



# Hamel-Smith

ATTORNEYS-AT-LAW, TRADEMARK & PATENT AGENTS

# FORUM

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## BANKS LEFT FLOATING

**National Westminster Bank v  
Spectrum Plus Ltd. & Ors.**

*Nicole Ferreira-Aaron & Timothy Hamel-Smith*

### The Decision

The House of Lords recently delivered its judgment in *National Westminster Bank v Spectrum Plus Ltd. & Ors.* Their Lordships unanimously decided that the Bank's debenture created a floating charge over the Company's book debts, as opposed to a fixed charge, despite the wording of the debenture.

The House of Lords accepted that it is conceptually possible to have a fixed charge over book debts. However, their analysis makes this difficult to achieve in practice. The decision also emphasises that in determining whether a charge is fixed or floating, the important deciding factor will be the commercial nature and substance of the arrangement and what happens in practice and not just what the document says.

### Why Does It Matter?

Book debts can comprise a significant part of a company's assets. For this reason the issue of whether they are subject to a fixed or floating charge can have a serious impact on the value of the security available to a debenture holder. In particular, a bank that finds that its charge over book debts is deemed to be floating rather than fixed will lose priority to preferential creditors as well as to any party who has subsequently obtained an effective fixed charge over the same pool of assets.

In arriving at their decision, the House of Lords overruled the decision in *Siebe Gorman* in which a similarly worded debenture was found to have created a fixed charge. Standard form debentures used by most banks have been drafted in reliance on the *Siebe Gorman* decision for 25 years. Because of this, the House of Lords was asked to rule that the effect of its decision should be purely prospective. However, they somewhat reluctantly refused to do so and the decision

therefore affects debentures granted prior to the judgment, as well as those granted after its delivery.

The decision in *Spectrum Plus* should not, however, have come as a complete surprise as there has been considerable doubt about the decision in *Siebe Gorman*. Perhaps most notably, the Privy Council (in its 2001 decision in *Brumark*) had already held that a charge over book debts that was described as a fixed charge in fact took effect as a floating charge where the charger retained the ability to deal with the book debts and their proceeds and it is basically the analysis in *Brumark* that has been preferred and applied in *Spectrum Plus*.

### And What Should The Banks Be Doing?

Because of the doubts over *Siebe Gorman* and more particularly the Privy Council decision in *Brumark*, lenders ought generally to have been aware of the risks that charges over book debts which were described as fixed might in fact only take effect as floating charges. Accordingly, they should have already adjusted many of their practices to take this possibility into account.

Nevertheless, in response to the decision in *Spectrum Plus*, banks would be well advised and are likely to review their outstanding facilities which seek to create a fixed charge over book debts. In any case where a significant element of the bank's security consists of a charge over book debts, both the terms of the existing debenture and the bank's course of dealings with the company should be examined. As a result of this process, the bank should be able to identify and take appropriate steps to mitigate any risks. Of course, the bank should also develop and implement appropriate new

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# THE IMPORTANCE OF MAKING AND UPDATING MY WILL

*Petal Roopnarine & Celeste Mohammed*

With our busy lives today, many of us procrastinate about making or updating our wills. However, it is important that each of us make the time to think through certain fundamental issues that arise when we make and update our wills. For example:

- Who would I like to look after my minor children if both of their parents should die?
- Which of my assets would I like to leave to whom?
- Who do I trust to make sure that my wishes for the care of my children and the distribution of my assets are faithfully carried out?
- How should I deal with any assets that I have abroad, particularly bearing in mind that there may be taxes imposed on transfers of those assets in many jurisdictions?

## **What Is A Will?**

A Will is an expression of a person's wishes to take effect after his death and is revocable at any time during his lifetime. By his Will, a testator appoints one or more persons to be his "executor" or "executors" who will administer his estate according to his expressed wishes. The law also permits trust corporations to be named as an executor in a Will. The law sets out very strict formalities for the signing and attestation of a valid Will. It is therefore very important to ensure that all of the relevant legal requirements are fulfilled if a document containing a person's wishes after his death is to be legally effective as a Will.

## **The Advantages Of Making A Will**

By making a comprehensive Will, and updating it when necessary, I ensure not only that my wishes are known but also that I have appointed the person or persons that I consider to be most suitable and trustworthy to see that my wishes are faithfully carried out after my death. In this way, I significantly reduce the risk of disputes over my estate which can become very expensive, protracted and ugly. I can therefore feel comfortable that I have done what I can to safeguard my family and loved-ones in the event of my death.

