Neutral Citation Number: [2023] EWHC 940 (Ch)

Claim Number: CR-2022-001108

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY & COMPANIES LIST (ChD)
IN THE MATTER OF AVANTI COMMUNICATIONS LIMITED (IN ADMINISTRATION)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Rolls Building
7 Rolls Buildings
Fetter Lane
London, EC4A 1NL

25th April 2023

Before:

MR JUSTICE EDWIN JOHNSON

Tom Smith KC and Edoardo Lupi (instructed by **Simpson Thacher & Bartlett LLP**) for the Joint Administrators of Avanti Communications Limited
David Allison KC and Rabin Kok (instructed by **Kirkland & Ellis LLP**) for the Lead Secured Creditors (HPS Investment Partners LLC and Solus Alternative Asset Management LP)

Hearing date: 25th January 2023

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JUDGMENT

Remote hand-down: This judgment was handed down remotely at 10.00am on 25th April 2023 by circulation to the parties and their representatives by email and by release to the National Archives.

Mr Justice Edwin Johnson:

Introduction

1. This is my reserved judgment on an application made by the joint administrators of Avanti Communications Limited (**"the Company"**). The joint administrators (**"the Joint Administrators"**) were appointed on 13th April 2022 pursuant to paragraph 22 of Schedule B1 to the Insolvency Act 1986 (**"the 1986 Act"**). The Company and its holding company Avanti Communications Group plc, which is also in administration, formed part of the Avanti group of companies (**"the Group"**).

2. By the application (**"the Application"**), which is made in the administration proceedings, the Joint Administrators and the Company (together **"the Applicants"**) seek a determination of whether certain assets which have been sold by the Company were secured by fixed or floating charges. This issue (**"the Characterisation Issue"**) matters because it affects what is payable, and what has been paid to creditors. It is also, as I understand the position, the last outstanding matter which needs to be resolved in the administration of the Company. The Application is made as an application for directions pursuant to paragraph 63 of Schedule B1 to the 1986 Act.

3. Although the resolution of the Characterisation Issue is capable of affecting various parties, the only parties, apart from the Joint Administrators, who appeared at the hearing of the Application were certain secured creditors, comprising funds managed by HPS Investment Partners LLC and Solus Alternative Asset Management LP. I shall refer to these secured creditors, as represented by their managing entities, as **"the Lead Secured Creditors"**.

4. At the hearing of the Application the Joint Administrators were represented by Tom Smith KC and Edoardo Lupi, counsel. The Lead Secured Creditors were represented by David Allison KC and Rabin Kok, counsel. I am grateful to counsel and those instructing them for their helpful written and oral submissions, and for their work in preparing the documents for this hearing.

5. The stance adopted by the parties in relation to the Characterisation Issue differed. The Joint Administrators, quite properly, adopted a neutral stance, essentially explaining the relevant facts and identifying the relevant law which governs the Characterisation Issue. The Lead Secured Creditors, again quite properly given the nature of their commercial interests in the Application, submitted that the answer to the Characterisation Issue was that the relevant assets were secured by fixed charges at the time of their disposal.

The evidence in the Application

6. In terms of evidence, the Application is supported by a witness statement of Matthew Callaghan, dated 2nd September 2022, who is one of the Joint Administrators. There was no further evidence served in the Application. In dealing with the facts relevant to the Application, I derive those facts from the witness statement of Mr Callaghan and its exhibits, from the other documents before me in the Application, and from what I have been told by counsel. There is no agreed statement of facts but, so far as I am aware, there is no material dispute of fact in the Application, and I have not been required to resolve any disputed question of fact. The Characterisation Issue is essentially a point of law, involving the application of the relevant legal principles to the relevant facts and documents in the present case.

The Relevant Assets

7. According to the witness statement of Mr Callaghan, at paragraph 12, the principal activity of the Group, including the Company, was the operation of satellites and the sale of wholesale satellite broadband and satellite connectivity services to internet providers, mobile network operators, enterprises, governments and other satellite operators. A brief history of the Group, and a Group structure chart can be found on

page 12 of the Joint Administrators' SIP 16 Statement of the Sale of the Business and Assets, dated 13th April 2022 (**"the SIP 16 Statement"**).

8. Immediately prior to the transactions which are relevant to the Application, the Company owned certain assets (**"the Relevant Assets"**) which are the subject matter of the Application. The Relevant Assets, which are conveniently divided into four categories, were constituted as follows at the date of the relevant disposals:
   (1) A Ka-band satellite payload known as HYLAS 3 which was operating in the 31.0°E orbital position (**"HYLAS 3"**).
   (2) Certain equipment used in the operation of network and ground station facilities, including relevant spares, electronic components and antennae, together with the benefit of warranties on those items (**"the Network and Ground Station Assets"**). The Network and Ground Station Assets were relevant to the operation of the HYLAS 3 satellite, as well as to the operation other satellites (HYLAS 1, HYLAS 2 and HYLAS 4) owned and/or operated by the Group. Some of the Network and Ground Station Assets were housed at the Goonhilly ground station ("**Goonhilly Station**"), where the Company leased office space.
   (3) Certain satellite network filings **("the Satellite Network Filings"**) registered with the International Telecommunication Union (**"the ITU"**). A sale of the Satellite Networks Filings required the consent of the Office of Communications (**"Ofcom"**).
   (4) Certain ground station licenses issued by Ofcom. These licenses (**"the PES Licenses"**) entitled the Company to operate the ground stations referred to above. As with a sale of the Satellite Network Filings, a sale of the PES Licenses also required the consent of Ofcom.

9. The Satellite Network Filings require some further explanation, as follows:
   (1) The position in outer space, or orbital slot, occupied by a satellite determines the areas to which its signals can reach. The rights in respect of orbital slots are regulated at an international level.
   (2) The ITU is a specialised agency within the United Nations. It operates in accordance with international treaties entered into by member states, which include the UK. It maintains a formal database of all registered satellite and terrestrial frequency assignments called the Master International Frequency Register (**"MIFR"**). In turn, Ofcom represents the UK Government in the ITU and acts as the UK notifying administration to the ITU. Among its general role and functions, Ofcom is required to decide whether to process an application for a satellite network filing based on certain criteria. If an application is approved by Ofcom and the filing registered on the MIFR, the registrant will have the entirety of the right to use the registered filing. Ofcom publishes a document/manual (Procedures for the Management of Satellite Filings, published 14th March 2019) which describes the procedures which must be followed by companies or other organisations within the UK, British Overseas Territories, the Channel Islands and the Isle of Man which submit applications through the UK for the management and processing of satellite filings (**"the Filings Manual"**).
   (3) A satellite filing recorded in the MIFR as being held by a UK satellite operator may be transferred but only by (a) one UK satellite operator to another UK operator which meets certain prescribed criteria; and (b) with the prior consent of Ofcom and subject to the transferee company or organisation providing evidence

that it satisfies the relevant due diligence requirements set by Ofcom. The Filings Manual makes clear that a transfer of this sort may be made for value.

(4) The case of the Joint Administrators is that the Company's bundle of rights in respect of the Satellite Network Filings entitled it to use particular orbital slots in relation to satellites. Those rights included a right to transfer the filings for value to another recognised operator, but always subject to the approval of Ofcom.

(5) In the present case, the most valuable of the Satellite Network Filings comprised three orbital filings which constituted the Group's spectrum rights at the 33.5°W orbital slot (UKDIGISAT-3, UKDIGISAT-4A and UKMMSAT-B). That slot was occupied by the HYLAS 4 satellite operated by another entity in the group, Avanti Hylas 2 Limited (**"AH2L"**). HYLAS 4 is the Group's main operating satellite. In addition, the Company owned certain further Satellite Network Filings related to other orbital slots which were not referable to a particular satellite owned or operated (or anticipated to be owned or operated) by the Group, and were held as speculative development assets and/or assets held for sale. These filings were not considered to have any material economic value.

The Transactions

10. By a sale and purchase agreement dated 17th March 2022 the Satellite Network Filings and the PES Licences were transferred by the Company to AH2L. The consent of Ofcom to this transfer (**"the Intragroup Transfer"**) was required and obtained. The assets were sold in exchange for two intercompany loan note instruments issued by AH2L to the Company in an aggregate amount equal to the fair market value of the assets transferred, which was stated as $35,000,100 **("the AH2 FMV Payment Obligations**"). All references to dollars in this judgment are references to US dollars.

11. As part of this transaction, the Company granted a new fixed charge over its rights in respect of the AH2 FMV Payments Obligations in favour of the secured creditors. At the same time, a parallel intercompany loan note instrument (the "**AH2 Additional Payment Obligation**") was also issued by AH2L to the Company. The purpose of the AH2 Additional Payment Obligation was to permit the Company to meet the potential claims of preferential creditors and the value of the prescribed part (as defined in Section 176A of the 1986 Act) in the event of a judicial determination that some or all of the Satellite Network Filings and the PES Licences were subject to floating charge security and not fixed charge security (including in circumstances where fixed charge security was re-characterised as floating in nature).

12. On 13th April 2022 the Company entered into two asset purchase agreements, as part of a pre-packaged sale in relation to the administration of the Company. By these agreements (**"the Disposal"**) the Company sold substantially all of its remaining business and assets to an entity ultimately owned by its secured creditors, Plate Bidco 4 Limited (**"Bidco"**) and certain other Group companies. The Disposal included HYLAS 3, the Network Ground Station Assets and the AH2 Payment Obligations. The value attributed to these particular assets, as part of the overall sale, was $41,557,579.

13. I will use the collective expression **"the Transactions"** to refer to the Intragroup Transfer and the Disposal.

14. In this context I should also mention that, also on 13th April 2022, the Joint Administrators put in place a secured administration funding agreement **("the AFA")**,

supported by the Lead Secured Creditors. The purpose of the AFA was to protect the position of the preferential and unsecured creditors in circumstances where some or all of the Relevant Assets were determined to have been secured by floating charges at the time of the Transactions. The object of the exercise was to allow the Transactions to proceed swiftly, with a view to maximising the value of the assets being sold, while at the same time providing against the risk of some or all of the Relevant Assets turning out to have been the subject of floating charge security. The AH2 Additional Payment Obligation was released on condition that the AFA was provided.

15. The AFA was therefore required because the Transactions were made on the basis that the Relevant Assets were subject to fixed charge security. The Joint Administrators acted on the basis of legal advice, but the possibility was recognised that some or all of the Relevant Assets were subject to floating charge security. Distributions were made to secured creditors on the same basis; namely that the Relevant Assets were subject to fixed charge security. The AFA was provided in case it turned out that distributions should have been made on the basis that the Relevant Assets or some of them were subject to floating charge security, so that the priority for preferential creditors over floating charge holders in Section 175(2) of the 1986 Act was engaged and so that the prescribed part provisions in Section 176A of the 1986 Act were engaged. In that event the AFA provides the facility pursuant to which funds can be provided to meet the additional distributions to HMRC and unsecured creditors which will be required on this basis, if there are insufficient assets in the administration estate for this purpose.

16. It is convenient to mention at this point that the only preferential creditor of the Company is HMRC. The amount receivable by HMRC, in its capacity as a preferential creditor depends, as I understand the situation, on whether the Relevant Assets or some of them were subject to floating charge security. Whether the unsecured creditors will receive anything at all by way of distribution of the Company's assets also depends, again as I understand the situation, on whether the Relevant Assets or some of them were subject to floating charge security. HMRC has confirmed that it does not wish to be heard in the Application, and none of the other unsecured creditors have indicated a wish to participate in the hearing of the Application. As I have stated, the parties who appeared at the hearing of the Application were confined to the Joint Administrators, who of course represent the Company, and the Lead Secured Creditors.

17. One consequence of this was that there was no party at the hearing which was present specifically to put the case that the Relevant Assets or some of them were subject to floating charge security. I do not think that this matters, for two reasons. First, it was a matter for all interested parties to decide whether they wished to be present at the hearing and put their particular case. Second, and more importantly, the Joint Administrators adopted a neutral stance at the hearing, identifying the arguments on either side in the Characterisation Issue. This was of considerable benefit, as it allowed me to be satisfied that I have in fact been made fully aware of the arguments each way on the Characterisation Issue.

