ন ৬৩১১

ISSN 1991-8976

Rajshahi University Law Journal

Volume 09 2014

Faculty of Law
University of Rajshahi

ISSN 1991-8976

Rajshahi University Law Journal (RULJ)

Volume 09 2014

Published by

Dean

Faculty of Law
University of Rajshahi
Rajshahi - 6205
Bangladesh

Faculty of Law

University of Rajshahi

Rajshahi University Law Journal (RULJ) Volume 09 2014

Rajshahi University Law Journal (RULJ) 2014
Faculty of Law
University of Rajshahi

Volume 09 2014

Published by
Dean
Faculty of Law
University of Rajshahi
Rajshahi - 6205, Bangladesh

Cover Design & Printed by
Md. Ariful Islam
Text Dot Com (TDC)
Farmgate, Motihar, Rajshahi-6212
Cell: 01711-951377

Subscription Rates
For Individuals : Tk200.00 US$ 20 (excluding postage)
For Organisation : Tk300.00 US$ 30 (excluding postage)

[Published in January 2016]

Rajshahi University Law Journal (RULJ) Volume 09 2014

EVOLUTION OF FIXED AND FLOATING CHARGES OVER BOOK DEBTS IN COMMON LAW JURISDICTION THROUGH CASE LAWS: AN ANALYSIS

Sharmin Farzana*

ABSTRACT *Before entering into a commercial relation, labeling of charges over book debts is very essential for both of lenders and borrowers. Generally, labeling is made according to the intention of the parties but sometimes consequences seem to be different. So, controversy remains there. It was first declared in the case of Siebe Gorman & Co ltd v Barclays Bank Ltd (1979)*[1] *that fixed charge can be created over book debts. But 25 years later the decision was overruled by the House of Lords in the case of Re Spectrum Plus (2005).*[2] *The main purpose of this paper is to analyse how fixed and floating charges are categorised by different case laws and also the implications of the charges in common law jurisdiction. This paper also suggests that the controversy regarding the categorisation of charges can be solved by the rights and obligations of the parties confined to each other.*

KEYWORDS: *Bank, book debts, common law, company, fixed charge, floating charge*

1. INTRODUCTION

The fixation or categorisation of charges over book debts of a company is a controversial issue in the history of company law in common law jurisdiction since 1979. In order to develop the function of the company, borrowing money from bank or from any financial institution is a common saga in the commercial world and bank take charges from company in order to have enforceable interest incase of failure of the company to pay their due debt or return though it does not hamper the title or ownership of the company. The charge can be either a floating charge or a fixed charge depending on the nature of the property on which a charge is granted. Normally, when a charge is granted on the capital structure of the company, such as land, stable plant and machinery and the company can not deal with the asset without prior consent of the bank (the chargee), that can be categorised as a fixed charge. And when a charge is granted on the fluctuating nature of asset of the company such as raw materials, book debts and there's no necessary of prior consent of the debenture holder to deal with the asset of the company that can be categorised as a floating

* Lecturer, Department of Law at University of Information Technology & Science, Chittagong, Bangladesh; farzana_du107@yahoo.com.

[1]2 Lloyd's Rep 142.

[2]UKHL 41.

charge. Generally, company prefers to grant floating charge instead of fixed because it's much easy to generate profit to repay the loan.

Sometimes it is seen that parties agree in diverse terms in labeling the charges but the consequences seem totally different than the label which shows the intention of the parties which was the significant concern of the *Siebe Gorman* case (1979). In the case of *Siebe Gorman*(1979) attempt has been made to define the accuracy of the label attached to the charges over book debts and was held that a fixed charge can be created over book debts though book debts were the fluctuating assets of the company. And for many years, it has been considered as an indispensable rule in granting charges over book debts though controversy regarding the categorisation of fixed or floating charges over book debts remains there. But recently the House of Lords in *Re Spectrum Plus* case (2005), on 30 June 2005 unanimously decided overruling the 25 years old decision of the *Siebe Gorman* casethat in spite the labeling of charges over book debts as fixed, floating charge can be created over book debts and its proceeds. In this case, it was also decided that the determination of fixed or floating charges over book debts is not fixed by the description in the agreement rather it is fixed by the nature of rights and obligations granted by the party to each other. The implication of the *Re Spectrum plus*case is significant as it finally resolves the controversy regarding characterising of fixed or floating charge in the commercial world and it expressly overrule the 25 years old decision with prospective effect only, for the first time in the history of the common law jurisdiction.