If a person fails to make a valid Will, he is deemed to die "intestate", in which case the law will determine who will be entitled to administer the estate and how

the property of the estate will be distributed. One unfortunate consequence of this may be that some persons whom I do not wish to benefit from my estate may be made beneficiaries by law, while others persons whom I would have wished to benefit may be excluded. Another is that someone who may be totally unsuited to the task of administering my estate can be appointed by the law to carry out this important and sensitive duty.

One often-overlooked, but critical, advantage of making a Will is that it provides a means by which I can give clear instructions about important matters affecting my children. In accordance with the *Family Law (Guardianship of Minors, Domicile and Maintenance) Act*, I can nominate a guardian to look after my children should anything happen to both parents. I can leave directions to allow monies to be made available for my children's upbringing and education. I can identify a suitable person or persons to handle the monies and any other assets I leave for them until they are able to do so for themselves. And I can say at what age I think that my children should take control of any money and other assets that I leave them.

## **Updating Or Making A New Will**

Even if I have already made a Will, it is important to stop from time-to-time and consider whether I might need to update it or make an entirely new Will. Generally speaking, it is useful to revisit my Will whenever there are any significant changes in my life or anything else occurs that has the potential to affect my wishes about how my assets should be distributed or administered after my death. For example, if I am about to be married, or have become married any time after making a Will, then I will need to make a new one. This is because, as a general rule, a marriage automatically revokes a previous Will of either party.

## **Assets Located Abroad**

A Will, validly executed under Trinidad law, can be stated to cover land and other assets located abroad. However, it is recommended that you consult with an attorney-at-law in the country where such land (and other assets) are located, who can advise as to legal aspects of ownership and taxation laws which may have a significant impact on the value of what you

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# BANKS LEFT FLOATING

## National Westminster Bank v Spectrum Plus Ltd. & Ors. (cont'd)

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documentation and practices for fresh debentures going forward.

In relation to financing transactions generally, and not just those involving debentures, *Spectrum Plus* provides a useful reminder that the Courts will look beyond the wording of the security and other commercial documents to the commercial nature and substance of the arrangements between the parties, including the way that their relationship and dealings are managed in practice. While it remains very important to ensure that the bank is utilising the most modern and favourable documents in all of its significant transactions, it is equally important to ensure that the bank's downstream practices and procedures support, rather than undermine, its objectives.

### So What Works To Create A Fixed Charge (And What Does Not)?

It is in law possible to create a fixed charge over all present and future book debts. However, if the company remains free to use the proceeds of the debt without restriction from the bank and to remove them from the security until it is enforced, the charge will be a floating charge even

if described as a fixed charge.

Essentially, whatever the debenture might say, a charge is floating (and not fixed) where the bank does not control the use of the proceeds. While it has not been specified exactly how much control by the bank is necessary to make the charge a fixed charge, the following methods of ensuring that a charge over book debts is fixed were cited with approval by the House of Lords:

- assigning the book debts to the bank and preventing all dealings with the debts by the company;
- preventing all dealings by the company with the debts other than their collection and requiring the proceeds when collected to be paid in reduction of the company's outstanding debt;
- preventing all dealings by the company with the debts other than their collection and requiring the proceeds to be paid into a blocked account with the bank;
- preventing all dealings by the company with the debts other than their collection and requiring the proceeds to be paid into a separate account with a third party bank over which the lending bank takes a fixed charge.

On the other hand, a debenture will not create a fixed charge over book debts where the company:

- is prohibited from disposing of its debts; and
- is required to pay the proceeds into an account with the bank, but is in fact able to draw on the account without restriction from the bank.

Additionally, a debenture will not create a fixed charge over book debts where it purports to:

- divide the debts from their proceeds;
- create a fixed charge over the debts; and
- create a floating charge over the proceeds.

If the debenture creates a floating charge over the proceeds, then it is also a floating charge over the debts.

The effect of this ruling is likely to force banks to reconsider lending decisions where a borrower's book debts represent its major group of assets. Banks and its customers may be challenged to find innovative alternatives one such perhaps being asset backed financing arrangements.

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## THE IMPORTANCE OF MAKING AND UPDATING MY WILL (cont'd)

leave for your family and loved-ones. In particular, given that many jurisdictions impose onerous taxes on transfers of assets after death, there may be steps that can be taken to mitigate the consequences of such taxes, particularly if the appropriate steps are taken sufficiently early.

### Making Sure That My Will Is Valid

Because the law is so very strict about the need to

observe the formalities for the signing and attestation of a valid Will it is essential to ensure that all requirements are fulfilled. An Attorney-at-Law can assist with these requirements and also advise as to various aspects of property ownership which can assist you in drafting a Will that is an effective expression of your wishes. If you reside abroad, it is also advisable to consult an Attorney-at-Law about issues relating to "domicile" and the "proper law" of your Will.

*Please Circulate*

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