Debenture or by way of the Notice of Crystallisation.*
>
> *B. Chelsey accepts that, in either case, having regard to existing authority, the effect of the examinership of the Company was to de-crystallise the converted charges.*
>
> *C. On the failure of the examinership and the lifting of court protection, those charges must have re-crystallised. Thus, when the Receiver was appointed immediately after the failure of the examinership, he was appointed solely on foot of fixed charges." [Emphasis in original].*

43. It was clear from Chelsey's written submissions, delivered after the respective positions of the parties had been set out at length on affidavit and just over two months before the intended hearing date of the application, that the main thrust of Chelsey's argument was now that the floating charge had crystallised either prior to or upon the presentation of the petition for the examiner, and that it only became necessary to consider the efficacy of the notice of crystallisation in the event that this argument proved unsuccessful.

44. Counsel's submissions at the hearing of the application were consistent with this approach. A finding by the court that automatic conversion of the floating charge into a fixed charge prior to the examinership had taken place, and had re-crystallised at the conclusion of the examinership, would have the advantage for Chelsey that the trenchant criticisms by Revenue of the notice of crystallisation procedure and the theory that the appointment of the receiver crystallised the floating charge would become irrelevant.

45. Counsel for Chelsey acknowledged that its analysis of the legal position had changed, but that it was nonetheless entitled to represent to the court what it considered to be the correct legal analysis. Counsel for Revenue took a different view, objecting to what she characterised as "*a complete volte-face*".

46. It was submitted by counsel for Chelsey that automatic conversion was expressly contemplated by Clause 3.4.2 of the debenture (quoted at para. 13 above). This sub-clause set out certain events, upon the occurrence of which a floating charge would be deemed to have been converted into a fixed charge. It was suggested that it has long been accepted by academics that crystallisation of a floating charge can arise as a result of an express contractual term, and referred to two decisions of the Supreme Court from which, it was submitted, it appeared that the concept of contractual automatic crystallisation had been accepted: In *Re JD Brian Limited (in liquidation)* [2016] 1 IR 131, and Re Holidair Limited [1994] 1 IR 416.

47. JD Brian was a case which primarily concerned whether express crystallisation had taken place prior to a winding up. Three companies executed debentures in favour of a bank as security for present and future borrowings. These debentures provided that the floating charges could be converted into fixed charges on service of a notice. The bank served such a notice on each company, the notices stating that the bank considered the property, assets and rights subject to the floating charge to be in jeopardy, and that the floating charge in each case was thereby converted into a fixed charge.

48. In November 2009, a petition for the winding up of the companies was presented by each of the companies, and a liquidator was appointed. The liquidator brought an application to the High Court seeking directions, confirming that the fixed charge had been *"validly crystallised",* and that as a result of the crystallisation of the floating charges all of the assets of the company fell outside the liquidation and that no distribution or dividend would be available or payable to any other creditor of the company.

49. The High Court held that service of the crystallisation notice had not validly crystallised the floating charges and converted them into fixed charges. The High Court also held that s.285(7) of the 1963 Act must be construed to the effect that the preferential debts ranked in priority to the claims of the bank whether or not the floating charges had been crystallised prior to the winding up.

50. The liquidator appealed these findings. The Supreme Court allowed the appeal, and set aside the findings of the High Court. While there does not appear to be any decision in this jurisdiction directly concerning automatic conversion, Chelsey submits that the decision in *JD Brian* makes it clear that the concept of contractual automatic conversion is accepted in this jurisdiction. Counsel placed emphasis in Chelsey's written submissions on the following excerpt from the judgment of Laffoy J.:

> *"[29] the trial judge stated… that she was of the view that there is no rule of law which precludes parties to a debenture creating a floating charge agreeing, as a matter of contract, that the floating charge will crystallise upon the happening of an event or a particular step taken by the chargee. That conclusion, with which I agree, is not disputed by any of the parties to the appeal." [Emphasis added in written submissions]*

It is submitted that "*the happening of an event*" would appear to encompass automatic conversion.

51. Chelsey also relied on the decision of the Supreme Court in *Re Holidair* that the floating charge in that case had crystallised on the appointment of joint receivers as demonstrating that crystallisation could take place other than by the express contractual agreement of the parties.

52. In the present case, Chelsey relied on the provisions of Clause 3.4.2 of the debenture (set out at para. 13 above), contending that events (4) and (5) had occurred prior to both the examinership and the notice of crystallisation. It was submitted that crystallisation of the floating charge had occurred on the presentation of the petition for the appointment of the examiner (event (4)), and that the "*decision*" of the company's sole member on 3rd October, 2013 pursuant to Regulation 9(3) of the European Communities (Single Member Private Limited Companies) Regulations 1994 must be construed as the equivalent of the convening of a meeting of members for consideration and subsequent passing of a resolution to appoint an examiner to the company. It was also submitted in the alternative that the appointment of the receiver after the examinership satisfied event (3) of the sub-clause.

53. It was submitted that the Supreme Court in *JD Brian* took the view that, in order to determine whether any crystallisation was effective, the court must examine the debenture to see whether it is clear that the parties intended that the occurrence of a certain event or, as the case might be, service of notice in accordance with the debenture, would result in the conversion of the floating charge to a fixed charge. While that case concerned express crystallisation by notice, Chelsey relied on the following passage from the judgment of Laffoy J. as authority for the proposition that the same test applied to automatic crystallisation:

> "*[71] …The task in this case is to determine whether, on a once-off basis, the service of the Crystallisation Notice under clause 10 converted the floating charge into a fixed charge. I am satisfied that in applying the principles enunciated in re Keenan Bros. Ltd in carrying out that task, the proper conclusion is that, as a matter of construction of clause 10, the intention of the parties was that, on the service of the Crystallisation Notice, the Company would thereafter be restricted in the use of the property and assets and rights which had been the subject of the floating charge and, contrary to the view expressed by the trial judge at para. 19, p.277, of the second judgment ([2011] IEHC 283, [2011] 3 I.R. 244) that the Company would cease to be entitled to use such property in carrying on its business without the consent of the Bank. That conclusion, in my view, is fully in accordance with the principles outlined in the judgments of Henchy and McCarthy JJ. in re Keenan Bros Ltd.*
>
> *[72] On the plain wording of clause 10 of the Debenture, the intention of parties is absolutely clear. The situation is identified in which the Bank has the right to serve a notice under clause 10. That situation is that the Bank, in its sole judgment,*

considers the property, assets and rights the subject of the floating charge to be in jeopardy. It is assumed that the Bank considered that to be the position on 28 October 2009. The purpose of the notice which the Bank acquired the right to serve in that situation is also clearly stated in clause 10. It was to convert the floating charge in the Debenture into a first fixed charge. Accordingly, the clear intention of the parties was that, on the service of the notice, the floating charge would become a fixed charge and the consequences of that occurring, including the obligations flowing from the consequences, would be borne by the Company as chargor. It is true that those consequences were not spelt out in clause 10, nor were they spelt out in relation to the conversion of a floating charge into a fixed charge by reason of the happening of an event specified in clause 11. The consequences ensue as a matter of law on the service of the notice under clause 10. In legal parlance the conversion of the floating charge into a fixed charge is known as crystallisation since the late nineteenth century. As the passage from the judgment of Henchy J. in re Keenan Bros. Ltd [1985] IR 401 at p.418, which is quoted at para. 39 above, clearly demonstrates, the consequence of the intervention of a chargee which results in crystallisation, for example express crystallisation, is that:-

> *'… the rights of the chargee become the same as if he had got a fixed charge; thereafter the company cannot deal with the assets in question except subject to the charge.'*

That was what was intended to happen under clause 10 of the Debenture and it is what actually happened on the service of the Crystallisation Notice on 28 October 2009." [Emphasis in written submissions].