The main purpose of the paper is to determine the controversy arisen over the label attached to a charge over book debts as either a fixed charge or floating charge and for critical analysis; emphasis is given here, on case laws perspective in common law jurisdiction. There are many cases regarding categorising fixed and floating charge in common law jurisdiction but here discussion has been made only on the line of cases which really helped to develop and implicate the evolution of fixed and floating charges in common law jurisdiction. The article begins by focusing the line of the case laws starting from *Siebe Gorman* and then discusses the cases in separate categories where fixed or floating charge are granted in order to understand the important differences between fixed and floating charges especially which were determined by different case laws and side by side the impact of the cases in common law jurisdiction.

This paper provides an ample scope to examine how the debate on charges over book debts has been finally resolved by the House of Lords in *Re Spectrum Plus* case and how they mitigate the potential harshness of any law, different from the previously issued law, by making the law prospective only. And to achieve this purpose, focus has been made on the history, reasoning and also positive and negative implication of the *Re Spectrum Plus* case in common law jurisdiction regarding the grant of fixed or floating charge over book debts of a company.

2. FIXED AND FLOATING CHARGES IN COMMON LAW JURISDICTIONS: A COMPARISON OF THEIR KEY FEATURES

In case of fixed charge, the charge holder has full control over the charged property and the company can not deal with the assets without the prior consent of the charge holder. So, after the creation of a fixed charge, fixed charge holder gets an equitable proprietary interest in the property and in case of insolvency of the company the fixed charge holder gets preferential interest in the property of the company.

On the contrary, in case of floating charge, the company can deal with the circulating assets of the company in ordinary course of its business without the prior consent of the charge holder and in case of any failure of company to pay its due debts the floating charge crystallises into a fixed charge. Thus, after creation of the floating charge, floating charge holder gets an immediate equitable interest in the property because floating charge is not for future security rather for present security which presently affects all the assets of the company expressed to be included in it, explained by Buckly LJ in the case of *Evans v Rival Granite Quarries Ltd* (1910) in the Court of Appeal (Lowry and Dignam, 2006: 93-98).

The most significant characteristics of floating charge are mentioned by Romer LJ in the case of *Re Yorkshire Woolcombers Association* (1903).[3] According to him, a charge is a floating charge if it has the following characteristics:

i. it is a charge over a class of assets present and future;

ii. that class will be changing from time to time; and

iii. until the charge crystallises and attaches to the assets, the company may carry on its business in the ordinary way.

These three characteristic differentiate fixed charge from floating chargewhich is also mentioned in the case of *Agnew and another v. Commission of Inland Revenue* (2001).[4] Here as per Lord Millet, 'it is the third characteristic which is the hallmark of a floating charge and serves to distinguish it from a fixed charge'. Thus, it has been mentioned in the case of *Illingworth v Houldsworth (1904)* by Lord Macnaghtenthat fixed charge can be created over ascertained and definite property which is capable of being ascertained and defined and on the other hand, floating charge can be created over ambulatory and shifting nature of property until itscrystallized.

3. EVOLUTION OF FIXED CHARGES OVER BOOK DEBTS THROUGH CASE LAWS

Lang (2007) suggested that in reality lenders prefer fixed charges in order to be more secured and borrower wants floating charges in order to have freedom to deal with book debts and proceeds in the ordinary course of its business because book debts as being a part of the circulating capital of a company, is an important source of cash flow and it is very difficult to carry on business having subject them to a fixed charge.