<u>The securities</u>

18. At the time of the Transactions, the Company had borrowings of approximately $825.6 million, pursuant to the following financing agreements:
    (1) A super senior facility (the "**SSF**") made available under a facility agreement originally dated 15th June 2017 (as amended and restated from time to time)

between Avanti Communications Group plc (**"the PLC"**), as parent of the Company and borrower, certain Group companies (including the Company) as guarantors and Global Loan Agency Services Limited ("**GLAS**") as agent (**"the SSF Agreement"**). The SSF Agreement was governed by English law save that, by clause 37.2 thereof, certain schedules were to be interpreted in accordance with the laws of the State of New York. The amended and restated version of the SSF Agreement with which I am concerned is dated 22nd October 2021.

(2) A facility described as a 1.5 lien facility ("the **1.5 Lien Facility**") made available under a credit agreement originally dated 24th May 2019 (as amended and restated from time to time) between Avanti Communications Jersey Limited as borrower, certain Group companies (including the Company) as guarantors, and Wilmington Trust (London) Limited as administrative agent (**"the 1.5 Lien Facility Agreement"**). The 1.5 Lien Facility Agreement was governed by New York law. The amended and restated version of the 1.5 Lien Facility Agreement with which I am concerned is dated 22nd October 2021.

(3) Senior secured loan notes (**"the PIK Toggle Notes"**) with maturity dates in 2022 issued by the PLC pursuant to an indenture dated 26th January 2017, with certain group companies (including the Company) as guarantors, and the Bank of New York Mellon, London Branch ("**BNY Mellon**") as trustee and in various other capacities (**"the PIK Toggle Notes Indenture"**). The PIK Toggle Notes were governed by New York law.

19. I will refer to the SSF Agreement, the 1.5 Lien Facility Agreement, and the PIK Toggle Notes Indenture, collectively, as **"the Debt Facility Documents"**, and to the debt obligations thereunder as the **"Secured Debt"**.

20. At the time of the Intragroup Transfer and the Disposal, the Secured Debt was secured by a shared security package which included the following security instruments:

(1) An English law debenture dated 3rd October 2013 between, among others, the PLC and certain Group companies (including the Company) as chargors, and BNY Mellon as notes trustee and security agent and as amended from time to time (including on 26th January 2017) (**"the 2013 Debenture"**).

(2) An English law debenture dated 26th January 2017 between, among others, the PLC and certain Group companies (including the Company) as chargors, and BNY Mellon as primary security agent and as supplemented from time to time (including on 15th February 2021) (**"the 2017 Debenture"**). I will refer collectively to the 2013 Debenture and the 2017 Debenture as the "**Debentures**".

21. There is also an intercreditor agreement, which was originally dated 26th January 2017 (as amended from time to time), which was entered into by the PLC as parent of the Company and issuer, subsidiary companies of the PLC (including the Company), BNY Mellon as primary security agent, and certain secured creditors (**"the Intercreditor Agreement"**). For present purposes it is only necessary to say that the Intercreditor Agreement, by clause 2.2 thereof, provided that what was referred to as the Shared Collateral (which included the Debentures) should rank and secure the Secured Debt in the following order: (a) the liabilities under the SSF; (b) the liabilities under the 1.5 Lien Facility, (c) the liabilities under the PIK Toggle Notes, and (d) a set of liabilities referred to as the Pari Passu Liabilities; being liabilities which existed under a set of documents defined in the Intercreditor Agreement as the Pari Passu Documents.

22. It was common ground between the parties that it was only necessary for me to consider the terms of 2017 Debenture, for the purposes of resolving the Characterisation Issue. I was told that the 2013 Debenture contains materially the same charging terms as the 2017 Debenture, and that the majority of the indebtedness existing pursuant to notes issued under the indenture of 3rd October 2013, as referred to in the 2013 Debenture, was understood by the Joint Administrators to have been exchanged for notes issued under the PIK Toggle Notes, with the remainder being converted into equity. For the same reason, it is my understanding that it is not necessary to consider the Pari Passu Documents, as defined in the Intercreditor Agreement, or the Pari Passu Liabilities which existed thereunder.

23. I will use the collective expression **"the Security Documents"** to refer to all of the various agreements which I have mentioned in this section of this judgment; that is to say the Debt Facility Documents, the Debentures and the Intercreditor Agreement.

The Characterisation Issue

24. The issue which I have to resolve in the Application, namely the Characterisation Issue, can be simply stated. At the time of the Transactions were the Relevant Assets secured by fixed or floating charges created by the Debentures?

25. The Characterisation Issue can be refined a little further. Whether the Relevant Assets were secured by fixed or floating charges depends on the nature of the security over the Relevant Assets when the security was created, unless there was some change in the nature of the security between the date of its creation and the Transactions, such as crystallisation or release. There is no evidence of any such event having occurred prior to the date of the Transactions. Accordingly, the Characterisation Issue can be refined down to the question of whether the Relevant Assets were secured by fixed or floating charges at the time of entry into the Debentures. As I have noted, this question can be answered by reference to the 2017 Debenture. It is not necessary to conduct a separate analysis in relation to the 2013 Debenture.

The Characterisation Issue – the law

26. In order to determine whether a charge is fixed or floating it is necessary to conduct a two-stage enquiry; see Lord Millett, giving the judgment of the Privy Council in *Agnew v Commissioners of Inland Revenue* [2001] UKPC 28 [2001] 2 AC 710, at [32]. As Lord Millett explained (italics have been added to all quotations in this judgment):

> *"The question is not merely one of construction. In deciding whether a charge is a fixed charge or a floating charge, the court is engaged in a two-stage process. At the first stage it must construe the instrument of charge and seek to gather the intentions of the parties from the language they have used. But the object at this stage of the process is not to discover whether the parties intended to create a fixed or a floating charge. It is to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. Once these have been ascertained, the court can then embark on the second stage of the process, which is one of categorisation. This is a matter of law. It does not depend on the intention of the parties. 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. A similar process is involved in construing a document to see*

whether it creates a licence or tenancy. The court must construe the grant to ascertain the intention of the parties: but the only intention which is relevant is the intention to grant exclusive possession: see Street v Mountford [1985] AC 809, 826 per Lord Templeman. So here: in construing a debenture to see whether it creates a fixed or a floating charge, the only intention which is relevant is the intention that the company should be free to deal with the charged assets and withdraw them from the security without the consent of the holder of the charge; or, to put the question another way, whether the charged assets were intended to be under the control of the company or of the charge holder."

27. At the first stage of the process the court must construe relevant instrument of charge in order to ascertain the nature of the rights and obligations which the parties intended to grant each other in respect of the charged assets. At the second stage, after these rights and obligations have been ascertained, the court must embark on the second stage of the process, which is one of categorisation, or characterisation. This is a matter of law, and does not depend upon the intention of the relevant parties, or the label which the parties have attached to the relevant instrument of charge. I will refer to these two stages as **"the First Stage"** and **"the Second Stage"**.

28. The general approach at the First Stage and the Second Stage is helpfully summarised in Lightman & Moss, the Law of Administrators and Receivers of Companies (Sixth Edition), at 3-021:

 "Accordingly, in construing the terms of the charge, it will be necessary to identify the nature of the class of charged assets and to ascertain whether the parties have agreed that the charged assets must be retained by the company as the subject of a specific charge, or whether it is intended that the company be at liberty to deal with the assets, free from the chargee's security. Any unfettered or significant commercial freedom in the chargor to deal with a fluctuating class of assets without the consent of the chargee will be inconsistent with the existence of a fixed charge over those assets. The critical issue is the nature and extent of the chargee's control of the assets in question. Resolution of this issue will therefore require an examination of the nature and extent of the restrictions placed by the charge documents and any ancillary agreements upon the dealings by the company with the charged assets".

29. Further useful guidance on the differences between fixed and floating charges can be found in the speeches of the members of the House of Lords in *Re Spectrum* [2005] UKHL 41 [2005] 2 AC 680. In his speech in this case Lord Scott gave an account of the history of the development of the floating charge, as security over any class of circulating assets that the chargor company might possess. At [111] Lord Scott summarised the essential characteristics of a floating charge in the following terms:

 "111. In my opinion, the essential characteristic of a floating charge, the characteristic that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime the chargor is left free to use the charged asset and to remove it from the security. On this point I am in respectful agreement with Lord Millett. Moreover, recognition that this is the essential characteristic of a floating charge reflects the mischief that the statutory intervention to which I have referred was intended to meet and should

ensure that preferential creditors continue to enjoy the priority that section 175 of the 1986 Act and its statutory predecessors intended them to have."

30. It is also instructive to set out the first part of Lord Scott's consideration of the actual debenture which was under consideration in *Re Spectrum*, at [112]:

    "112. If, as I think, the hallmark of a floating charge and a characteristic inconsistent with a fixed charge is that the chargor is left free to use the assets subject to the charge and by doing so to withdraw them from the security, how should the charge over book debts granted by the bank's debenture be categorised? The following features of the debenture and the arrangements regarding the bank account into which the collected debts had to be paid need to be taken into account: (1) the extent of the restrictions imposed by the debenture (para 81 above); (2) the rights retained by Spectrum to deal with its debtors and collect the money owed by them (para 81 above); (3) Spectrum's right to draw on its account with the bank into which the collected debts had to be paid, provided it kept within the overdraft limit (para 82 above); (4) the description "fixed charge" attributed to the charge by the parties themselves."

31. So far as a fixed charge is concerned, Lord Walker, in his speech in *Re Spectrum* provided the following description of a fixed charge, as contrasted to a floating charge, at [138] and [139]:

    "138. This passage brings us close to the issue of legal principle, that is the essential difference between a fixed charge and a floating charge. Under a fixed charge the assets charged as security are permanently appropriated to the payment of the sum charged, in such a way as to give the chargee a proprietary interest in the assets. So long as the charge remains unredeemed, the assets can be released from the charge only with the active concurrence of the chargee. The chargee may have good commercial reasons for agreeing to a partial release. If for instance a bank has a fixed charge over a large area of land which is being developed in phases as a housing estate (another example of a fixed charge on what might be regarded as trading stock) it might be short-sighted of the bank not to agree to take only a fraction of the proceeds of sale of houses in the first phase, so enabling the remainder of the development to be funded. But under a fixed charge that will be a matter for the chargee to decide for itself.

    139. Under a floating charge, by contrast, the chargee does not have the same power to control the security for its own benefit. The chargee has a proprietary interest, but its interest is in a fund of circulating capital, and unless and until the chargee intervenes (on crystallisation of the charge) it is for the trader, and not the bank, to decide how to run its business. There is a detailed and helpful analysis of the matter, with full citation of authority, in Worthington's Proprietary Interests in Commercial Transactions (1996) pp 74-77; see also her incisive comment on this case ("An Unsatisfactory Area of the Law-Fixed and Floating Charges Yet Again") in (2004) 1 International Corporate Rescue 175. So long as the company trades in the ordinary way (a requirement emphasised by Romer LJ in the Yorkshire Woolcombers case [1903] 2 Ch 284, 295, and by the Earl of Halsbury on appeal in the same case [1904] AC 355, 357-358) the constituents of the charged fund are in a state of flux (or circulation). Trading stock is sold and becomes represented by book debts; these are collected and paid into the bank; the trader's overdraft facility enables it to draw cheques in favour of its suppliers to pay for new stock; and so the trading cycle continues."