54. Chelsey submitted that the wording of the debenture made it clear that the occurrence of events (4) and (5) in Clause 3.4.2 had the effect of converting the floating charge into a fixed charge, and that Clause 3.4.4 (also quoted at para. 13 above), which set out the restrictions on the company in dealing with assets after conversion of the floating charge, left no doubt that the occurrence of those events had that effect.

55. In the event that this Court is of the view that the floating charge did not crystallise by way of automatic conversion as alleged, Chelsey contends that express crystallisation of the floating charge took place by way of service of the notice of crystallisation of 23rd November, 2013. The text of the notice, set out at para. 15 above, purported to invoke Clause 3.4.1(3) of the debenture in stating that Chelsey considered "*that this conversion is desirable to protect our Security, as that term is defined in the Debenture". "Security*" is defined in the debenture as "*the Security constituted or intended to be constituted by this deed".*

56. An issue of much contention between the parties was whether such a notice could be served by a chargee during the examinership of the chargor. Section 5(2) of the Companies (Amendment) Act 1990 ('the 1990 Act'), which governed examinerships at the

time, set out a list of acts which could not be undertaken in relation to a company in examinership. Such acts did not include service of a notice of crystallisation.

57. Section 5(2)(d) of the 1990 Act (as substituted by s.14(b)) of the Companies (Amendment) (No. 2) Act 1999) provided that:

> "*(d) where any claim against the company is secured by a mortgage, charge, lien or other encumbrance or a pledge of, on or affecting the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of that security, except with the consent of the examiner;…*"

58. Chelsey contended that the notice of crystallisation was not an "*action…to realise the whole or any part of that security…*", but that it was "*evidently an action to protect the security in the event of the examinership failing*", and laid particular emphasis on the fact that it took no further action on foot of its security until the cessation of the examinership – that is to say, it did not call upon the examiner to gather in and transfer the assets subject to the crystallised charge to the chargee. Chelsey drew a distinction between crystallisation, which it contended related to the status of the charge, and realisation, which connoted actions to be taken to enforce the charge. It was submitted that service of the notice of crystallisation in the present case was fundamentally different from the notice served in *Holidair*, in which the company was directed "*that all book debts be lodged to accounts in the name of the trustee*", which the Supreme Court viewed as an attempt to realise the security by seeking to make the book debts available for set off against the debt of the charge-holder. Chelsey contended that it took no such enforcement step, as it "*knew that any enforcement action would have to await the conclusion of the protection period*" [written submissions para. 51].

59. It was submitted by Chelsey that, whether the floating charge converted to a fixed charge by automatic conversion prior to the examinership or by notice during the examinership, the charge de-crystallised as a result of the examinership. As Blayney J. stated in *Re Holidair* (pp. 448-449):

> *"… it is necessary to deal with the submission made on behalf of the companies and the examiner that, while the floating charge would have crystallised on the appointment of the receivers, it would have become decrystallised, that is to say, it would have resumed its character of a floating charge on the appointment of the examiner. In my opinion this submission is well-founded.*
>
> *Once the examiner was appointed, the receivers could no longer act (s.5 sub-s. 2(b) of the Act of 1990). It would accordingly have been pointless to keep the book debts frozen. The receivers would have had no right to collect them. Apart from this, since the purpose of the Act of 1990 as emphasised by the Chief Justice in his judgment, is the protection of the company and consequently of its shareholders, workforce and creditors, it would be wholly inconsistent with that purpose that the companies would be deprived of the use of their book debts particularly as it appears that they are absolutely essential for their survival during the period of*

protection. Furthermore, it is no injustice to the debenture holders who appointed the receivers since the companies are continuing to trade and so continuing to create new book debts to replace those that may be paid and the proceeds of which may be used by the companies. Finally, it seems to me that if the receivers were to insist upon the charge on the book debts remaining crystallised, they would be in breach of s.5, subs. (2) (d) of the Act of 1990, which provides that: -

> *'Where any claim against the company is secured by a charge on the whole or any part of the property, effects or income of the company, no action may be taken to realise the whole or any part of such security, except with the consent of the examiner'.*

For these reasons I would hold that on the appointment of the examiner the charge on the book debts ceased to be crystallised and became again a floating charge."

60. Chelsey contended that, if a floating charge which crystallised prior to the examinership de-crystallised in this manner, a floating charge which crystallised during the examinership *"must automatically and immediately de-crystallise for the same reasons. The continued crystallisation of the charge would be incompatible with the policy underpinning the legislation, which is aimed at ensuring the survival of the company during the period of protection*" [written submissions para. 54].

61. However, if that is so, what happens to the de-crystallised charge if the examinership fails and protection is lifted? The written submissions on behalf of Chelsey expressed its position as follows:

> *"56. It is clear from the passage extracted above [i.e. the passage from* Blayney J. *in Re Holidair] that the basis for Blayney J.'s finding was the overriding legislative aim of protecting the company during the period of examinership. This rationale obviously does not apply once the protection is lifted. If the commencement of court protection is sufficient, in and of itself, to reverse the effect of a crystallisation, then it is submitted that the lifting of that protection should, conversely, have the effect of re-crystallising the charge. To hold otherwise would be to, effectively, extend the effect of the examinership beyond the period of court protection. It is submitted that for that to be the case it would have to be provided for expressly in legislation." [Emphasis in original].*

62. It was submitted that, if a receiver appointed within three days prior to the examinership was prohibited from acting on foot of his appointment, and the charge had de-crystallised in accordance with the decision in *Re Holidair*, there would be no question but that such a receiver would remain appointed and could resume acting pursuant to the charge on foot of which he was appointed following the withdrawal of protection by the court. There would be no suggestion that the de-crystallisation of the charge continued to apply after the end of the examinership. It would follow that any such de-crystallised charge must be regarded as having "*re-crystallised*"; to hold otherwise would be to change

retrospectively the nature of the appointment, and effectively to extend the effect of examinership beyond the period of protection.

Submissions of Revenue

63. In both the written submissions on behalf of Revenue, and in the oral submissions made by Ms. O'Brien on Revenue's behalf, substantial complaint was made about the *"shifting claims"* of Chelsey during the course of the proceedings. Counsel referred to the *"inconsistencies"* in Chelsey's case, and submitted that these must have consequences for the way in which the court would view the case now made by Chelsey.

64. It was submitted that the notice of motion issued by the receiver sought an order *"determining the effect of the notice of crystallisation dated 23 November 2013…in the context of the examinership of the Company…"*, but made no reference to contractual automatic conversion, nor was any issue raised in this regard by the receiver in his grounding affidavit. After Mr. Blake had set out Revenue's position in his affidavit of 29th May, 2019, Mr. Stein responded with an affidavit of 18th September, 2019 in which, at paras. 16-17, he made reference to the concept of automatic conversion, but only in the context of Clause 3.4.2 (3) of the debenture, i.e. automatic conversion in the case of appointment of a receiver. It was also pointed out that, while Mr. Stein set out in the first paragraph a brief description of his involvement with the company, he did not identify himself as a director of the company.

65. Counsel accepted that, while the situation would be different if governed under the law presently enforced, the appropriate determinant as to priorities was the nature of the charge when the receiver was appointed. However, Revenue did not accept that automatic conversion had taken place, and laid heavy emphasis on the fact that this analysis was not raised or relied upon by Chelsey until the written submissions were proffered.