And this commercial factor was challenged in 1979 in *Siebe Gorman* casewhich was the first in history in which the court declared that it was possible to create a fixed charge over a company's present and future book debts (Hanloon and Heywood 2006). This case was concerned with the proceeds of book debts over which the company has purported to grant its bank a fixed charge. The company was prohibited from disposing of the uncollected debts and although it was free to collect them, it was required to pay the proceeds into an account in its name with the bank. It was

[3] 2 Ch 284.

[4] 2 A. C. 710; 13 .WLR 454.

held that a fixed charge was effectively created in this case because the company was not free to deal with the account which it had with the bank without prior consent of the bank and the borrower was treated only as an agent for the purpose of collecting the said debts and paying them into a designated account under the control of the lender (C S Yeo 2002: 71).

So, this is the first ever judicial pronouncement of the common law court to decide that fixed charge can be created over book debts or fluctuating assets of a company and in order to do that sufficient control must be needed over the book debts of the company. Following the decision the principle was adopt by many of banks and financiers. The decision of the *Siebe Gorman* was affirmed a number of cases including *Chalk v Kahn (2001); Realisations Ltd (2001), William Gaskell Group Ltd v Highley (Nos 1, 2 and 3) (1994), Re Portbase Clothing Ltd (1993) and Re New Bullas ltd (1993).*[5]

Re Keenan Bros (*1985)*[6] is another example of evolution of fixed charges in common law jurisdiction by case laws where stronger rule of bank's strict control over book debts was followed and there was an express restriction to the company not to deal with the book debts and proceeds without the prior consent of the bank in writing, make any withdrawals or direct any payment from the said account. The charger company was required to pay the proceeds of book debts into a blocked accountover which the bank had an absolute discretion to permit the company to draw on that account. The Supreme Court of Ireland following the rules established in *Siebe Gorman*case held that a fixed charge over book debts had been created because the bank's control over the blocked account was such that not to enable the company of the free use of the proceeds. Thus, in comparison to *Siebe Gorman* and *Re Keenan bros*, it can be concluded that the rules of categorising a charge to be a fixed charge is strictly followed in *Re Keenan Bros* rather than in *Siebe Gorman* and it also can be concluded here that mere expression of creating a 'blocked account' for fixed charge is not enough, it must has to come in application or operation.

4. PROBLEMS OF CASE LAWS IN CATEGORISING FIXED OR FLOATING CHARGES OVER BOOK DEBTS: THE DILEMMA

But following the above construction of fixed charge established by *Siebe Gorman* and *Re Keenan Bros* it is seen that, it's really a great problem for the company to carry on business smoothly as it has to obtain consent before dealing with the proceeds by which cash flow could be hampered. And in order to solve the problem various attempt has been made in case laws, such as, by permitting the borrower to utilise the collected proceeds in conducting its business, held in the case of *Re Brightlife Ltd* (1987)[7] and even by treating book debts and proceeds as separate divisible assets, held in the case of *Re New Bullas Trading* (1994).[8] Some said that it is valid on the basis of freedom of contractual relationship some said it is not held in

[5] 2 BCLC 361 sub nom; 1 BCLC 13; Ch 388; BCLC 13898; (1994) 1 BCLC 449 CA.

[6] IR 401.

[7] BCLC 353; Ch 200.

[8] 1 BCLC 449.

the case of *Agnew v Commissioner of Inland Revenue* (2001).[9] Here, main purpose is to focus on the case laws signaling of some uncertainty over *Siebe Gorman* decision. This part of the article discusses (i) the case laws which faced problems in categorising fixed charge over book debts and its proceeds following the principles established by *Siebe Gorman* and *Re Keenan*and (ii) measures taken to solve the problem by Court.