32. So far as the First Stage is concerned, my attention was drawn by counsel to a number of well-known decisions setting out the ordinary principles of contractual construction in relation to commercial documents. For present purposes I find it most convenient, and necessary only to refer to the following invaluable summary of the relevant principles by Popplewell J in *Lukoil Asia Pacific Pte Ltd v Ocean Tankers (Pte) Ltd (The Ocean Neptune)* [2018] EWHC 163 (Comm) [2018] 2 All ER (Comm), at [8]:

> *"[8] There is an abundance of recent high authority on the principles applicable to the construction of commercial documents, including Investors' Compensation Scheme Ltd v West Bromwich Building Society, Investors' Compensation Scheme Ltd v Hopkin & Sons (a firm), Alford v West Bromwich Building Society, Armitage v West Bromwich Building Society [1998] 1 All ER 98, [1998] 1 WLR 896; Chartbrook Ltd v Persimmon Homes Ltd (Chartbrook Ltd and anor, Pt 20 defendants) [2009] UKHL 38, [2009] 4 All ER 677, [2009] 1 AC 1101; Re Sigma Finance Corpn [2009] UKSC 2, [2010] 1 All ER 571; Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2012] 1 All ER (Comm) 1, [2011] 1 WLR 2900; Arnold v Britton [2015] UKSC 36, [2016] 1 All ER 1, [2015] AC 1619; and Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2018] 1 All ER (Comm) 51, [2017] AC 1173. The court's task is to ascertain the objective meaning of the language which the parties have chosen in which to express their agreement. The court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. The court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to the objective meaning of the language used. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other. Interpretation is a unitary exercise; in striking a balance between the indications given by the language and the implications of the competing constructions, the court must consider the quality of drafting of the clause and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest; similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated. It does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."*

33. A few other general points may usefully be mentioned, in the context of the First Stage.

34. The labels used by the parties to denote their rights and obligations are relevant at the First Stage as a guide to what security they objectively intended to create, such as the labels fixed and floating; see *Arthur D Little Ltd (In Administration) v Ableco Finance LLC* [2002] EWHC 701 (Ch) [2002] 3 W.L.R. 1387 at [31]. The court is fundamentally concerned with the nature of the rights and obligations the parties

intended to create; see *Ashborder BV v Green Gas Power Ltd* [2004] EWHC 1517 (Ch) at [181].

35. The nature of the assets in question may also be taken into account. A distinction often drawn in the authorities is between a chargor's circulating capital and its non-circulating capital, the reason being that "*compliance with the terms of a fixed charge on the company's circulating capital would paralyse its business*"; see *Agnew* at [7]. As Lord Millett further explained in *Agnew*, at [30], assets forming a company's circulating capital "*are the natural subjects of a floating charge*". In *Arthur D Little*, Roger Kaye QC (sitting as a Deputy High Court Judge) noted that the charged shares in that case were not part of the chargor's circulating capital. The chargor did not need to sell them, deal with them, or substitute them as part of its ordinary business as a management consultant, nor to improve or assist its cash flow as part of that business. In holding that the shares were subject to fixed charge security, the judge noted as follows, at [41]:

> "*None of these impeded the company's ability to trade as a management consultant without recourse to the shares. It is a striking feature of all the relevant cases to which I was referred that a charge over what was regarded as the company's circulating capital was inconsistent with a fixed charge*"

36. In *Ashborder*, at [183], the relevance of the nature of the assets in question was said to be limited, where there is an express power for the chargor to dispose of the assets in question. Where there is not, Etherton J (as he then was) recognised that the nature of the assets may well be significant. As Etherton J explained, at [183]:

> *"183.Further, there is a danger in the present case in laying too great an emphasis on the nature of the assets in question, namely the Licences and the OGL Shares. The fact that assets are not part of a company's circulating capital or stock in trade, which it needs to sell as part of its ordinary business, can understandably have an important influence in the categorisation of a charge as a fixed charge, rather than a floating charge, in an appropriate case. In the present case, however, unlike, for example, Arthur D Little and Re Yorkshire Woolcombers Association, the parties have agreed an express provision permitting each of the Octagon Group Companies to dispose of assets in the ordinary course of its business. In accordance with Lord Millett's two stage process, what must be ascertained at the first stage, as a matter of standard interpretation of written documents, is whether, on the language used, the express power to dispose of assets in the ordinary course of business was limited to particular assets or applied to all assets of the company. Whilst, of course, the nature of the assets in question forms part of the factual background against which the standard process of documentary interpretation takes place, the ordinary and natural meaning of the words used is the primary touchstone. By contrast, in the absence of an express provision permitting disposals in the ordinary course of business, the nature of the charged assets assumes a much greater significance in the process of establishing whether the intention was to create a fixed charge or a floating charge over the assets in question."*

37. Regard may also be had to the nature of the business of the chargor when construing the rights and obligations created under the contractual documentation; see *Arthur D Little* at [40(2)]:

> *"(2) I again remind myself that the company was not trading in shares and no one has suggested it did. The essential nature of its business cannot, in my judgment, be ignored. The shares in CCL were not part of the company's circulating capital and it did not need to sell them, to deal with them, or to substitute them as part of its ordinary business as a management consultant, C nor to improve or assist its cash flow as part of that business. The shares were not part of a fluctuating body of assets which changed from time to time in the ordinary course of the company's business."*

38. Post-contractual conduct is generally irrelevant and inadmissible. However, in this context, it has been noted that if a stipulation in the charging documents is not adhered to in practice, the agreement may be held to be a sham and characterised as a floating charge: see Goode & Gullifer on Legal Problems of Credit and Security (Seventh Edition), at paragraph 4-22. In the present case, and subject to one limited exception to which I shall come, there is no evidence of what I would regard as relevant post-contractual conduct.

39. Turning specifically to the Second Stage, and as the authorities make clear, the critical question is whether the rights and obligations in respect of the relevant assets are consistent, as a matter of law, with fixed charge security or floating charge security. The labels used by the parties are not relevant. The correct characterisation of the relevant instrument of charge is a question of law, having regard to the rights and obligations ascertained at the First Stage.

40. In *Re Yorkshire Woolcombers Association Ltd* [1903] 2 Ch 284, Romer LJ provided the following description of a floating charge, at 295:

> "*I certainly do not intend to attempt to give an exact definition of the term 'floating charge', nor am I prepared to say that there will not be a floating charge within the meaning of the Act, which does not contain all the three characteristics that I am about to mention, but I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge. (1) If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some future step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."*

41. In relation to the third characteristic identified by Romer LJ one can see that a critical question, if not the critical question at the Second Stage is the question of control. Who has control of the relevant class of assets, as between chargor and chargee? Returning to the judgment of the Privy Council in *Agnew*, Lord Millett, after quoting Romer LJ's description of a floating charge in *Woolcombers*, gave the following further explanation of the third characteristic identified by Romer LJ, at [13]:

> *"This* [Romer LJ's description] *was offered as a description and not a definition. The first two characteristics are typical of a floating charge but they are not distinctive of it, since they are not necessarily inconsistent with a fixed charge. It*

is the third characteristic which is the hallmark of a floating charge and serves to distinguish it from a fixed charge. Since the existence of a fixed charge would make it impossible for the company to carry on business in the ordinary way without the consent of the charge holder, it follows that its ability to do so without such consent is inconsistent with the fixed nature of the charge."

42. At [23] Lord Millett added the following, on the question of control:

"If the chargor is free to deal with the charged assets and so withdraw them from the ambit of the charge without the consent of the chargee, then the charge is a floating charge. But the test can equally well be expressed from the chargee's point of view. If the charged assets are not under its control so that it can prevent their dissipation without its consent, then the charge cannot be a fixed charge."

43. The question of control, and its relationship with the nature of the relevant class of assets subject to the relevant charge was explained by Stanley Burton QC (as he then was) in *Re Cimex Tissues Ltd* [1994] BCC 626, in the following terms at 635:

"If the crucial difference between a fixed charge and a floating charge is in the nature of the interest of the chargee prior to any event of crystallisation, it would follow that a licence for the chargor to deal to some extent with the charged assets is not necessarily inconsistent with a fixed charge. If, however, the licence to deal given to the chargor is extensive, the charge will be floating, since in these circumstances there is in effect no attachment of the charge to any specific asset: see Goode, Legal Problems of Credit and Security, at p. 56. The extent to which the licence to deal is compatible with a fixed charge must depend on all the circumstances of the case, and in particular on the nature of the charged property. Where the charged property is stock, or book debts - i.e. where the assets are naturally fluctuating - the court will readily conclude that a liberty for the chargor to deal with the charged assets is inconsistent with a fixed charge. Where, as in the present case, the assets are specific and do not necessarily fluctuate, some liberty to release the charged assets may not be inconsistent with a fixed charge. Conversely, however, on this basis a floating charge over present goods, not extending to future goods, is not a conceptual impossibility."

44. There is one further case to which I find it useful to make reference, prior to returning to the present case. The case in question is the decision of the House of Lords in *Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council* [2001] UKHL 58 [2002] 1 AC 336. In this case, as part of a land reclamation scheme, the local county council arranged with a contractor for coal-bearing shale to be separated from the coal by means of a washing plant. Pursuant to the contract between the contractor and the council, which was on the then standard terms of the Institute of Construction Engineers, the contractor established two coal washing plants on the site. The contractor became insolvent and the council exercised its right to expel the contractor from the site. The administrators of the contractor applied for delivery up of the coal washing plants. This gave rise to a dispute over who, as between the council and the contractor, was entitled to the coal washing plants. For present purposes, the relevant issue which arose in the case was whether clause 63 of the contract created a charge over the coal washing plants and, if so, whether that charge was a fixed or floating charge. In his speech, at [3], Lord Hoffmann identified this issue in the following terms:

"3 My Lords, this appeal raises two questions of general importance. The first is whether a standard condition in the Institution of Civil Engineers ("ICE") form of contract which allows the employer, in various situations of default by the contractor, to sell his plant and equipment and apply the proceeds in discharge of his obligations, is a floating charge which should be registered under section 395 of the Companies Act 1985. The second is the effect of a failure to register when the contractor has gone into administration but the employer has nevertheless purported to exercise the power of sale."

45. The contract provided, by clause 53, that no plant, goods or materials could be removed from the site without the written consent of the engineer, such consent not to be unreasonably withheld where the same were no longer immediately required for the purposes of the completion of the works. If any such plant, goods or materials were removed from the site they were deemed to revest in the contractor. In agreeing with Millett LJ (as he then was) in the Court of Appeal that clause 63 of the contract created a floating charge, Lord Hoffmann said this, at [41]:

"41 On these points I can be brief because I agree with Millett LJ for the reasons which he gave. I do not see how a right to sell an asset belonging to a debtor and appropriate the proceeds to payment of the debt can be anything other than a charge. And because the property subject to condition 63 (constructional plant, temporary works, goods and materials on the site) was a fluctuating body of assets which could be consumed or (subject to the approval of the engineer) removed from the site in the ordinary course of the contractor's business, it was a floating charge: see Agnew v Comr of Inland Revenue [2001] 2 AC 710, 723-724."

46. It is also useful to have in mind the essential part of the reasoning of Millett LJ (as he then was) in the Court of Appeal on the question of whether the charge created by clause 63 was fixed or floating; see *Re Cosslett (Contractors) Ltd* [1998] Ch 495. At 510C Millett LJ identified the difference between a fixed and a floating charge in the following terms:

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

47. In applying this test to the facts of the case, Millett LJ reasoned as follows, at 510D-511A:

"The business of the company was to carry out works of civil engineering. In the ordinary course of that business it entered into the contract with the council. In bringing plant and materials onto the site and carrying out the works for the council it was carrying on the ordinary course of its business. It is not to be supposed that its business was confined to the performance of its contract with the council; and if it wished to remove plant or materials from the site and deploy them elsewhere this too would be in the ordinary course of its business. In

forbidding the company from removing from the site plant or materials required, whether immediately or not, for the completion of the works, the council was, therefore, placing a restriction on the way in which the company carried on business. Thus far I agree with the judge. Where I part company from him is that I do not regard this restriction as having any relation to the council's security. The council's purpose in imposing the restriction was not to protect its security but to ensure that the company would give proper priority to the completion of the works. A similar restriction would have been appropriate even if the council had not taken any security interest. In a case where the plant or materials are not immediately required, the engineer's consent is not to be unreasonably withheld. As Evans L.J. pointed out in argument, the fact that the decision is left to the engineer shows that it is to be made on operational grounds. If completion of the works will not be prejudiced or delayed by the removal of an item of plant or materials, then consent to its removal must be given; consent cannot be withheld on the ground that the remaining plant and materials would be insufficient security if the company were in default.

In the course of argument it was pointed out that the council must give seven days' notice before expelling the company from the site, and it was suggested that once such notice has been given and while it has not yet expired the engineer may properly refuse his consent on the ground that the remaining security is insufficient. I do not agree with this; but even if I did it would make no difference. If the council's right to prevent removal on security and non-operational grounds arises only upon notice of expulsion, then in my judgment the effect of giving such notice is to crystallise the charge.