66. In relation to the submission by Chelsey that automatic conversion had occurred by virtue of sub-Clauses (4) and (5) of Clause 3.4.2 of the debenture, Revenue described this submission as *"fundamentally flawed"* for the following reasons:

> *"A. The wording of the Notice purportedly served by Chelsey on 28th November 2013 is contradictory to the claim that crystallisation had occurred.*
>
> *B. In order for the automatic crystallisation to have occurred the authorities show that the relevant terms must have been effective at law, which they were not.*
>
> *C. Chelsey allowed the Company to continue in a manner inconsistent with the assertion that the floating charges had crystallised following the presentation of the petition to appoint the Examiner, and any related meetings." [Written submissions, para. 19].*

67. In relation to the notice of crystallisation (the text of which is at para. 15 above), Revenue submitted that the purported restriction "*from using disposing or otherwise dealing with the assets listed herein and subject to the fixed charge*" referred to in the

letter was to apply "*from your receipt of this notice on this date*". It was suggested that the appropriate inference to be drawn from this was that the company was free, up to the date of the notice, to deal with its assets free from any alleged fixed charge. The notice did not refer to any automatic crystallisation event. It was therefore submitted that the terms of the notice were incompatible with automatic conversion having already taken place, and that any claim for automatic conversion must fail on this ground alone.

68. Counsel for Revenue also addressed the issue of whether or not conversion of a floating charge to a fixed charge could ever be compatible with the scheme and purpose of the examinership process. It was submitted that the principles governing the interpretation of security created by a debenture were well-settled. In *JD Brian*, Laffoy J. stated as follows: -

> *"[32] …there was no dispute as to the general principles which apply to the construction of an agreement between the parties which would include a debenture, reference being made to the decision of this court in Analog Devices B.V. v Zurich Insurance Limited [2005] IESC 12, [2005] 1 IR 274. However, by reference to the decision of the Privy Council in Agnew v. C.I.R. … [2001] 2 A.C. 710 [Agnew], the approach to determining whether or not a charge created by a debenture was or was not a fixed charge was stated to be a two-stage process, the first stage being to construe the debenture and seek to gather the intentions of the parties from the language they used, that is to say, to ascertain the nature of the rights and obligations which they intended to grant each other in respect of the charged assets. Thereafter, it was open to the Court to embark on the second stage of the process, categorisation, which is a matter of law and does not depend on the intention of the parties. The final sentence in the passage from the decision of the Privy Council quoted stated, at p.725 that:-*
>
> > *'32 …If their intention, properly gathered from the language of the instrument, is to grant the company rights in respect of the charged assets which are inconsistent with the nature of a fixed charge, then the charge cannot be a fixed charge however they may have chosen to describe it.'*
>
> *I agree with the observation of the trial judge that the approach of the Privy Council appears to be identical to that of Henchy and McCarthy JJ. in this court in re Keenan Bros. Limited [1985] I.R. 401."*

69. It was submitted that, whatever the intention of the parties to the debenture with respect to automatic conversion, such clause would "*necessarily be ineffective where the company succeeded in securing the appointment of an examiner".* Neither *J.D. Brian* nor *Holidair* dealt with the situation involving a contractual automatic conversion clause; indeed, the former case did not concern an examinership at all.

70. In *Re. Holidair*, joint receivers were appointed to the company on 19th January, 1994. On 20th January, 1994, a petition was presented by Holidair Limited and a number of subsidiaries for the protection of the court and the appointment of an examiner. An

examiner was appointed on an interim basis and his appointment was subsequently confirmed. Pursuant to s.9(1) and (3) of the 1990 Act, an order was made that the power to borrow and give security previously exercisable by the directors would now be exercisable only by the examiner up to a specified limit, and that any sums so borrowed would be certified as expenses of the examiner.

71. By letters of 31st January and 3rd February, 1994, the debenture holders' trustee drew the company's attention to the covenant prohibiting borrowing without the prior written consent of the trustee, and directed payment of the proceeds of the book debts into a specified account in the trustee's name on the basis that the chargee banks had a fixed charge over the company's book debts. If the fixed charge was valid, and the book debts were not available to the companies, the borrowing requirements of the companies for working capital would be greatly increased.

72. The High Court found that the charge over the book debts was a fixed charge, that the book debts could therefore not be used by the companies in the ordinary course of business, and that there would have to be compliance with the trustees' directions. The companies and the examiner appealed to the Supreme Court, which overturned the decision of the High Court and allowed the appeal.

73. Finlay C.J. referred to the "*conflicting contentions* [of the parties] *as to what the real intention and purpose of the Act of 1990 was",* and stated as follows*:* -

> *"In the course of his judgment in [In Re. Atlantic Magnetics Limited [1993] 2 IR 561], McCarthy J. dealt with what he was satisfied was the purpose of the Act in the following terms, at p.578:-*
>
> > *'It is, I believe, of great importance to bear in mind in the application of the Act that its purpose is protection - protection of the company and consequently of its shareholders, workforce and creditors. It is clear that parliament intended that the fate of the company and those who depend upon it should not lie solely in the hands of one or more large creditors who can by appointing a receiver pursuant to a debenture, effectively terminate its operation and secure as best they may the discharge of the monies due to them to the inevitable disadvantage of those less protected. The Act is to provide a breathing space, albeit at the expense of some creditor or creditors.'*
>
> *I am satisfied that this identification of the purpose of the Act is correct, and that it is consistent with the view of the Court expressed in a judgment which I delivered in that case, concerning specific questions with regard to the powers of an examiner which were raised before the Court. Counsel for the banks in this case stated that he did not submit that the Court should review or reconsider its decision in the case of Re Atlantic Magnetics Ltd…., but asserted that the decision related to points other than any of those which arose on the hearing of this appeal. I am satisfied that it does relate to issues which arise on the hearing of this appeal, and*

insofar as it sets out a general principle and general identification of the purposes of the Act, it is extremely relevant to this appeal. I see no reason why I should depart either from the general principles laid down in that case or from the particular decisions.

With regard to the issues arising on this appeal, therefore, I conclude that it is appropriate that we should approach it on the basis that the intention of the legislature to be derived from the terms of the Act of 1990 was to provide a period of protection available for examination so as to try and ensure that if possible some scheme of arrangement might be made rather than an immediate liquidation or receivership of a company. It was also, I am satisfied, part of the intention of the legislature that if at all possible and if considered appropriate by an examiner, during the relatively short period of protection under the court provided for in the Act of 1990, that a company should be continued as a going concern and that where ambiguity or doubt arises concerning the construction of any sections in the Act, these two objectives should be borne in mind."

74. Finlay C.J. went on to find that the bank's direction fell foul of s.5(2)(d) of the 1990 Act (quoted at para. 57 above) as "*an action taken to realise the security consisting of the book debts by making them immediately available on the conclusion of the period provided for in s.5 sub.1 as a set off in respect of part of the debt of the banks*". The court found in any event that the charge, when properly construed, was in fact a floating charge; as Blayney J. put it:

> *"I am satisfied… that the correct construction of the clause is that the trustee had a discretion to determine into what company account, with what bank, the proceeds of book debts should be paid from time to time. But there is no restriction in the clause on the companies drawing the monies out of these accounts. Accordingly, there is nothing in it to prevent the companies from using the proceeds of the book debts in the normal way for the purpose of carrying on their business. By reason of this the charge has also the third characteristic referred to by Romer L.J. in his judgment in In re Yorkshire Woolcombers' Association Ltd. [1903] 2 Ch. 284 and is accordingly a floating charge and not a fixed charge". [p. 447]*

75. Counsel for Revenue submitted that the situation in *Re Holidair* was "*entirely analogous"* to that of the present case, and that conversion of the floating charge into a fixed charge would be incompatible with the purpose and intent of the legislative scheme as set out by McCarthy J. in In *Re Atlantic Magnetics Limited* and endorsed in *Re Holidair* by Finlay C.J. It was submitted that the intention of parliament, would be "*set at nought*" by the conversion of a floating charge into a fixed charge on the happening of an examinership.