Accordingly, and in disagreement with the judge, I hold the charge to be a floating charge."

48. In terms of what level of control distinguishes a fixed charge from a floating charge, my attention was also drawn to the following extract from Goode & Gullifer on Legal Problems of Credit and Security (Seventh Edition), at 4-23 (underlining added):

"How much freedom can the chargor be given to deal with charged assets if the charge is to retain its status as a fixed charge? Or to put the question another way, how far must the chargor's power to manage the charged assets be restricted? It is not possible to give a completely exhaustive reply to this question, although some guidance is given by the Spectrum case. <u>At one end of the spectrum is total freedom of management. This is plainly incompatible with a fixed security interest. A charge cannot claim a fixed security in an asset in one breath and then, in the next, allow the chargor to dispose of the asset as if it were the chargor's own. At the other end of the spectrum, is a total prohibition on dealings of any kind in the asset or its proceeds</u>. Clearly, in this case, the charge is a fixed charge. <u>Between the two ends of the spectrum lies an infinite range of possibilities. However, it now looks as though virtually all those possibilities will result in the charge being characterised as floating.</u> The House of Lords made in clear in Spectrum that where the chargor is able to remove the assets from the scope of the charge the charge must be floating. <u>Thus only total prohibition of all dealings and withdrawals without permission is enough to create a fixed charge.</u> Taken literally, this would mean that even a power to make item by item substitutions would prevent a charge from being fixed, since a power to substitute includes a power to dispose. Although this particular point is still uncertain, it is clear that, if any power to substitute at all is to be held to be consistent with a

fixed charge, it would have to be very specific in only permitting disposal of an item if a substitute item was immediately acquired, so that the security is in no [way] *reduced. It is clear that merely to label the charge "fixed" is not enough. The instrument must restrict the debtor's dealing powers; and the restrictions must be meaningful, not a mere sham."*

49. It will be noted that this extract includes the suggestion (shown underlined above) that *"only total prohibition of all dealings and withdrawals without permission is enough to create a fixed charge"*. A statement to a similar effect (also shown underlined) can be found in the following extract Beale, Bridge & Gullifer, The Law of Security and Title Based Financing (Third Edition), at 6.110:

"Freedom to dispose of charged assets It has been clear for some time that a certain amount of restriction on disposal of charged assets by the chargor is consistent with a floating charge. A negative pledge clause in a charge prohibiting the creation of further charges ranking in priority to that charge, and a clause prohibiting the selling, factoring, or other disposal of charged book debts do not prevent a charge from being floating. In relation to some assets, the additional problem arises of identifying what it is that needs to be controlled by the charge, that is, what counts as "the charged assets". <u>Arguably the law has now reached the point where, in order for a charge to be characterized as fixed, there must be a total restriction on any disposal of the charged assets by the chargor without the consent of the chargee</u>. This view is consistent with the four methods of creating a fixed charge charge over book debts set out by Lord Hope in the Spectrum case: first, prevention of all dealings with the book debts by the chargor, including collection; second prevention of all dealings except collection, and requiring the collected proceeds to be paid to the chargee; third, prevention of all dealings except collection and requiring the collected proceed to be paid into a blocked account with the chargee; fourth, prevention of all dealings except collection and requiring collected proceeds to be paid into an account with a third-party bank, over which the chargee takes a fixed charge. Further it is clear that the restriction on disposal must be an express or implied term of the charge agreement, and that such a restriction will not be readily implied, in particular not just from the label put by the parties on the charge."

50. Both these textbooks suggest that the law may have reached the point where a charge can only be characterised as fixed where there is a total restriction on any disposal of the charged assets by the chargor without the consent of the chargee. I will need to come back to these suggestions, in my discussion of the Characterisation Issue.

51. I received from counsel considerably more detailed submissions on the law relevant to the Characterisation Issue. These submissions included reference to a number of authorities additional to those mentioned above. In making my decision on the Characterisation Issue I have taken all of the submissions of counsel on the law into account, including the additional authorities to which I have not made express reference. It seems to me however that the above summary of the law is sufficient to identify the principles which fall to be applied in the two-stage exercise which I have to carry out in order to resolve the Characterisation Issue. I will refer to further authorities, as necessary, when I come to my discussion of the Characterisation Issue.

<u>The Security Documents</u>

52. The Security Documents are complex and detailed documents, which are not easily summarised. I am indebted to counsel on both sides for their assistance in guiding me through the thicket of contractual provisions. What follows is my summary of the key terms of the Security Documents, relevant to the Characterisation Issue. The summary is not intended to be a detailed and comprehensive summary of all the relevant provisions which I have considered. Also, and as previously indicated, it is not necessary to go through both of the Debentures for the purposes of summarising the relevant provisions. It is sufficient to consider the 2017 Debenture.

53. As noted above, the 2017 Debenture was entered into between the PLC and various Group companies (including the Company) as chargors, and BNY Mellon, as Primary Security Agent. As I am concerned with the meaning and effect of the Security Documents so far as they affected the Company and its assets, specifically the Relevant Assets, it is convenient to discuss the Security Documents by reference to the rights and obligations of the Company thereunder. So far as defined expressions in the Security Documents are concerned, I adopt those defined expressions and their meaning as defined in the relevant Security Documents save insofar as the relevant defined expression is one which I have established in this judgment.

54. The starting point is clause 3 of the 2017 Debenture, which is the charging clause. By clause 3.1, the following parties entered into the following charging obligation:

> *"Subject to the existence of the Existing Debentures, each Initial Chargor, as continuing security for the payment of the Secured Obligations, charges in favour of the Primary Security Agent with full title guarantee the following assets, both present and future from time to time owned by it or in which it has an interest:"*

55. The Initial Chargors, as defined in the 2017 Debenture, included the Company. By clause 3.1(b) the Company charged, *"by way of first fixed charge"*, a series of classes of assets in favour of the Primary Security Agent. The classes of assets are listed in sub-paragraphs (i) – (xi) and encompass a very broad range of asset types. For the purposes of this judgment I do not think that it particularly matters whether one treats clause 3.1(b) as creating a single charge over the specified classes of assets, or a series of charges. For convenience, and for the purposes of this judgment, I will treat clause 3.1(b) as creating a single charge.

56. By clause 3.1(b)(iii) the Company charged *"all of its rights, title and interest in the Equipment"*. Equipment is defined in clause 1.1 of the 2017 Debenture to mean the following:

> *"Equipment" means all plant, machinery, computers, office and other equipment, furnishings and vehicles and other chattels together with any spare parts, replacements or modifications and the benefit of all contracts, licences and warranties relating thereto and HYLAS 1, HYLAS 3 and Artemis (as well as HYLAS 4 once acquired) and associated equipment including all ground segment equipment for tracking, telemetry, control and monitoring of HYLAS 1, HYLAS 3 and Artemis (as well as HYLAS 4 once acquired), any equipment relating to the monitoring and/or maintaining of any Orbital Positions, transponders, including as specified in any relevant Security Accession Deed;"*

57. This definition expressly included Hylas 3. The definition also seems to me to have been wide enough to have included the Network and Ground Station Assets.

58. By clause 3.1(b)(ix) the Company charged *"the benefit of all licences, consents and agreements held by it in connection with the use of any of its assets;"*. This definition seems to me to have been wide enough to include the Satellite Network Filings and the PES Licenses. I did not understand it to be in dispute that the Satellite Network Filings and the PES Licenses, as permissions and licenses, were rights capable of being subject to fixed charge security.

59. The key point is therefore that the list of asset types in the sub-paragraphs of clause 3.1(b) of the 2017 Debenture was clearly broad enough to have included all the Relevant Assets. It is also to be noted that, by clause 3.3 a floating charge was created over all *"present and future assets, undertakings and rights to the extent not effectively mortgaged, charged or assigned pursuant to clause 3.1 (Specific Security) or clause 3.2 (Security Assignment)"*. It follows that an asset was and is only subject to the charge in clause 3.3, if not caught by the charge in clause 3.1(b).

60. Clause 5 of the 2017 Debenture contains a negative pledge, whereby the Company agreed not to *"create or agree to create or permit to subsist any Security over all or any part of the Charged Property except to the extent not prohibited by the Debt Documents or with the prior consent of the Primary Security Agent"*.

61. By clause 13 of the 2017 Debenture the Primary Security Agent was irrevocably authorised to release the Security over any Charged Property in the following circumstances:

> *"The Primary Security Agent is irrevocably authorised to and, upon the delivery to the Primary Security Agent of (i) a director's certificate from the relevant Chargor substantially in the form set out in Schedule 6 hereto and (ii) an English law legal opinion of external counsel stating that the conditions to such a release constituting a Permitted Release have been met; provided that in giving such opinion, such counsel may rely on the aforementioned director's certificate as to compliance with such conditions and as to any matters of fact, shall (at the cost of the relevant Chargor and without any consent, sanction, authority or further confirmation from any other Shared Collateral Creditor), release the Security created hereunder over any Charged Property in each case in accordance with the terms of the Intercreditor Agreement:*
>
> *(a) upon irrevocable and unconditional payment in full of principal, interest and all other Secured Obligations*
>
> *(b) by a Chargor upon the release of such Chargor from any Guarantee Liabilities that constitute Secured Obligations granted by such Chargor;*
>
> *(c) in connection with any disposition of Charged Property that is a Non-Distressed Disposal; and*
>
> *(d) as otherwise permitted under the terms of the Debt Documents,*
>
> *(such release, a "Permitted Release")."*

62. There are a number of points to be made on clause 13, as follows:
    (1) Clause 13 sets out the circumstances in which the Primary Security Agent is authorised to release the security created by the 2017 Debenture.
    (2) Leaving aside paragraphs (a) and (b), which are essentially concerned with redemption and release, property may be released from the security (i) in the case

of a Non-Distressed Disposal and (ii) as otherwise permitted under the terms of the Debt Documents. Such releases are defined as Permitted Releases.

(3) In the case of a Permitted Release there are two further conditions which must be met. A director's certificate from the Company must be provided and an English law opinion of counsel must also be provided, in each case confirming that the conditions for the relevant Permitted Release have been met.

(4) The relevant release must be in accordance with the terms of the Intercreditor Agreement.

63. The combined effect of clause 5 and clause 13 is thus to define circumstances in which the Relevant Assets could be released from the charge created by clause 3 of the 2017 Debenture; namely by Permitted Release. The next task is to look further into the circumstances in which such a Permitted Release could take place, continuing to concentrate upon the forms of Permitted Release referred to in paragraphs (c) and (d) of clause 13.

64. Dealing first with a Non-Distressed Disposal, this expression is defined in clause 14.1(b) of the Intercreditor Agreement to mean the following:

"*a disposal of:*

(i) an asset of a member of the Group; or

(ii) an asset which is subject to the Shared Collateral

to a person or persons outside the Group where:

(A) two directors of the Parent certify for the benefit of the Security Agents that the disposal and, if the disposal is of Charged Assets, the release of Shared Collateral, is not prohibited under the Super Senior Documents, the 1.5 lien Documents, the PIK Toggle Pari Passu Documents and the Pari Passu Documents; and

(B) that disposal is not a Distressed Disposal."

65. The conditions which must be met for a Non-Distressed Disposal are therefore that there must be a disposal of a charged asset (i) to a person outside the Group, (ii) where two directors of the PLC certify that the disposal and release of security is "*not prohibited*" under each of the Debt Facility Documents. The disposal must also not be a Distressed Disposal.

66. Turning to paragraph (d) of clause 13 of the 2017 Debenture, it seems to me that one ends up in much the same place as paragraph (c) of clause 13. If a disposal is not a Non-Distressed Disposal one must refer to the Debt Documents to see whether the disposal is otherwise permitted. I have not been able to find a definition of the Debt Documents in the 2017 Debenture. The equivalent clause (clause 15) in the 2013 Debenture refers to Note Documents, which are defined, in the 2013 Debenture, to mean *"the Notes (including any additional notes issued under the Indenture), any documents evidencing any Security and the Security Trust Deed"*. It seems to me reasonable to proceed on the basis that the reference to the Debt Documents in the 2017 Debenture (assuming that I have not simply overlooked the definition) refers to, or includes reference to the Debt Facility Documents.