76. Counsel submitted accordingly that, in as far as Chelsey sought to rely on Event (4) of Clause 3.4.2 – the presentation of a petition for the appointment of an examiner – or Event (5) – the convening of a meeting of directors or members for the purpose of considering a resolution for the appointment of an examiner – the clause should be deemed void for illegality and of no legal effect. The purpose of these clauses was to

ensure that the use or disposition of assets which would otherwise be available to the examiner in his efforts to – in the words of Finlay C.J. – "*try and ensure that if possible some scheme of arrangement might be made rather than an immediate liquidation or receivership*" could not be effected due to the restrictions contained in Clause 3.4.4. As such, the clauses are inimical to the scheme and intent of the examinership legislation and, it is submitted, should not be enforced by this Court. It was submitted that the fixed charge allegedly brought about by the crystallisation would be incompatible with the continuation of trading by the company, and that private contractual arrangements may not be permitted to stymie the operation of a legislative scheme, the essence of which is to afford protection with a view to bringing about the continuation of the company as a going concern.

77. Criticism was also made by counsel of the fact that the automatic conversion argument did not surface at any point prior to the appointment of the receiver. The point was made that an applicant for the appointment of an examiner such as the company would have a duty to the court of utmost good faith, and would be bound to disclose the existence of a recently crystallised floating charge. There was no reference to any such crystallisation in the petition of the company or the grounding affidavit of Mr. Stein, and no suggestion that the company was ever formally notified of the alleged automatic conversion. The notice of crystallisation of 23rd November, 2013 made no reference to any automatic conversion prior to the appointment of the examiner. It was submitted that it surely could not be the case that the chargee was the beneficiary of an effective automatic conversion from floating charge to fixed charge, but did not realise it or was unaware of it until long after the court's protection ceased.

78. Counsel also submitted that reliance on automatic conversion of the floating charge to a fixed charge was in breach of s.5(2)(d) of the 1990 Act. The term "*realise"* in that sub-section must, it was contended, be given a broad interpretation supportive of the purpose and intent of the legislation, and that, in all the circumstances, the assertion of automatic conversion of the floating charge was an action to realise the security in breach of s.5(2)(d).

79. A separate objection was made to reliance on event (5) of Clause 3.4.2. It was suggested that there was no compliance with the terms of that sub-clause, as no "*meeting*" was ever "*convened*". As set out at para 9 above, there was a "*decision*" of the sole member of the company, stated to be "*pursuant to Regulation 9 para. 3 of the European Communities (Single Member Private Limited Companies) Regulations 1994*", that the company petition the High Court for the appointment of an examiner. It was submitted that this "*decision"* did not comply with the requirement of Event (5), which expressly required the convening of a meeting and the passing of a resolution. Counsel submitted that Chelsey was asking the court to "*edit"* the sub-clause or supply the words "*or equivalent*". If the sole member had not complied with the requirements of Event (5), it was submitted that Chelsey was not entitled to rely on it for the purpose of automatic conversion.

80. All of the points above in relation to automatic conversion and in particular the incompatibility of crystallisation of a floating charge with the operation of an examinership were asserted *a fortiori* as regards the notice of crystallisation. It was submitted that there was no basis upon which a notice purporting to crystallise a floating charge could be validly served 46 days into the protection period, particularly where the terms of the notice itself asserted that the company was, from receipt of the notice, "…*restricted from using, disposing or otherwise dealing with the assets listed herein, and subject to the fixed charge…"*. The notice, it was submitted, fell foul of s.5(2)(d) of the 1990 Act for the same reasons as the alleged automatic conversion.

81. Strong objection was taken by Revenue to the alleged service of the notice of crystallisation. It was suggested that there was a significant doubt as to the very existence of the notice; it appeared from the email of 6th August, 2018 from Mr. Stein to the receiver referred to at para. 27 above that the receiver did not possess a copy of the notice, and that Mr. Stein retrieved the copy pursuant to an inquiry from the receiver. It was only at this point that the notice emerged as an issue at all. Counsel went some way to suggesting that, given Mr. Stein's role in Chelsey and the company, the court should regard the sudden appearance of the notice of crystallisation, almost five years after the appointment of the examiner, with circumspection and possibly suspicion.

82. It was submitted in any event that the notice was not served in accordance with Clause 18 of the debenture, which, in as far as relevant, is as follows: -

"18 NOTICES

18.1 Communications in Writing

Any notice or other communication to be made under, or in connection with, this Deed shall be in writing, in the English language addressed to the relevant party.

18.2 Addresses

The address and fax number (and the department or officer, if any, for whose intention the communication is to be made) of each Party for any communication or document to be made or delivered under or in connection with this Deed is:

The Chargor: Name: Latzur Limited

Address: 25-28 North Wall Quay, IFSC, Dublin 1.

Attention: Caroline Sweeney

Fax No: +353 16711251

The Chargee: Name:Chelsey Investissement S.A.

Address: 16 Boulevard Emmanuel Servais, Luxembourg, Luxembourg.

Attention: Marion Foki

Fax No: +352 226764

Or to such other address or fax number as may be notified to the Chargee by not less than five Business Days' notice.

18.3 DELIVERY

18.3.1 Any such notice or other communication made or delivered by one party to another under or in connection with this Deed will only be effective:

(1) if delivered by hand, on delivery;

(2) if sent by fax, upon transmission, subject to the correct code or facsimile number being received on the transmission report;

(3) in the case of posting, 48 hours after posting (and proof that the envelope containing the notice or communication was properly addressed, prepaid registered and posted by airmail will be sufficient evidence that the notice or other communication has been duly served or given):

18.3.2 Any notice or other communication to be made or delivered to the Chargee will be effective only if it is marked for the attention of the department or officer of the Chargee referred to in clause 18.2 above (Addresses) (or any substitute department or officer as the Chargee shall specify for this purpose)…."

83. Revenue submitted that the service as averred to be Messrs. Bendayan and Stein, set out at paras. 33-34 above, patently did not comply with Clause 18. The notice was not served on the designated recipients or at the designated address. It was not addressed to the company at the specified address. There was no proof that the address on the letter had been notified to Chelsey by not less than five business days' notice. It was submitted that, having been expressly put on notice at para. 17 of Mr. Blake's second affidavit that proof of service would be required, affidavits sworn on behalf of Chelsey which establish that service was not effected in accordance with the debenture itself, particularly given the seriousness of the implications of the notice, were fatal to any assertion that the company had been properly served.

Discussion: Automatic Crystallisation

84. I propose to deal firstly with the question of whether an automatic crystallisation of the floating charge occurred by operation of the terms of the debenture as now contended for by Chelsey, or whether the many objections raised by Revenue to such a conclusion are valid. In doing so, I should note that no decision was cited to me which deals directly with the issue of the validity or otherwise of a contractual automatic crystallisation clause.

85. In her judgment in *JD Brian*, Laffoy J. endorses the view of Finlay Geoghegan J. in the High Court in that case that crystallisation of a floating charge by agreement of the parties on the happening of an event or a particular step taken by the chargee was in

theory permissible: see para. 29 of the judgment of Laffoy J. referred to at para. 50 above, and also para. 99 of that judgment.

86. The effect of the decision of the Supreme Court in *JD Brian* was that the crystallisation prior to the winding up of the floating charge and its conversion thereby into a fixed charge, under the law applicable at the time, meant that the preferential creditors did not take priority over the claims of the debenture-holder, and the priority debts of the preferential creditors could not be discharged out of property which was the subject of the floating charge prior to crystallisation. It is clear from the judgment of Laffoy J. that this is a conclusion which the court reached with some regret, and Laffoy J. expressed, at para. 97 of her judgment, the view that s.621(7) of the Act, which replicated s.285(7) of the 1963 Act:

> *"…requires to be amended to reverse the undoubtedly unsatisfactory outcome of this decision".*

87. As we know, s.621(7) was indeed subsequently replaced by s.98 of the Companies (Accounting) Act, 2017, which accorded priority to preferential debts over a charge originally created as a floating charge but subsequently converted into a fixed charge. This legislative change has gone some way to addressing at least the first of two concerns expressed by Laffoy J. in relation to the operation of express or automatic crystallisation:

> *"[98] …an issue might well arise as to the effectiveness of the creation of a fixed charge by crystallisation on the service of the notice if there was evidence to suggest that, either with the knowledge or at least tacit approval of the debenture holder, things continued on after the service of the notice in a way which was inconsistent with the fact that a crystallisation had taken place… in such a hypothetical situation an affected preferential creditor could argue that the debenture holder had waived the crystallisation event or, alternatively, that it was estopped from relying on it, if it was clear that the debenture holder permitted the situation to continue more or less as if it were a floating charge after the crystallisation event…*
>
> *[99] Another concern brings me back to s.99 of the 1963 Act, which is referred to in outlining the statutory provisions above, where it is noted that under that provision there was no requirement for the registration of the conversion of a floating charge to a fixed charge… one is conscious of the concerns expressed in Lynch-Fannon and Murphy, Corporate Insolvency and Rescue (2nd ed., Bloomsbury Professional, 2012), at para. 9.36, pp. 343 and 344, on the current state of the law arising from that proposition. There it is stated that it may be necessary to revisit the questions raised by certain forms of crystallisation in the short term and, in particular, against the backdrop of a consideration of fundamental insolvency law principles, which include the necessity of transparency as between creditors and debtor companies, it being suggested that the occurrence of less than public events is contrary to the principles which underpin the system of registration of company charges and other encumbrances."*

88. As the present case deals with the application of the law and priorities under the 1963 Act rather than the 2014 Act, it seems appropriate to deal later in this judgment with the specific concerns as expressed by the Supreme Court.

89. The first task of the court in considering whether the floating charge has crystallised on the happening of an event is to embark upon the "*two-stage process*" referred to by Laffoy J. in *JD Brian* (see para. 68 above). Firstly, the terms of the debenture must be construed with a view to inferring the intentions of the parties from the language they used. Clause 3.4.2 quoted at para. 13 above refers to the floating charge *"automatically [being] converted into a fixed charge"* if certain named events occur. The use by the parties of the term *"fixed charge"* is not determinative of their intentions; it is a factor to be taken into account. However, Clause 3.4.4 (also at para. 13 above) sets out the restrictions which apply to the use and ownership of the assets which are the subject of conversion in accordance with Clause 3.4 once the events set out in Clause 3.4.2 which trigger the conversion take place. In my view, those restrictions and requirements, particularly in Clause 3.4.4 (1) (… *"shall not sell, transfer, convey, lease, licence, assign (or enter into any agreement thereto) or otherwise deal with or dispose of the converted assets…)",* make it clear that the parties intended the conversion of the floating charge into a fixed charge on the happening of the events specified in that clause.

90. It then falls to the court to decide whether, as a matter of law, the "*converted"* charge is properly regarded as a fixed charge. In the present case, this requires the court to consider whether the intention of the parties as set out above is inconsistent with the nature of a fixed charge. The particular concern in the present case is whether such a fixed charge can be said to be valid in circumstances where the company succeeds subsequently in appointing an examiner, and indeed, where Clause 3.4.2 (4) and (5) on which Chelsey primarily relies as precipitating the conversion specifically provide for the conversion taking place by reason of the imminent appointment of an examiner.

91. In relation to the first test, I am satisfied, having regard to the wording of the debenture itself, that the clear intention of the parties was to provide for the conversion of a floating charge into a fixed charge on the happening of certain events. The provisions of Clause 3.4.4 make it clear that, on the occurrence of these events, the ability of the company in the normal course of events to deal in any way with the assets the subject matter of the charge was removed; the assets were then to be identified and delivered to the chargee, together with "*all documents of title relating to such converted assets*". It seems to me that these provisions established the requisite intention of the parties to create a fixed charge.

92. In *JD Brian*, Finlay Geoghegan J. found that the proper interpretation of s.285 (7) of the 1963 Act was that the preferential debts ranked in priority to the debenture holder's claim *"irrespective of whether the floating charge crystallised prior to the commencement of the winding up…"*, (although the Supreme Court respectfully disagreed with this conclusion). As that disposed of the matter, Finlay Geoghegan J. stated that it was "*not strictly necessary for me to consider the second issue as to the validity of so-called 'automatic*

crystallisation' of the floating charge in this jurisdiction. However, having received detailed submissions and considered the matter in some depth, it appears to me desirable that I should set out, in brief, my conclusions …" [para. 42].

93. Finlay Geoghegan J. proceeded to set out her views on automatic crystallisation, with regard to the law in this jurisdiction on fixed and floating charges generally, and with particular reference to the analysis of Hoffman J. in In *Re. Brightlife Ltd* [1987] 1 Ch. 200, with which Finlay Geoghegan J. agreed. The learned judge concluded at para. 56 of her judgment as follows:

> *"… I am of the view that there is no rule of law which precludes parties to a debenture creating a floating charge agreeing, as a matter of contract, that the floating charge will crystallise upon the happening of an event or a particular step taken by the chargee. Whether the parties actually achieve their intention is a separate issue by reason, inter alia, of the Supreme Court decision in In re. Keenan Bros. Ltd [1985] I.R. 401."*

94. As we have seen, Laffoy J. agreed in principle with this condition: see para. 29, quoted at para. 50 above. However, as we can see from paras. 98 and 99 of her judgment quoted at para. 87 above, Laffoy J. had two concerns: firstly, doubts might arise over whether automatic conversion had occurred if there were circumstances which suggested that *"…things continued on after [the alleged crystallisation event] in a way which was inconsistent with the fact that a crystallisation had taken place…an effected preferential creditor could argue that the debenture holder had waived the crystallisation event or, alternatively, that it was estopped from relying on it…*".

95. This concern is relevant to the present proceedings, in which Revenue expresses the view that the alleged automatic conversion is invalid in the circumstances that occurred, particularly by virtue of, firstly, what Revenue contend is the incompatibility as a matter of law of the automatic conversion with the subsequent examinership, and secondly, the behaviour of Chelsey subsequent to the alleged automatic conversion and in particular purporting to serve a notice of crystallisation during the currency of the examinership, notwithstanding what Chelsey now contend is the automatic conversion prior to the examinership.

96. The second concern expressed by Laffoy J. was in relation to the fact that there is no provision for registration of conversion of a floating charge to a fixed charge, with the implication of a lack of transparency as to the true state of indebtedness of the company: see para. 99 as quoted at para. 87 above.

97. In relation to this latter concern about registration, I agree with the view taken by Finlay Geoghegan J. at para. 56 of her judgment in *JD Brian*:

> *"It is a matter for the Oireachtas and not the courts to intervene in order to avoid an unfair adverse impact on third party creditors from contractual arrangements which may be entered into between a debenture holder and a company. The*

Oireachtas has, of course, done so by enacting s.98 (in relation to receivers), s.99 (in relation to registration of certain charges) and s.285(7) (in relation to priority for certain debts on a winding up) referred to extensively above. I, again, respectively agree with Hoffman J. that, having regard in particular to those interventions by the legislature, it is inappropriate for the courts to impose additional restrictive rules on grounds of public policy…"

98. It does not seem to me that there can be any objection in principle to parties agreeing that conversion of a floating charge to a fixed charge will take place on the happening of a named event. The borrower is lent money on the strength of security over its assets; the lender agrees that the borrower should continue to have access to those assets; the parties agree however that, should certain events occur, access becomes restricted so that ownership and control of the asset return to the lender. These are in my view normal and unexceptionable contractual dealings. There may of course be – as Revenue contends in the present case – factual or legal circumstances which arise in a given case which may suggest that the automatic conversion has not been effective. Such instances must be examined on a case by case basis.