67. It is next therefore necessary to go to the Debt Facility Documents, in order to see what they prohibit, and what they permit. In doing so, it is not necessary to go through each of the SSF Agreement, the 1.5 Lien Facility Agreement and the PIK Toggle Notes

Indenture. It is common ground that the restrictions on disposals of a chargor's assets are materially similar under these three Debt Facility Documents. Where they differ, the most restrictive obligations are to be found in the SSF Agreement. As such, it is possible to concentrate on the relevant provisions of the SSF Agreement.

68. Starting with clause 20(a) of the SSF Agreement, this contains the following obligation:

> *"(a) Each Obligor shall, and the Parent shall ensure that each member of the Group shall, comply with the covenants set out in and the other provisions of Schedule 12 (Covenants) and each of the other Parties agree to be bound by the terms of Schedule 12 (Covenants) as if such terms were set out in the body of this Agreement which covenants shall remain in force from the date of this Agreement for so long as any amount is outstanding under the Finance Documents or any Commitment is in force."*

69. The Obligor is defined to mean the Parent or a Guarantor. The Parent is the PLC. A Guarantor means an Original Guarantor or an Additional Guarantor. The Company is listed as an Original Guarantor in Schedule 1 to the SSF Agreement. Clause 20(a) itself contains the obligation to comply with the covenants and provisions in Schedule 12 to the SSF Agreement (**"Schedule 12"**).

70. Clause 37 of the SSF Agreement contains a governing law clause which provides that the SSF Agreement and any non-contractual obligations arising out of or in connection with it are governed by English law. Clause 37.2 then provides that certain of the schedules to the SSF Agreement, including Schedule 12, are to be interpreted in accordance with the laws of the State of New York. In theory this presents a problem, because neither the Joint Administrators nor the Lead Secured Creditors have presented any expert evidence of New York law. The parties are however agreed that I should interpret the provisions of Schedule 12 simply on a plain reading of the relevant provisions, in reliance upon the presumption that the principles of construction under New York law are the same as those under English law; see Dicey, Morris and Collins on the Conflict of Laws (Sixteenth Edition), at 3R-001. I am prepared to proceed on this basis. Indeed, it seems to me that the present case is not one where particular principles of construction, whether under English law or New York law (if in any way different), have any great part to play. The essential tasks are to understand the overall scheme of the thicket of contractual provisions in the Security Documents, to identify the relevant provisions, and to read those provisions.

71. Returning to Schedule 12, and so far as asset sales are concerned, the key provision in Part A of Schedule 12 is Paragraph 2.9. In the remainder of this judgment all references to Paragraphs are, unless otherwise indicated, references to the paragraphs of Part A or Part B of Schedule 12. In its material part, Paragraph 2.9(a) provides as follows:

> *"(a) The Parent will not, and will not cause or permit any Subsidiary to, directly or indirectly, consummate an Asset Sale unless: (i) the Parent (or a Subsidiary, as the case may be) receives consideration at the time of the Asset Sale at least equal to the Fair Market Value of the assets or Equity Interests issued or sold or otherwise disposed of; and (ii) 100% of the consideration received in the Asset Sale by the Parent or such Subsidiary is in the form of cash or Cash Equivalents. For purposes of this provision, each of the following will be deemed to be cash:"*

72. Paragraph 2.9(b), in its material part, provides as follows:

> *"(b) Within 30 days after the receipt of any Net Proceeds or Event of Loss Proceeds equal to or greater than $1.0 million, the Parent (or the applicable Subsidiary, as the case may be) shall apply such Net Proceeds and/or Event of Loss Proceeds in the following order:*
>
> *(i) first, to prepay the Loans pursuant to an Asset Sale Offer at an offer price equal to 101% of the principal amount thereof, plus accrued and unpaid interest to (but not including) the date of prepayment;*
>
> *(ii) second (if any balance remains), to repay, repurchase, prepay or redeem the 1.5 Lien Indebtedness and any other Indebtedness that is pari passu as to security with the 1.5 Lien Indebtedness pursuant to an offer to the lenders of such 1.5 Lien Indebtedness and such other Indebtedness at an offer price equal to 101% of the principal amount thereof, plus accrued and unpaid interest to (but not including) the date of purchase, prepayment or redemption*
>
> *(iii) third (if any balance remains), to repay, repurchase, prepay or redeem the PIK Toggle Notes and any other Indebtedness that is pari passu as to security with the PIK Toggle Notes pursuant to an offer to the holders of PIK Toggle Notes and such other Indebtedness at an offer price equal to 101% of the principal amount thereof, plus accrued and unpaid interest to (but not including) the date of purchase, prepayment or redemption; and*
>
> *(iv) fourth (if any balance remains), to repay, repurchase, prepay or redeem the Amended Existing Notes and any other Indebtedness that is pan passu as to security with the Amended Existing Notes pursuant to an offer to the holders of those Notes and such other Indebtedness at an offer price equal to 101% of the principal amount thereof, plus accrued and unpaid interest and other amounts, if any, to (but not including) the date of purchase, prepayment or redemption,"*

73. The provisions of Paragraph 2.9(b) which I have just set out (**"the Waterfall Provisions"**) require the proceeds of the relevant disposal, if equal to or in excess of $1 million, to be applied in accordance with the provisions set out in sub-paragraphs (i) to (iv) of Paragraph 2.9(b). What this means in practice is that such proceeds must be applied first to repay the liabilities under the SSF Agreement, and then (assuming available proceeds) the liabilities under the 1.5 Lien Facility Agreement, and then (again assuming available proceeds) the liabilities under the PIK Toggle Notes Indenture. It should also be noted, in this context, that it is not simply the net proceeds of an Asset Sale (the Net Proceeds) which have to be applied to the liabilities in accordance with the Waterfall Provisions. The Net Proceeds have to be applied at an offer price equivalent to 101% of the principal amount due under the relevant Debt Facility Document. I assume that this stipulation, at the least, renders an otherwise permitted Asset Sale commercially unattractive. Put more simply, the proceeds of the relevant Asset Sale are appropriated to the payment of the Secured Debt, in the order of priority established by the Debt Facility Documents and the Intercreditor Agreement.

74. An Asset Sale is defined in Paragraph 1 of Part B. The opening part of this definition is in the following terms:

> *"Asset Sale" means:*

(a) *the sale, lease, conveyance or other disposition of any assets of the Parent or a Subsidiary by the Parent or a Subsidiary; provided that the sale, lease, conveyance or other disposition of all or substantially all of the assets of the Parent and the Subsidiaries taken as a whole will be governed by paragraph 2.13 of Part A of this Schedule 12 and/or paragraph 2.22 of Part A of this Schedule 12 and not by paragraph 2.9 of Part A of this Schedule 12; and*

(b) *the issuance of Equity Interests by any Subsidiary or the sale by the Parent or any of the Subsidiaries of Equity Interests in any Subsidiary (in each case, other than directors' qualifying shares)."*

75. There then follow a series of exceptions to this definition, which are set out in sub-paragraphs (i) to (xiii) of the definition of Asset Sale in Part B of Schedule 12. The Company could therefore make a disposal, free of the restrictions in Paragraph 2.9(a), if the relevant disposal fell within any of the exceptions to the definition of an Asset Sale, as those exceptions are set out in sub-paragraphs (i) to (xiii) of the definition. Of those exceptions (**"the Asset Sale Exceptions"**), the following fall to be noted in particular.

76. By sub-paragraph (i), the Company could enter into a single transaction or series of related transactions involving assets having a Fair Market Value of less than $2 million (**"the Limited Value Exception"**).

77. By sub-paragraph (iv) the Company could also make a disposal of the kind referred to in this sub-paragraph. The sub-paragraph is lengthy, and needs to be quoted in full:

"(iv) the sale, lease or other transfer of satellite capacity, transponder capacity, backhaul services, related licensing arrangements and equipment ordered by customers and/or partners for use with the capacity, co-location or backhaul services sold by the Company in the ordinary course of business and any sale or other disposition of damaged, worn-out or obsolete assets or assets that, in the good faith judgment of the Parent, are no longer useful in the conduct of the business of the Parent and the Subsidiaries taken as a whole (including the positioning of any satellite in an inclined orbit or the abandonment or other disposition or sale of any satellite (or satellite payload or component) or intellectual property that is in the reasonable good faith judgment of the Parent, no longer economically practicable to maintain or useful in the conduct of the business of the Parent and the Subsidiaries taken as a whole);"

78. As can be seen, sub-paragraph (iv) creates different categories of excepted disposals, as follows:

(1) First, there is a disposal falling within the first part of sub-paragraph (iv), which is concerned with the disposal of satellite capacity, transponder capacity, backhaul services and related items, as referred to in sub-paragraph (iv) (**"the Capacity Exception"**):

"the sale, lease or other transfer of satellite capacity, transponder capacity, backhaul services, related licensing arrangements and equipment ordered by customers and/or partners for use with the capacity, co-location or backhaul services sold by the Company in the ordinary course of business"

(2) Next, there is a disposal falling within the second part of sub-paragraph (iv), which is concerned with obsolete assets (**"the Obsolete Exception"**):

"and any sale or other disposition of damaged, worn-out or obsolete assets"

(3) Finally, there is a disposal falling within the third and last part of sub-paragraph (iv), which is concerned with assets which are no longer useful (**"the Usefulness Exception"**):

"or assets that, in the good faith judgment of the Parent, are no longer useful in the conduct of the business of the Parent and the Subsidiaries taken as a whole (including the positioning of any satellite in an inclined orbit or the abandonment or other disposition or sale of any satellite (or satellite payload or component) or intellectual property that is in the reasonable good faith judgment of the Parent, no longer economically practicable to maintain or useful in the conduct of the business of the Parent and the Subsidiaries taken as a whole);"

79. By sub-paragraph (v) the Company could make a disposal falling into the following category (**"the Licence Exception"**):

"licenses and sublicenses by the Parent or any Subsidiary in the ordinary course of business;"

80. Moving on to Paragraph 2.22 in Part A, this imposes a further restriction, by sub-paragraph (b), on a disposal by a Guarantor (a definition which includes the Company), unless various conditions are satisfied. Subject to these conditions, the restriction is in the following terms:

"(b) A Guarantor (other than a Guarantor whose guarantee is to be released in accordance with any of the Finance Documents or paragraph 2.33 of Schedule 12 (Covenants)) will not, directly or indirectly: (1) consolidate or merge with or into another Person or (2) sell, assign, transfer, lease, convey or otherwise dispose of all or substantially all of the properties or assets of such Guarantor and the Subsidiaries taken as a whole, in one or more related transactions, to another Person, unless:"

81. The position, in terms of the disposal of assets is then effectively drawn together by Paragraph 2.32 of Part A, which provides in its opening part as follows:

"(a) Subject to the terms of the Intercreditor Agreement or any Additional Intercreditor Agreement, the Agent and the Security Agent(s) shall, at the request of the Parent or a Guarantor (if the Parent or such Guarantor has provided the Agent an Officer's Certificate and Opinion of Counsel certifying compliance with this paragraph 2.32) (i) release the relevant Collateral and (ii) execute and deliver appropriate instruments evidencing such release (in the form provided by and at the expense of the Parent), in each case, under one or more of the following circumstances:"

82. In terms of the circumstances in which such a release can take place, sub-paragraph (i) of Paragraph 2.32 provides as follows:

"(i) in connection with any sale, assignment, transfer, conveyance or other disposition of such property or assets to a Person that is not (either before or after giving effect to such transaction) the Parent or a Subsidiary, if the

sale or other disposition does not violate the "Asset Sale" provisions of this Agreement or paragraph 2.22 of this Part A of Schedule 12;"

83. As can be seen, the overall structure of the relevant restrictions in Part A of Schedule 12 is essentially the same as the permission to make a Non-Distressed Disposal created by the combination of the relevant provisions in the 2017 Debenture (as summarised above) and clause 14 of the Intercreditor Agreement. In the case of Part A of Schedule 12, a disposal is permitted by Paragraph 2.32 of Part A, provided that it does not violate the Asset Sale provisions or the provisions of Paragraph 2.22 of Paragraph A.