99. In these proceedings, the case was not made by Chelsey until written submissions were delivered that automatic conversion pursuant to clause 3.4.2 (4) or (5) had taken place. No reference was made to this assertion in the notice of motion or the affidavits submitted by Chelsey. Revenue, correctly in my view, did not object to Chelsey making the argument contending for automatic conversion, but submitted that the fact that the argument was being made so late in the day had implications for the validity of the claim.

100. It was clear that Revenue's fundamental objection to automatic conversion is the contention that it is incompatible with examinership. It was submitted that automatic conversion would necessarily be ineffective where the company succeeded in securing the appointment of an examiner. It was suggested that the restrictions placed on the company's assets by the terms of the debenture are incompatible with the scheme and effect of examinership legislation, which envisages the assets the subject of the charge being available to the company to assist it in trading out of its difficulties.

101. However, the decision of the Supreme Court in *Re Holidair* makes it clear that a crystallised floating charge de-crystallises on the appointment of an examiner. The passage of the judgment of Blayney J. in *Re Holidair* set out above at para. 59 and relied upon by Chelsey encapsulates the reasoning of the Supreme Court in this regard.

102. Chelsey submits that the analysis by Blayney J. in that passage applies to the present case. The floating charge was converted into a fixed charge on the presentation of the petition for the appointment of the examiner or the seeking by the company of the protection of the court, which occurred on 8th October, 2013. On the granting of protection and the appointment of Mr. Fennell as interim examiner on that date, the crystallised floating charge de-crystallised automatically, so that the company was at liberty to deal with the assets the subject of the charge.

103. If this interpretation were correct, the assets would fall to be dealt with under the statutory scheme of examinership. The examiner would formulate proposals which would be set down for consideration by the court under s.24 of the Companies (Amendment) Act 1990. Chelsey, assuming its rights would have been impaired if the examiner's proposals were implemented, would have had the right to be heard by the court under s.24(2), and could, *inter alia*, submit that the proposals were "*unfairly prejudicial*" to its interests in accordance with s.24(4). If the court were satisfied that the proposals should be confirmed, and that they were not unfairly prejudicial to Chelsey, that company would then be bound by the proposals in accordance with the scheme of the Act.

104. In the event, none of this occurred, as the examiner was unable to source investment in order to enable him to formulate proposals to save the company. Chelsey submits that it took no action which was inconsistent with the de-crystallisation of its converted charge; it did not seek to claim ownership or restrict the use by the examiner or the company of the assets the subject of the charge.

105. In particular, Chelsey submits that it did nothing which would contravene s.5(2)(d) of the 1990 Act quoted above, in that it did not take any "*action…to realise the whole or any part of that security…".* Revenue on the other hand submits that reliance by Chelsey on automatic conversion of the floating charge to a fixed charge is *ipso facto* an attempt to "*realise"* the whole or part of the security.

106. Whether and how s.5(2)(d) of the 1990 Act – now s.520(4)(d) of the 2014 Act – applies in a given case depends on the facts of the matter. In *Re Holidair*, as we have seen, Finlay CJ found that the bank's decision to pay the proceeds of book debts into a specified account in the trustee's name was an action taken to realise its security over the book debts by making them available for set-off on the expiry of the protection period, and thus fell foul of s.5(2)(d). The question in the present proceedings is whether the same conclusion must be reached in relation to the purported conversion of the floating charge to a fixed charge.

107. It does not seem to me that the alleged automatic conversion, if it were valid, can be regarded as an "*action…taken to realise the whole or any part of that security*…". No steps were taken by Chelsey to restrict the use of the company's assets, to claim ownership of them, or, as in *Re Holidair*, to manoeuvre the assets into a position where they were amenable to realisation at the end of the protection period. There is no suggestion that the assets of the company were not fully available to the examiner in his attempt to attract investment so that proposals could be formulated with a view to saving the company. With respect to the "*hypothetical situation*" which concerned Laffoy J. at para. 98 of her judgment in *J.D Brian,* there is no suggestion of a tacit agreement between Chelsey and the company after the conversion that things would continue on and the company would continue to trade as if the conversion had not occurred, as the examinership immediately "changed the goalposts". The effect of the conversion would have been to ensure that, if the examinership were to fail, Chelsey would have a fixed charge rather than a floating charge over the assets of the company. In this respect, the

converted floating charge would have been no different from a fixed charge created by the company prior to the examinership which did not involve conversion on the happening of an agreed event.

108. Of course, Revenue argues that there is no evidence other than that Chelsey was oblivious to any conversion of the floating charge in the manner now contended for in Chelsey's written submissions, and the fact that Chelsey served a notice of crystallisation shortly prior to the conclusion of the examinership, the terms of which are incompatible with any prior automatic conversion ("…*the purpose of this notice is to convert the floating charge created under the debenture to a fixed charge…"),* makes it clear that even Chelsey was not of the view at that time that automatic conversion had taken place prior to the examinership.

109. Is it permissible for Chelsey to rely on automatic conversion pursuant to Clause 3.4.2 of the debenture in circumstances where it is clear that it did not advert to the possibility that such conversion had taken place, and sought subsequently to avail of an alternative method of conversion? It is clear from the wording of Clause 3.4.2 – see para. 13 above – that conversion takes place "*automatically*" and "*without notice*" if the events set out in that clause occur. From that point onwards, the conversion is regarded as being complete in law pursuant to the agreement of the parties to the debenture. I do not think that the fact that the parties were unaware of the conversion or of the legal consequences of what they agreed means without more, that those consequences do not apply.

110. The real issue is whether the subsequent conduct of Chelsey makes it in some way impermissible for Chelsey to rely on the automatic conversion for which it contends. The notice of crystallisation was served on 23rd November, 2013. It does require the directors of the company, to whom it is addressed, to "*note that you are, from your receipt of this Notice on this date, restricted from using, disposing or otherwise dealing with the assets listed herein, and subject to the Fixed Charge"*. However, there was no evidence before me that would suggest that either the directors or indeed the examiner took or refrained from any action on foot of this direction, or paid any attention to it at all, and the court protection was terminated five days later on 28th November, 2013.

111. The receiver was appointed as receiver and manager on that date, and while his deed of appointment refers to the debenture, it does not specify whether the appointment is pursuant to a fixed or floating charge. The receiver accepts the appointment *"subject to the terms and conditions above referred to and more particularly contained in the debenture"*. These terms and conditions would of course include Clause 3.4.1, pursuant to which Chelsey purported to serve the notice of crystallisation, and Clause 3.4.2, which authorises automatic conversion in given circumstances.

112. There was no evidence adduced before the court which suggested that the company or the receiver altered their respective positions or acted differently by virtue of the service of the notice of crystallisation, or that it was in effect some sort of representation on which the company relied to its detriment. Still less is it the case that Revenue relied on or was affected other than indirectly by service of the notice. It does not seem to me that

any argument can be made that there was any estoppel, whether by convention or otherwise, by which Revenue could say that it had somehow altered its position in reliance on the notice of crystallisation, and indeed, I did not understand Revenue to make this case.

113. If the converted floating charge is, as occurred in *Re Holidair¸* regarded as having been "*de-crystallised*" by virtue of the appointment of the examiner, what happens when the examinership comes to an end without a scheme having been approved by the court? As we have seen in paras. 60 *et seq.* above, Chelsey contends that the lifting of court protection must be regarded as "*re-crystallising"* the charge. Revenue does not accept that the alleged crystallisation of the floating charge is valid in the first place, and is therefore of the view that the "*re-crystallisation"* of the floating charge as a fixed charge does not arise.