84. So far as Part A of Schedule 12 is concerned therefore, the overall position is as follows.
    (1) The Company could make a disposal which fell within the terms of any of the Asset Sale Exceptions, and was not caught by the restriction in Paragraph 2.22(b) of Part A.
    (2) The Company could make a disposal which did not fall within the terms of any of the Asset Sale Exceptions, and was not caught by the restriction in Paragraph 2.22(b), provided that (i) the conditions in Paragraph 2.9(a) of Part A were met and (ii) the proceeds of sale, if equal to or in excess of $1 million, were paid in accordance with the provisions of Paragraph 2.9(b) of Part A; that is to say the Waterfall Provisions.

85. Finally, it is worth noting that Paragraph 2.15(a) of Part A contains a prohibition on impairing the security interest, which is, in its material part, in the following terms:

    "The Parent will not, and will not cause or permit any Subsidiary to, take or omit to take, any action which action or omission would have the result of materially impairing the security interest with respect to the Collateral (it being understood that the incurrence of Liens on the Collateral permitted by the definition of "Permitted Collateral Liens" shall under no circumstances be deemed to materially impair the security interest with respect to the Collateral) for the benefit of the Agent and the Finance Parties, and the Parent will not, and will not cause or permit any Subsidiary to, grant to any Person other than the Security Agent(s), for the benefit of the Agent and the Finance Parties and the other beneficiaries described in the Security Documents, any interest whatsoever in any of the Collateral; provided that…"

86. The Collateral is defined in Part B of Schedule 12 to mean *"the rights, property and assets securing the Finance Documents and any rights, property or assets over which a Lien has been granted to secure the Obligations of the Parent and the Guarantors under the Finance Documents."*.

<u>Discussion – the First Stage</u>

87. There is not a great deal of ground to cover, in my discussion of the First Stage, because much of the ground has already been covered in my summary of the relevant provisions of the Security Documents. Essentially, there are two questions to be answered. The first question is whether the Relevant Assets are within the scope of the charging clause in the 2017 Debenture. The second question is what are the nature of the contractual restrictions and permissions on the disposal of the Relevant Assets, under the terms of the Security Documents.

88. I have already answered the first question. The Relevant Assets all seem to me to fall within the scope of the charge created by clause 3.1(b) of the 2017 Debenture. The charge thereby created was expressed to be a fixed charge, but this of course is not decisive in considering whether the charge created by clause 3.1(b) was fixed or floating.

89. Turning to the second question, and summarising the analysis set out in the previous section of this judgment, the overall position is as follows:
    (1) The Relevant Assets were all subject to considerable restrictions upon their disposal.
    (2) The Company could make a disposal of the Relevant Assets, by way of an Asset Sale pursuant to Paragraph 2.9(a) of Part A (of Schedule 12 to the SSF Agreement), provided that such disposal was not caught by the restrictions in Paragraph 2.22(b) of Part A, and provided that the following conditions in Paragraph 2.9(a) were met:
        (i) The Company had to receive consideration at least equal to the Fair Market Value of the assets disposed of.
        (ii) 100% of the consideration received had to be in the form of cash or Cash Equivalents.
    (3) In the case of such an Asset Sale, if the proceeds of sale were equal to or greater than \$1 million the Company had to apply the proceeds of sale in accordance with the Waterfall Provisions in Paragraph 2.9(b) of Part A.
    (4) Assuming that such a disposal was not caught by Paragraph 2.22(b) of Part A, the Company could make a disposal of the Relevant Assets which would not qualify as an Asset Sale, and would not be subject to the restrictions in Paragraph 2.9 of Part A, if it fell within one of the Asset Sale Exceptions.

90. This summary of the overall position leaves one matter unexamined, which is the scope of the relevant Asset Sale Exceptions; namely the Limited Value Exception, the Capacity Exception, the Obsolete Exception, the Usefulness Exception and the Licence Exception. I will consider each of these particular Asset Sale Exceptions in turn.

91. Starting with the Limited Value Exception, this permits disposals by single transaction or series of related transactions involving assets having a Fair Market Value of less than \$2 million. Fair Market Value is defined to mean the following:

    "the value that would be paid by a willing buyer to an unaffiliated willing seller in a transaction not involving distress of either party, determined in good faith by any responsible accounting or financial officer of the Parent."

92. The Limited Value Exception clearly permits the disposal of less valuable assets. It seems unlikely however that it was intended to permit the disposal of the Relevant Assets. The SIP 16 Statement deals with the value of the Group's assets, at pages 17 and 18. The Relevant Assets were valued as follows:

    "The assets sold by ACL that were individually valued by GT comprise those assets that are most material and which are considered to be subject to fixed charge security:

    — Satellite asset [Hylas 3]*: Value has been assessed on a value in use methodology, which estimates the value of an asset by calculating an NPV of cash flows under a specific use, payload only mission hosted on the ESRS-C satellite. The asset is valued at \$3.5m to \$3.7m.*

> — *Ground station and network assets* [the Network and Ground Station Assets]*: Given a lack of transferability for both of these asset types, GT have relied upon the Group assessment of NBV for these assets which equates to c$3m.*
> — *Orbital slots* [the Satellite Network Filings]*: These have been compared to available market acquisition benchmarks. Particular value has been placed on the slot used for Group operations. Based on these benchmarks, the value assessed is $20m to $50m (with the directors of ACL considering these to have a fair market value of $35m).*
> — *Other licenses* [the PES Licenses]*: GT do not consider there is separable value to other licenses required to conduct Avanti's business as these are not transferrable to third parties. Therefore, the value assessed is $nil."*

93. As these figures demonstrate, to the extent that the Relevant Assets were considered capable of disposal, their value was not such as to bring them within the Limited Value Exception. Within the Relevant Assets there might well have been a single asset which could have been hived off and made the subject of a separate disposal in reliance on the Limited Value Exception but, beyond this, it does not seem to me that the Limited Value Exception enabled the Company to dispose of the Relevant Assets free of the restrictions in the Security Documents.

94. Next, there is the Capacity Exception. The purpose of the Capacity Exception seems clear to me. The evidence is that the business of the Group included the sale of wholesale satellite broadband and satellite connectivity services; that is to say wholesale satellite capacity. The disposals permitted by the Capacity Exception had to be in the ordinary course of business. The obvious purpose of the Capacity Exception was to allow the Group to conduct its business of selling satellite capacity and associated licences and equipment. That business would have been stifled if the Group had been subject to the restrictions on the disposals which I have summarised above. The position seems to me to be analogous to that of any company deriving income from the use of a particular asset. The obvious example is land. A company may own the freehold interest in a piece of land, which it uses to generate income; say by running an amusement park on the land. A charge of the land itself, which restricted the company's ability to deal with the land, would not interfere with the business of the company. A charge over the income from the amusement park, which restricted the company's ability to make use of that income in order to run the amusement park and realise a profit, might well interfere with the business of the company.

95. I also note that the Capacity Exception only applied to *"capacity, co-location or backhaul services sold by the Company"*. This engages the question of what was meant by "the Company", which is not a defined expression in Part B of Schedule 12 or elsewhere in the SSF Agreement. It does not seem to me that it can mean the Company, as defined in this judgment, because sub-paragraph (iv) in the list of Asset Sale Exceptions, maintains a distinction between Parent and Subsidiary. As I construe sub-paragraph (iv), the reference to the Company is best read as a reference to the Group. This seems to me to make commercial sense of the Capacity Exception, in the sense that it allows any particular member of the Group to make sales of the kind permitted by the Capacity Exception. If the reference to the Company meant only the PLC, or only a particular company within the Group, it seems to me that this would have created potential problems, as it might thereby have prevented a particular

company or particular companies within the Group from carrying out the ordinary business of the Group.

96. Drawing together the above analysis, it does not seem to me that the Capacity Exception was intended to allow disposals of assets, such as the Relevant Assets, which the Group used to conduct its business. Rather, it seems to me that the Capacity Exception was intended to allow the Group to make sales, lettings or transfers in the ordinary course of its business. Put more simply, the Capacity Exception allowed the Group to deal in satellite capacity, as opposed to the equipment required for the generation of that capacity, without restriction.

97. Next, there is the Obsolete Exception. It seems to me that the reach of the Obsolete Exception, at least so far as the Relevant Assets were concerned, was limited. I say this for two reasons. First, the Obsolete Exception is only engaged where assets are damaged, worn out or obsolete. It is difficult to see how this could apply to intangible assets such as the Satellite Network Filings and the PES Licenses, or the Network and Ground Station Assets so far as they comprised intangible property. Second, the Obsolete Exception is not generally available. The relevant asset must be damaged, worn out or obsolete. The circumstances in which this situation will arise are necessarily limited, and any such disposal would be unlikely to involve anything particularly valuable.

98. Next, there is the Usefulness Exception. Again, it seems to me that the reach of the Usefulness Exception is limited. I can see that the Usefulness Exception is capable of applying to tangible and intangible assets. I can also see that the description of the assets within the scope of the Usefulness Exception is capable of extending to Hylas 3, the Satellite Network Filings and, conceivably, the PES Licenses. There is however the limitation that any such assets must have been judged no longer to be useful or no longer to be economically practicable to maintain, in the good faith judgment of the PLC in the conduct of the Group as a whole.

99. It seems reasonable to assume that the Usefulness Exception was intended to apply in a different situation to the Obsolete Exception. With this in mind it seems to me that the concept of use, in the Usefulness Exception, was intended to mean, in the case of the relevant asset, that the relevant asset was no longer useful to the Group, as opposed to a situation where the relevant asset was damaged, worn-out or obsolete.

100. Again, it seems to me that the circumstances in which a situation would arise which would engage the Usefulness Exception are relatively limited. A disposal falling within the Usefulness Exception would need to be one where the relevant asset could reasonably be judged no longer to be of use in the conduct of the business of the Group. In such a situation, it is difficult to see how the disposal would involve anything particularly valuable, unless the situation was one where, for a particular reason, the relevant asset had little or no value for the purposes of the Group's business, but did have value to the operator of another business.

101. In this context the Lead Secured Creditors also pointed to Paragraph 2.15(a) of Part A, which I have set out earlier in this judgment. Their argument was that if, in the good faith judgment of the PLC, a decision was made that a substantial asset was no longer useful in the business of the Group, the PLC was under an obligation to ensure that the

relevant member of the Group disposing of the relevant asset, pursuant to the Usefulness Exception, replaced the relevant asset with an asset of equal value. This obligation was said to arise by virtue of the obligation not to impair the security interest with respect to the Collateral, as set out in Paragraph 2.15(a). A failure to replace, so it was submitted, would have breached this obligation not to impair the security interest. While I accept that any such replacement asset which was acquired would become subject to the security created by the Security Documents, I am doubtful that the position in this respect is as straightforward as contended for by the Lead Secured Creditors. In theory, I can see that circumstances might arise where (i) a substantial asset became capable of disposal pursuant to the Usefulness Exception, and (ii) the disposal of the asset would result in a material impairment of the security interest. It is however not easy to envisage such circumstances, given that if the relevant asset was no longer of use in the conduct of the business of the Group, one might expect that asset not to have much value. Beyond this, I note that there is a proviso to Paragraph 2.15(a) which states that nothing in Paragraph 2.15(a) restricts the discharge or release of the Collateral in accordance with the Finance Documents. As such, it is not clear to me that Paragraph 2.15(a) would apply at all to a disposal pursuant to the Usefulness Exception. Looking at the matter in the round, I am doubtful that Paragraph 2.15(a) imposes an obligation to replace of the kind contended for by the Lead Secured Creditors.

102. That said, there is a more general point which can be made in the context of Paragraph 2.15(a), which is as follows. Paragraph 2.15(a) does strike me as a material provision in the scheme of restrictions and controls over the Relevant Assets which were imposed by the Security Documents in favour of the chargee. The general point remains in place that the PLC must ensure that the security interest is not impaired. Such a general obligation is capable of striking widely at dealings with assets, if I am wrong in my understanding of the proviso to Paragraph 2.15(a).

103. In terms of the Asset Sale Exceptions, this leaves the Licence Exception. On its face the Licence Exception appears fairly wide. It applies to *"licenses and sublicences by the Parent or any Subsidiary in the ordinary course of business"*. In theory, this might be said to extend to any kind of disposal of a licence, including the disposal of the Satellite Network Filings (as effective licenses) or the PES Licenses. Looking at the wording of the Asset Sale Exceptions they are introduced by words which indicate the kind of disposal which is the subject of the relevant Exception. By way of example, the Capacity Exception, the Obsolete Exception and the Usefulness Exception are all introduced by the words *"the sale, lease or other transfer"*. By way of further example, the Limited Value Exception is introduced by the words *"any single transaction or series of related transactions"*. In each case, the relevant Exception is introduced by words identifying the types of disposal which are within the relevant Exception. In the case of the Licence Exception, by contrast, the wording goes straight to *"licenses and sublicenses"*, which may be said to be wide enough to include any disposal of a licence or sublicence, whether by transfer or grant.

104. In reality I do not think that this can be correct. The relevant licence or sublicence must be *"by the Parent or any Subsidiary in the ordinary course of business"*. Given what I know of the Group's business, it seems obvious to me that the Licence Exception was intended to apply to the grant of licenses or sublicence by members of the Group in the ordinary course of their business. This makes obvious commercial sense. If a member

of the Group wished to grant a licence or sublicence to a customer, in order to allow the customer to make use of a particular service offered by the Group, it would be highly inconvenient if the relevant grant was caught by the restrictions on Asset Sales. Support for this analysis can, as it seems to me, also be derived from the wording which introduces other classes of Asset Sale Exceptions. If, by way of example, it had been intended that the Licence Exception should extend to the transfer of licenses or sublicenses, the obvious question which arises is why the drafting of the Licence Exception did not make specific reference to transfer, in common with the specific references to transfer in sub-paragraphs (ii) and (iv).

105. In summary, it seems to me that the scope of the Licence Exception is limited to the grant of licenses and sublicenses by members of the Group, in the ordinary course of the business of the Group. In my judgment the Licence Exception does not extend to the disposal of licenses or sublicences held by members of the Group.

106. There is one further matter with which I should deal before leaving the First Stage, although it may be said to be equally relevant to my discussion of the Second Stage. I have said earlier in this judgment that, subject to one limited exception to which I would come, there is no evidence of what I would regard as relevant post-contractual conduct; that is to say conduct which might affect my construction of the Security Documents. The limited, and essentially negative exception is this. Prior to the Transactions there is no evidence of a history of dealings with the Relevant Assets, or of the Relevant Assets having been charged other than by the Debentures. In particular there is no history of the restrictions in the Security Documents on making disposals not being observed. To the contrary, clause 6 of the amendment and restatement agreement dated 22nd October 2021, by which the SSF Agreement was amended and restated, recorded the request of the PLC to a waiver of the provisions of Paragraph 2.9 of Part A with respect to the Asset Sale which was intended pursuant to a series of factoring agreements, and also records the consent of the Agent to the PLC's entry into the factoring agreements. This is, to state the obvious, evidence of the restrictions in the Debt Facility Documents being observed.

107. With the above analysis of the ability of the Company to make disposals of the Relevant Assets in place, I turn to my discussion of the Second Stage.

<u>Discussion – the Second Stage</u>

108. Before I come to specific discussion of the nature of the charge over the Relevant Assets, it seems to me that it is necessary to deal with the suggestion, in both Goode & Gullifer and in Beale, Bridge & Gullifer, that the point in law has been reached where only total prohibition of all dealings and withdrawals without permission is enough to create a fixed charge, or only a total restriction on any disposal of the charged assets by the chargor without the consent of the chargee is sufficient to created a fixed charge. If these statements are correct then the charge created by clause 3.1(2)(b) of the 2017 Debenture could not have created a fixed charge over the Relevant Assets. As is apparent from my discussion of the First Stage, certain dealings with the Relevant Assets or some of them were permitted by the Security Documents.

109. In this context it is also helpful to make reference to an article to which my attention was drawn, which deals with the same question. The article in question appeared in the Journal of International Banking and Financial Law, on 1st October 2008, (2008) 9

JIBFL 467, written by Professor Sarah Worthington and Ina Mitchkovska. The title of the article is *"Floating charges: the current state of play"*. I am indebted to the authors for the expert assistance provided by the article, and for the review of the case law which the article contains. The article also provides a useful point of entry into the question which I am currently considering. This is because the authors, in their discussion of the characterisation rules, include the following analysis:

> *"In Re Spectrum Plus Ltd ([2005] 2 AC 680 [2005] UKHL 41 [2005] All ER (D) 368 (Jun)), the House of Lords approved this approach and held that the essential difference between a fixed and a floating charge turns upon the ability of the chargor/debtor to deal with the charged assets. The charge is fixed if and only if the chargor is required to preserve the charged assets, or their permitted substitutes, for the benefit of the charge. Without this requirement, the charge is floating. In particular, the charge is floating if the chargor is free to remove the charged assets, and their permitted substitutes, from the scope of the security, and use them for its own benefit in the course of its business (at least until the charge crystallises or the chargee intervenes to enforce the floating security) (see Lord Scott at [107], Lord Walker at [138], [139]."*

110. A little later in the article, the authors say this:

> *"The test adopted by the House of Lords now provides a relatively easy answer to the characterisation question: the charge is floating unless the chargor is barred from removing the charged assets and their permitted substitutes from the scope of the security and using them for its own benefit in the course of its business. It follows that the imposition of some restrictions on use in the ordinary course of business, but not amounting to a total embargo, simply will not do to attract the label of fixed charge. Because of this, fixed charges over many assets are now often commercially and operationally unattractive to the debtor."*

111. I find myself in respectful disagreement with the statements in these extracts which I have underlined. So far as the extracts cited from the speeches of Lord Scott and Lord Walker in *Re Spectrum* are concerned, I do not think that they support the underlined statements. I have already quoted Lord Walker at [138] and [139]. It seems to me that what Lord Walker was doing, in this part of his speech, was identifying the key differences between a fixed charge and a floating charge. In particular, Lord Walker made the following key point, at the end of [139], which I repeat for ease of reference:

> *"So long as the company trades in the ordinary way (a requirement emphasised by Romer LJ in the Yorkshire Woolcombers case [1903] 2 Ch 284, 295, and by the Earl of Halsbury on appeal in the same case [1904] AC 355, 357-358) the constituents of the charged fund are in a state of flux (or circulation). Trading stock is sold and becomes represented by book debts; these are collected and paid into the bank; the trader's overdraft facility enables it to draw cheques in favour of its suppliers to pay for new stock; and so the trading cycle continues."*

112. This is a reference to what is referred to in the case law as the circulating capital or fluctuating assets of the relevant company, which the company uses in its ordinary trading cycle. If the chargor is left free to deal with this circulating capital, the result is a floating charge. In the case of a charge over a company's circulating capital, one would normally expect that charge to be a floating charge, because otherwise the

control over the circulating capital given to the chargee by a fixed charge would, or might create commercial problems for the business of the company.

113. What was said by Lord Walker, at [138] and [139] is entirely consistent with what was said by Lord Scott at [111], which I also repeat for ease of reference:

> *"111. In my opinion, the essential characteristic of a floating charge, the characteristic that distinguishes it from a fixed charge, is that the asset subject to the charge is not finally appropriated as a security for the payment of the debt until the occurrence of some future event. In the meantime the chargor is left free to use the charged asset and to remove it from the security. On this point I am in respectful agreement with Lord Millett. Moreover, recognition that this is the essential characteristic of a floating charge reflects the mischief that the statutory intervention to which I have referred was intended to meet and should ensure that preferential creditors continue to enjoy the priority that section 175 of the 1986 Act and its statutory predecessors intended them to have."*

114. I have not previously quoted what was said by Lord Scott at [107], which is referred to by the authors of the article. At [107] Lord Scott said this:

> *"107. I respectfully agree. Indeed if a security has Romer LJ's third characteristic I am inclined to think that it qualifies as a floating charge, and cannot be a fixed charge, whatever may be its other characteristics. Suppose, for example, a case where an express assignment of a specific debt by way of security were accompanied by a provision that reserved to the assignor the right, terminable by written notice from the assignee, to collect the debt and to use the proceeds for its (the assignor's) business purposes, ie, a right, terminable on notice, for the assignor to withdraw the proceeds of the debt from the security. This security would, in my opinion, be a floating security notwithstanding the express assignment. The assigned debt would be specific and ascertained but its status as a security would not. Unless and until the right of the assignor to collect and deal with the proceeds were terminated, the security would retain its floating characteristic. Or suppose a case in which the charge were expressed to come into existence on the future occurrence of some event and then to be a fixed charge over whatever assets of a specified description the chargor might own at that time. The contractual rights thereby granted would, in my opinion, be properly categorised as a floating security. There can, in my opinion, be no difference in categorisation between the grant of a fixed charge expressed to come into existence on a future event in relation to a specified class of assets owned by the chargor at that time and the grant of a floating charge over the specified class of assets with crystallisation taking place on the occurrence of that event. I endeavoured to make this point in Smith (Administrator of Cosslett (Contractors) Ltd) v Bridgend County Borough Council [2002] 1 AC 336 , 357, para 63. Nor, in principle, can there be any difference in categorisation between those grants and the grant of a charge over the specified assets expressed to be a fixed charge but where the chargor is permitted until the occurrence of the specified event to remove the charged assets from the security. In all these cases, and in any other case in which the chargor remains free to remove the charged assets from the security, the charge should, in principle, be categorised as a floating charge. The assets would have the circulating, ambulatory character distinctive of a floating charge."*

115. I do not find in this part of Lord Scott's speech a statement to the effect that a charge is a fixed charge if and only if the chargor is required to preserve the charged assets, or their permitted substitutes for the benefit of the chargee. The point made by Lord Scott in this part of his speech, in a case involving a charge over book debts, was that where the chargor remains free to remove the charged assets from the security, the charge should, in principle, be categorised as a floating charge. This does not seem to me to be the same as saying that a charge can only be fixed if the chargor is required to preserve the charged assets or their permitted substitutes for the benefit of the chargee. Such a statement does not seem to me to engage with the question of what degree of restriction, from the point of view of the chargor, and what degree of control, from the point of view of the chargee, is required for the relevant charge to be a fixed charge. The speeches of their Lordships in *Re Spectrum* do not seem to me to support an absolute approach to this question. In particular, the speeches do not seem to me to support the statements of the authors in Goode & Gullifer and in Beale, Bridge & Gullifer to the effect that a total prohibition on disposals is required before a charge can be fixed.

116. It seems to me that the same point emerges equally clearly from the speech of Lord Millett, in *Agnew*. I have already cited what was said by Lord Millett in *Agnew*, at [23]. For ease of reference I repeat the last part of [23]:

> *"If the chargor is free to deal with the charged assets and so withdraw them from the ambit of the charge without the consent of the chargee, then the charge is a floating charge. But the test can equally well be expressed from the chargee's point of view. If the charged assets are not under its control so that it can prevent their dissipation without its consent, then the charge cannot be a fixed charge."*

117. To the same effect is the extract from Lightman & Moss which I have also quoted earlier in this judgment. I repeat the last part of this extract, for ease of reference, with my own underlining:

> *"Any <u>unfettered or significant commercial freedom</u> in the chargor to deal with a fluctuating class of assets without the consent of the chargee will be inconsistent with the existence of a fixed charge over those assets. <u>The critical issue is the nature and extent of the chargee's control of the assets in question.</u> Resolution of this issue will therefore require <u>an examination of the nature and extent of the restrictions placed by the charge documents and any ancillary agreements upon the dealings by the company with the charged assets</u>".*

118. Turning to the other cases to which I was referred in the submissions, some of which I have also cited earlier in this judgment, I do not find any support in those cases for an absolute approach of the kind suggested in the two textbooks mentioned above. I can see that it is helpful, in considering the question of whether a charge is fixed or floating, to look at the range of possibilities as a spectrum, with total freedom of management at one end of the spectrum, and a total prohibition on dealings of any kind at the other end of the spectrum; see Goode & Gullifer at 4-23. What I cannot see is that a charge will only be fixed if it is located at the total prohibition end of the spectrum. The case law seems to me to support a more nuanced approach, which depends upon a combination of factors. This, it seems to me, was the essential point being made by Millett LJ (as he then was) in the extract from his judgment in the Court of Appeal in *Re Cosslett* which I have quoted above, and again in the extracts, which I have also quoted above, from the judgment of the Privy Council which Lord Millett delivered in *Agnew*.