114. It seems to me that, if the automatic conversion of the floating charge to a fixed charge under Clause 3.4.2 (4) of the debenture was effective prior to the court granting protection to the company, and that fixed charge was de-crystallised in the manner deemed permissible in *Re Holidair* to enable the statutory scheme of examinership to operate, it must follow that the charge re-crystallises when the period of protection ceases without the court having approved proposals for the survival of the company. I accept that, as Chelsey put it in its submissions, to hold otherwise would be *"to extend the effect of examinership beyond the period of court protection*". As Chelsey points out, a receiver remains appointed, and is freed from the prohibition in s.5(2)(b) of the 1990 Act – s.520(4)(b) of the 2014 Act – and is "*able to act*" within the meaning of that sub-section when court protection is lifted from the company. In "*Examinerships"* O'Donnell, (2016) 2nd Ed., it is stated at para. 3.61 that "…*the presentation of the petition effectively suspends any receivership unless (on the appointment of the examiner) the court gives the receiver powers under s.522 [of the 2014 Act]. The receivership may be reactivated if for any reason the court protection is withdrawn…".* The author cites in *Re Atlantic Magnetics* and in *Re United Meat Packers* as cases where the receiver resumed his role once protection had been withdrawn.

115. In any event, it is clear from the judgments of the Supreme Court in *Re Holidair* that the purpose of de-crystallisation is to allow the statutory scheme to operate. Once the scheme no longer applies, logic demands that the de-crystallisation be reversed. If the automatic crystallisation of the floating charge is valid, but the effect of it is suspended for the period of court protection, it follows that, after protection is lifted, the charge must thenceforth be regarded as a validly constituted fixed charge.

116. In relation to the issue of whether a fixed charge was validly created by conversion of a floating charge by operation of Clause 3.4.2 (4) of the debenture, my conclusions are as follows: -

    (1) In agreeing the said clause, Chelsey and the company intended that the floating charge created by the debenture would be converted into a fixed charge by the happening of the event set out in that sub-clause, i.e. *"…if a petition is presented*

for the appointment of an…examiner …or the protection of the court is sought by the chargor…";

(2) that this event did occur on 8th October, 2013 – or arguably, on 3rd October, 2013, when the sole member of the company, Vangas Management SA, decided that the company should petition for an examiner – when a petition was presented to this Court by the company for the appointment of an interim examiner;

(3) that there is no rule of law precluding parties to a debenture creating a floating charge agreeing, as a matter of contract, that the floating charge will crystallise on the happening of an event, or a particular step taken by the chargee;

(4) the fact that there is no requirement in law for registration of the conversion of a floating charge to a fixed charge does not in itself affect the validity of such a conversion;

(5) the conversion of a floating charge to a fixed charge on the happening of an event or by agreement of the parties to the debenture in circumstances where an examiner is subsequently appointed to the chargor company is not void or illegal by reason of such an appointment; such a converted floating charge de-crystallises in accordance with the principles set out by the Supreme Court in *Re Holidair*, and permits access to and use by the company of the charged assets for the duration of the examinership;

(6) the conversion of a floating charge to a fixed charge on the happening of an event or by agreement of the parties to the debenture was not prohibited by s.5(2)(d) of the 1990 Act (s.520 (4)(d) of the 2014 Act);

(7) the concern that a company would continue to have access to and use assets subject to a converted floating charge pursuant to a "*tacit agreement*" between chargor and chargee does not arise in the current circumstances;

(8) The conversion of the floating charge in the present case took place by agreement of the parties as set out in the debenture, and the fact that Chelsey did not advert to the conversion at the time of service of the notice of crystallisation did not affect its validity;

(9) the service of the notice of crystallisation itself did not affect the validity of the automatic conversion of the floating charge to a fixed charge;

(10) the effect of the withdrawal of protection by this Court, and the end of the examinership, was to re-crystallise the floating charge so that it would be re-activated as a fixed charge;

(11) the receiver was accordingly appointed pursuant to a validly constituted fixed charge.

117. These conclusions are sufficient to decide the matter. I will give the parties an opportunity in due course to address the form of the order to be made, particularly given that the notice of motion does not expressly seek the assistance of the court in relation to the question of automatic conversion pursuant to Clause 3.4.2 (4) or (5) of the debenture, which issue arose for the first time in Chelsey's submissions.

118. However, it will be clear from the synopsis of the parties' respective positions set out above that the parties addressed the questions of whether, if an automatic conversion could not be deemed to occur pursuant to Clause 3.4.2 (4), it could be said to have occurred by reason of the happening of event (5) of that clause, or by virtue of service of the notice of crystallisation. Given the detailed submissions made by the parties, and in case I have erred in my conclusions set out above, I propose to address briefly those remaining issues.

119. As regards automatic conversion pursuant to Clause 3.4.2 (5), the wording of which is set out at para. 13 above, Chelsey contended that the "*decision"* of the company's sole member on 3rd October, 2013 pursuant to Regulation 9(3) of the European Communities (Single Member Private Limited Companies) Regulations 1994 ('the 1994 Regulations') S.I. No. 275 of 1994 must be construed as the equivalent of the convening of a meeting of members and passing of a resolution to appoint an examiner as referred to in that clause.

120. Revenue had the same objections in principle to the alleged automatic conversion under event (5) as it had to event (4) of Clause 3.4.2. However, it also objected to reliance on event (5) in the manner set out at para. 79 above, i.e. that the "*decision*" did not comply with the terms of the sub-clause and that, accordingly, Chelsey could not rely on it as effecting an automatic conversion.

121. Regulation 9(3) of the 1994 Regulations, in as far as is relevant, is as follows:-

> "(3) …any provision of the Companies Acts which –
>
> *(a) enables or requires any matter to be done or to be decided by a company in general meeting, or*
>
> *(b) requires any matter to be decided by a resolution of the company,*
>
> shall be deemed to be satisfied, in the case of a single-member company, by a decision of the member which is drawn up in writing and notified to the company in accordance with this regulation."

122. The debenture was executed on May 24th, 2012. The 1994 Regulations therefore predate the debenture and, to the extent that event (5) of Clause 3.4.2 does not provide for a "decision" pursuant to the 1994 Regulations rather than a "*meeting of the directors or members of the chargor…convened for the purposes of considering any resolution…for appointing an examiner to the chargor…*", the drafting of Clause of 3.4.2 (5) appears to

be somewhat flawed. Revenue's contention that there has not been compliance with the strict wording of that sub-clause is correct.

123. It is not suggested however by Revenue that the "*decision*" of 3rd October, 2013 was not implemented in accordance with the procedures appropriate to a single member company such as Latzur, or that the decision did not have the same effect as the sort of resolution envisaged in Clause 3.4.2 (5) which would have been appropriate if Latzur had not been a single-member company. Revenue's point is a technical one: that there was no compliance with the seemingly inappropriate procedure set out in that sub-clause.

124. Counsel for Chelsey urged me to accept that the single-member resolution was the means required by law to reflect the will of the member, and was equivalent to the resolution procedure to which reference is made in the sub-clause, and that I should therefore accept that it was an effective performance of event (5), given that a "*meeting*" cannot be "*convened*" involving one member. It was pointed out that Regulation 9(1) provides, with one exception irrelevant for present purposes, that

> *"…all the powers exercisable by the company in general meeting under the Companies Acts or otherwise shall be exercisable, in the case of a single-member company, by the sole member without the need to hold a general meeting for that purpose."*

125. It seems to me that the net effect of these provisions was to provide that matters which formerly required to be carried out by the company in general meeting could now by law be carried out by a sole member without the need for a meeting or a resolution. A legal provision requiring a meeting of members and a resolution was, by reason of the enactment of the 1994 Regulations no longer applicable in the case of a single-member company.

126. However, what the parties to the debenture did in the present case was to agree in Clause 3.4.2 (5) a procedure which was inappropriate and inoperable in the case of a single-member company. I am asked to disregard this and substitute for the terms of event (5) a formulation consistent with the 1994 Regulations in order to give effect to the assumed intention of the parties.