119. I do not think that it is either sensible or appropriate for me to attempt my own description of the characteristics of a fixed charge and a floating charge. The case law provides ample guidance in this respect, upon which I cannot improve. Nor do I think that it is sensible or feasible to try to identify the location of the point on the spectrum of possibilities where a floating charge gives way to a fixed charge, or vice versa. For present purposes it is sufficient to say that the case law seems to me to support a nuanced approach to the question of whether a charge is fixed or floating, which requires a number of factors to be taken into account. The case law again provides ample guidance on the factors to be taken into account, but I would make particular reference to what was said by Stanley Burnton QC (as he then was) in *Re Cimex Tissues Ltd*, at 635, which I have already quoted, but which I repeat for ease of reference (with underlining added):

> *"If the crucial difference between a fixed charge and a floating charge is in the nature of the interest of the chargee prior to any event of crystallisation, it would follow that a licence for the chargor to deal to some extent with the charged assets is not necessarily inconsistent with a fixed charge. If, however, the licence to deal given to the chargor is extensive, the charge will be floating, since in these circumstances there is in effect no attachment of the charge to any specific asset: see Goode, Legal Problems of Credit and Security, at p. 56. The extent to which the licence to deal is compatible with a fixed charge must depend on all the circumstances of the case, and in particular on the nature of the charged property. Where the charged property is stock, or book debts - i.e. where the assets are naturally fluctuating - the court will readily conclude that a liberty for the chargor to deal with the charged assets is inconsistent with a fixed charge. Where, as in the present case, the assets are specific and do not necessarily fluctuate, some liberty to release the charged assets may not be inconsistent with a fixed charge. Conversely, however, on this basis a floating charge over present goods, not extending to future goods, is not a conceptual impossibility."*

120. Returning to the article, and independent of my disagreement with the earlier sections of the article quoted above, it seems to me that the authors also provide some useful commentary, on the correct approach to distinguishing between fixed and floating charges, in the following extract from the penultimate section of the article:

> *"Spectrum was a case concerning debts. Its analysis has general application, but the case can easily be misapplied in considering how to characterise charges over other revenue-generating assets. Many assets generate revenue; land, shares, insurance contracts, contractual performance rights, equipment put out for hire, leasing agreements. If the chargor is entitled to use the revenue at will, is the charge over the underlying asset properly characterised as fixed or floating?*
>
> *Some of these cases are easy. The trick is to remember to focus on the charged asset, and ask whether that asset (or its substitute) has to be preserved for the benefit of the chargee. A charge over land, for example, will be a fixed charge, notwithstanding that the income from any commercial operations taking place on the land is at the disposal of the chargor, not the chargee. The same is true of a charge over a fleet of vehicles run by a car-hire company, or a charge over equipment (such as computers, televisions, furniture) that may be hired out to customers. It is only if the charged asset itself (the land or equipment) is at the free disposal of the chargor that the charge is floating. The same approach is*

appropriate if the charge is over shares, even if the chargor is entitled to use the dividends at will (Arthur D Little (in admin) v Ableco Finance LLC [2002] EWHC 701 Ch). In all of these cases, the charged assets are themselves preserved intact for the benefit of the chargee, so that the charge is fixed."

121. Applying my analysis thus far, I come to the conclusion that the charge over the Relevant Assets was not necessarily a floating charge simply because the Company had some ability, under the terms of the Security Documents, to deal with the Relevant Assets or some of them. In order to determine whether the charge was fixed or floating, it is necessary to consider all the circumstances of the present case, and the factors identified in the case law as important to the determination of whether a charge is fixed or floating. I therefore turn to a discussion of the factors, as identified in the case law, which are relevant in this determination.

122. I start with the nature of the restrictions contained in the Security Documents.

123. As I have already noted, these restrictions did not impose a total restriction on the Company dealing with the Relevant Assets or some of them. Nevertheless the ability of the Company to deal with the Relevant Assets was strictly limited. In terms of complete freedom to deal with the Relevant Assets, the Company did have the ability, but only if and in so far as the relevant disposal fell within one of the Asset Sale Exceptions, and then only if the relevant disposal was not caught by Paragraph 2.22 of Part A of Schedule 12. For the reasons which I have already set out, the Asset Sale Exceptions only provided limited opportunities to make disposals of the Relevant Assets, and only in particular sets of circumstances. Most importantly, it seems to me that the Asset Sale Exceptions provided no opportunity for the Company to dispose of the Relevant Assets or any of them in the ordinary course of its business, by which I mean the ordinary course of the Company's trading.

124. Turning away from the Asset Sale Exceptions, and concentrating upon Paragraph 2.9(a), this did give the Company the ability to make disposals of the Relevant Assets, provided that the conditions in sub-paragraphs (i) and (ii) were observed. This ability was however materially, and critically qualified by the requirement, in Paragraph 2.9(b), to comply with the Waterfall Provisions, on commercially unattractive terms, save in the case of disposals where the proceeds of sale were less than $1 million. Paragraph 2.9(b) may not have amounted to an actual restriction on the disposal of the Relevant Assets, but it seems to me that it rendered any such disposal commercially unattractive, not only because of the offer price required by Paragraph 2.9(b)(i), but also because the Company could not exploit the proceeds of any such disposal for the benefit of its own business. It is important to note that, in *Re Spectrum*, Lord Hope provided a summary, at [54], of the four methods to take effective fixed charge security over book debts. One of these methods was *"to prevent all dealings with the book debts other than their collection, and to require the proceeds when collected to be paid to the chargee in reduction of the chargor's outstanding debt"*. In the present case the requirement of payment to the charge, save for disposals under the $1 million floor, was achieved by Paragraph 2.9(b).

125. By the same token, it seems to me that the scheme of restrictions on disposals of the Relevant Assets, contained in the Security Documents, gave to the chargees of the charge very significant control over the Relevant Assets. The essential point, as it

seems to me, is that the Company was not free to deal with the Relevant Assets. Its freedom to deal with the Relevant Assets was materially and significantly limited. Putting the matter another way, it seems to me that the scheme of restrictions in the Security Documents gave the Company no ability to deal with the Relevant Assets in the ordinary course of its business.

126. Beyond the restrictions contained in the Security Documents, it is also important to consider the nature of the Relevant Assets. The Relevant Assets do not seem to me to have constituted anything resembling the circulating capital or fluctuating assets of a company. On the basis of what I know of the business of the Group, it seems to me that the Relevant Assets are more correctly characterised as the tangible and non-tangible infrastructure owned by the Company, which was used to generate the sources of the Company's business income. The Relevant Assets did not need to be sold to generate this income. In addition to this the Relevant Assets were all assets which, at least to varying degrees, were inherently difficult to transfer.

127. The distinction between an income generating asset and the income generated by that asset has been recognised in the case law. For ease of reference, I repeat what was said by the Deputy Judge in *Arthur D Little Ltd*, but on this occasion setting out the whole of what was said at [40]:

> *"In my judgment, bearing that passage I have just quoted in mind, Mr Moss is right on this aspect of the case for the following reasons.*
>
> *(1) Although clause 3.1(d) referred quite generally to all the subsidiary shares, it is plain from the definition of "subsidiary shares" in clause 1.1, from the reference in clause 7.3 and the identification of the shares in schedule 2, that at the time the debenture was made the only shares intended to be covered at that time by the debenture were specifically the CCL shares; that is, the shares that I have to consider. These are the only shares mentioned. I do not, therefore, regard this aspect as inconsistent with a fixed charge.*
>
> *(2) I again remind myself that the company was not trading in shares and no one has suggested it did. The essential nature of its business cannot, in my judgment, be ignored. The shares in CCL were not part of the company's circulating capital and it did not need to sell them, to deal with them, or to substitute them as part of its ordinary business as a management consultant, C nor to improve or assist its cash flow as part of that business. The shares were not part of a fluctuating body of assets which changed from time to time in the ordinary course of the company's business.*
>
> *(3) The shares did not remain under the management and control of the chargor in a manner which meant the company was free to withdraw them from the security, despite the charge, and to deal with them as part of its stock in trade: see In re Cosslett (Contractors) Ltd [1998] Ch 495, 510, per Millett LJ, and the passages I have cited in Agnew v Comr of Inland Revenue [2001] 2 AC 710, 719, 725, paras 13, 32. The shares could not be sold: see clause 6 and clause 8.5(a) and (b), entitling Ableco to secure transfer of the shares."*

128. In Goode & Gullifer, the position is described in the following terms, at 4-17 (underlining added):

> *"The position is less clear where the charge is over an income-generating asset. <u>Where the asset is clearly separate from the income generated, for example, a chattel which could be hired out, control of the income is not required for a fixed</u>*

charge over the asset itself. It is a matter of construction of the fixed charge as to whether it is over the asset itself, or over the lease by which the asset is hired out. If it is over the former alone, there is no need for the charge to control any rental income."

129. Both *Agnew* and *Re Spectrum* were concerned with charges over book debts, where there was no distinction of the kind drawn in Goode & Gullifer. The Privy Council examined this problem in *Agnew*, which Lord Millett described in the following terms, at [42] and [43]:

"42. Their Lordships turn finally to the questions which have exercised academic commentators: whether a debt or other receivable can be separated from its proceeds; whether they represent a single security interest or two; and whether a charge on book debts necessarily takes effect as a single indivisible charge on the debts and their proceeds irrespective of the way in which it may be drafted.
43. Property and its proceeds are clearly different assets. On a sale of goods the seller exchanges one asset for another. Both assets continue to exist, the goods in the hands of the buyer and proceeds of sale in the hands of the seller. If a book debt is assigned, the debt is transferred to the assignee in exchange for money paid to the assignor. The seller's former property right in the subject matter of the sale give him an equivalent property right in its exchange product. The only difference between realising a debt by assignment and collection is that, on collection, the debt is wholly extinguished. As in the case of alienation, it is replaced in the hands of the creditor by a different asset, viz its proceeds."

130. The answer of the Privy Council to this problem was set out in the following terms, at [46]:

"46. While a debt and its proceeds are two separate assets, however, the latter are merely the traceable proceeds of the former and represent its entire value. A debt is a receivable; it is merely a right to receive payment from the debtor. Such a right cannot be enjoyed in specie; its value can be exploited only by exercising the right or by assigning it for value to a third party. An assignment or charge of a receivable which does not carry with it the right to the receipt has no value. It is worthless as a security. Any attempt in the present context to separate the ownership of the debts from the ownership of their proceeds (even if conceptually possible) makes no commercial sense."

131. This problem does not seem to me to arise in the present case, which is not concerned with book debts, but with what I understand to be income generating assets. The separation can therefore be drawn which is identified in Goode & Gullifer.

132. In summary therefore, the Relevant Assets seem to me to have been assets which could perfectly well have been the subject of a fixed charge. They were income generating assets of the Company, which were not themselves part of the circulating capital or fluctuating assets or circulating stock in trade of the Company.

133. In their submissions the Joint Administrators described the Characterisation Issue as finely balanced. If this means that the answer to the Characterisation Issue is not obvious in the present case, and requires careful analysis of the Relevant Assets and the Security Documents, by reference to the relevant case law, I would agree. Beyond this, I would not agree. Analysing the scheme of relevant restrictions in the Security

Documents, so far as they affected the ability of the Company to deal with the Relevant Assets, taking into account the nature of the Relevant Assets, and looking at all the circumstances of this case, it seems quite clear to me that the charge over the Relevant Assets created by clause 3.1(b) of the 2017 Debenture and the charge over the Relevant Assets created by the equivalent charging clause in the 2013 Debenture both took effect as fixed charges when created, and remained fixed charges at the time of the Transactions.

Conclusion

134. For the reasons set out in this judgment, I reach the following conclusions:

(1) At the time of entry into each of the Debentures, the security created over the Relevant Assets by the relevant Debenture was a fixed charge.

(2) At the time of the Transactions the Relevant Assets continued to be secured by the fixed charge created by the 2017 Debenture and, so far as this remains relevant, the fixed charge created by the 2013 Debenture.

135. I will make a declaration to the above effect.