127. I do not see how this would be permissible. Regulation 9 permits single-member companies to order its affairs in a way which is different from that required of multiple-member companies. Thus, if event (5) had set out that the decision of the single-member of Latzur to appoint an examiner to the company would trigger the automatic conversion, this would have been effective as such a formulation has been permissible since the enactment of the 1994 Regulations. However, the parties – in 2012 – opted for a formulation which is unworkable. Regulation 9 does not in my view magically transform an unworkable procedure chosen by the parties into a procedure which is consistent with the law enacted eighteen years previously and the composition of the ownership of the company.

128. Counsel for Chelsey urged that the court would be entitled to interpret the contract in accordance with "*business common sense*", and give effect to what must be the presumed intention of the parties. However, what would be involved in this would not be an interpretation of an ambiguous word or phrase; in effect, Chelsey seeks the substitution of a workable formulation of words for an unworkable one. In this regard, I am mindful of the dicta of Mustill LJ in *Charter Reinsurance Company Limited v. Fagan* [1997] AC 313 at 388, followed in *Marlan Homes v. Walsh* [2012] IESC 23 at para. 52 by MacKechnie J. in giving the unanimous judgment of the Supreme Court: -

> *"There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and to force on the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court. Particularly in the field of commerce, where the parties need to know what they must do and what they can insist on not doing, it is essential for them to be confident that they can rely on the court to enforce their contract according to its terms."*

129. As McKechnie J. observed in Marlan: -

> *"It is important that, when faced with a construction issue, a court should focus its mind on the language adopted by the parties being that which they have chosen to best reflect their intentions. It is not for the court, either by means of giving business or commercial efficacy or otherwise, to import into such arrangement a meaning, that might also be available from an understanding of the more general context in which the document came to exist, but is one not deducible by the use of the interpretive rules as mentioned." [Paragraph 51 of judgment].*

130. I am of the view that to interpret event (5) in the way in which Chelsey suggests would be to stretch too far the concept of interpreting the contract in a manner which would give it business efficacy, and to infer a meaning which the words actually used will not support. Accordingly, I find that Chelsey did not validly effect an automatic conversion of the floating charge into a fixed charge by means of the "*decision*" of 3rd October, 2013.

131. Chelsey also argued in the alternative that the appointment of the receiver on 28th November, 2013 represented an event under Clause 3.4.2 (3) which converted the floating charge into a fixed charge. However, Revenue pointed out that "*…if… [the crystallisation of a floating charge by the appointment of a receiver] prevented Section 440 of the Companies Act 2014 from being operative it would arise in every single receivership in the State. It does not, and the Receiver's practice confirms this. This is further confirmed by the case law…dealing with Section 440 of the Companies Act… [para. 17 written submissions]".*

132. Counsel for Chelsey stated that, while he did not abandon the Clause 3.4.2 (3) argument, he was not pressing it either. As the analysis of Revenue on this point appears to me to be correct, I do not propose to consider it further.

Crystallisation by notice.

133. As set out at para. 55 above, Chelsey contended that, if the floating charge did not crystallise by way of automatic conversion, crystallisation took place by way of service of the notice of crystallisation, the text of which is set out above at para. 15 above.

134. All of the points of principle made against automatic conversion pursuant to events (4) and (5) of Clause 3.4.2 discussed above were reiterated in relation to the notice of crystallisation. In this regard, I do not consider that there is any significant difference between an "*express crystallisation*", such as service of the notice in the present case, and "*automatic conversion*". It is clear from the judgments of the High Court and Supreme Court in *JD Brian* that there is no difference in principle between crystallisation on the happening of an event or a particular step taken by the chargee, and no rule of law precluding any agreement between parties in this regard: see *JD Brian*, Laffoy J., pp. 164-165.

135. However, can the agreed "*step*" – in this case, service of a notice of crystallisation in accordance with Clause 3.4.1 of the debenture – be taken 46 days into the period of protection, particularly where the notice expressly seeks to restrict the company from *"using, disposing or otherwise dealing with the assets listed herein, and subject to a fixed charge…"?*

136. The service of such a notice is not prohibited under s.5(2) of the 1990 Act, or s.520 (4) of the 2014 Act. It seems to me that, if the service of the notice crystallises the floating charge, it must simultaneously de-crystallise in order for the examinership to be able to function, in accordance with the principles set out by the Supreme Court in *Re Holidair.* There is no evidence before me that Chelsey sought in any way to restrict the use by the company of its assets as set out in either the notice or the debenture, as the examinership terminated five days after service of the notice.

137. I am satisfied that, subject to the notice being validly served, and if I am incorrect in holding that automatic conversion had taken place in the manner discussed above, the floating charge crystallised into a fixed charge by virtue of service of the notice, albeit that the notice's effect was suspended or "*de-crystallised*" until the period of protection was lifted.

138. Revenue does however – as we have seen – dispute that valid service of the notice was effected. Revenue's position in this regard is set out in detail above at paras. 81-83.

139. As I explained in relation to the affidavits of Messrs Bendayan and Stein at paras. 29-34 above, those affidavits were delivered only after the written submissions of Revenue made it clear that Revenue would contend at the hearing that Chelsey had not proved service. In the event, I acceded to Chelsey's application to file those affidavits in court.

140. While I was invited by counsel for Revenue to take a jaundiced view of the late submission of these affidavits, it seems to me that, in the absence of cross-examination or any specific circumstances which suggest that the affidavits were not sworn in good

faith, I must take them at face value. I do not think that I can infer solely from the fact that they were sworn late in the day, and clearly in response to Revenue's submissions, that the deponents have not sworn their contents honestly and to the best of their knowledge.

141. Revenue relies in any event on what it alleges is non-compliance with the requirements in the debenture as to service of the notice: see paras. 82-83 above in this regard. It seems to me that the criticisms of service set out at para. 83 above by Revenue are valid. The notice was not communicated in the manner set out in Clause 18 of the debenture.

142. However, that is not to say that the notice was not served at all. As the evidence of Messrs Bendayan and Stein is uncontested, I must find that it was served by Chelsey on the company. Is it the case that, because the notice was not communicated in the manner agreed by the parties, the notice of crystallisation must be regarded as being ineffective?

143. It is not clear to me that Latzur was in any way prejudiced by the failure to serve the notice in the manner set out in the debenture. The infractions of Clause 18 are minor in nature. I do not think that failure to adhere to the letter of the debenture as regards communication of the notice can be regarded as fatal to the invocation by Chelsey of Clause 3.4.1, particularly if the evidence of Mr. Bendayan on behalf of Chelsey, and Mr. Stein on behalf of Latzur, is accepted, and actual service of the notice and receipt of it by Latzur must be regarded as having taken place.

144. In any event, if objection were to be taken to communication of the notice, it seems to me that it must be taken by Latzur, who is the contracting party. If Latzur did not complain about service, it does not seem to me that Revenue can do so on its behalf.

Conclusions

145. In summary, my findings are as follows: -

(1) Automatic conversion of the floating charge to a fixed charge was validly effected in accordance with Clause 3.4.2 (4) of the debenture;

(2) Automatic conversion of the floating charge to a fixed charge was not validly effected in accordance with Clause 3.4.2 (5) of the debenture;

(3) If the finding at (1) above is incorrect, I am satisfied that crystallisation of the floating charge was effected by service of the notice of crystallisation on 23rd November, 2013;

(4) The receiver was appointed under a fixed charge rather than a floating charge;

(5) Given the law applicable at the material time, the funds available to the receiver will be distributed to Chelsey as holder of the fixed charge.

146. As this judgment is being delivered electronically, I will give the parties fourteen days from the date of this judgment to make brief written submissions to me concerning the orders to be made, and their precise terms.