The case of *Re Brightlife ltd* (1987)[10], first gave signal of some uncertainty over *Siebe Gorman* decision. The bank was granted a fixed charge over its present and future book debts (and floating charge over other assets) by the debenture. The company could not sell, factor or discount debts without the bank's written consent. The company was permitted to collect the debts and pay them into its ordinary bank account. On the account the company could draw as it wished. Eight years after *Siebe Gorman,* the issue of fixed charges was in front of the of the High Court in this case which was whether the charge would be considered as fixed or floating when book debt and proceeds were paid into an account that was not controlled by the chargee (be it a bank or some other credit institution) (Clifford Chance 2004: 7). It was held in this case that if the charger was allowed to collect its book debts and place them in a bank account that was outside the control of the chargee, then the charge would be construed as floating charge (Pouge 2005). Hoffman J in *Re Brightlife* case explained that even though the charge was expressed as a fixed charge, it should be categorised in law as floating charge. It was seen in *Siebe Gorman* and *Re Keenan Bros*that in order to constitute fixed charge there must be a 'blocked account' with the lender bank in which the borrower has to pay the collected proceeds and the borrower will not be allowed to make any withdrawals or direct any payment from the said account without the prior consent of the bank in writing.

But in the *Re Brightlife* case we see that though the company was not allowed to sell, factor or discount debts without the bank's written consent, the company was allowed to collect the debts and pay them into its ordinary bank account and could draw as it wished. So, it is settled that fixed charge can not be created over book debts andthis was followed although in a different context in the cases of *Re Cosslett (Contractors) Ltd (1998)*[11] and also in the New Zealand case of *Supercool Refrigeration and Air Conditioning v Harvard Industries Ltd (1994)*[12] *(Ferran* 2008).

Another example of uncertainty of *Siebe Gorman* is the case of *Re New Bullas Trading* (1994).[13] The Bank company always want to be in a secured position, so they want to have fixed charge over uncollected book debts but floating charge has to be granted for the company to deal with the proceeds and in this case the Court of Appeal held that the freedom of contract can prevail by allowing book debts and its proceeds as separate property. This case added a new move toward the commercial

---

[9] UKPC 28; (2001) 2 AC 710.

[10] BCLC 353; Ch 200.

[11] Ch 495.

[12] 3 NZLR 300.

[13] 1 BCLC 449.

world of having the advantages from the combination of both fixed and floating charges.

The judgment of *New Bullas* has been subject to much criticism because it's the first case which first made differences between book debts and its proceeds, which could never be happened because book debts and proceeds can not be divided from each other. Again the judgment has been held only on the basis of the label of the charges, but sometimes it has been seen that the labels of the charges always does not reflect the intention of the parties, So, the judgment can not be the authentic rule to follow and this was also held in the case of *Re Pearl Maintenance Maintenance Services ltd* (1995)[14] where Carnwath J rejected the argument that *New Bullas* had replaced the traditional approach with a 'charge as labeled' approach (Lang 2007). And this debate also continued in the case of *Agnew v Commissioner of Inland Revenue* (2001)[15] and from these sequel of case laws it is seen that judges are not very deliberated to discuss the authoritative grounds on the basis of which the charges are categorised and that understandings of bank and company are developing day by dayin order to develop their commercial relationship which is also followed in *Agnew* (2001).

Agnew case (also known as 'Brumark') started in New Zealand and subsequently appeal was made to the Privy Council in the United Kingdom. In this case denying the judgment of *New Bullas*, the Privy Council held that the borrower was free to deal with the uncollected book debts in the ordinary course of business, free to withdraw them from the security without the consent of the chargee, there is nothing but a floating charge over book debts and also its proceeds and that book debts and its proceeds are indivisible. Thus it was not possible to have a fixed charge on uncollected debts and a floating charge over the proceeds (Lang 2007)

In the *Agnew*case the court has construed the charge as floating on the basis of the rights and obligations conferred by the contractual relation between the charge holder and the chargee. If the debenture prevent the company to deal with the book debts and its proceeds in its ordinary course of business and is only allowed to collect and make payment in a blocked account, is construed only a fixed charge and there must be a sufficient post collection control though no standard of control has been given by the court. But in this case, it was held that the payment of proceeds into a bank account from which the company is free to make unrestricted withdrawals was not amounted to sufficient control to create a fixed charge. And whether the parties are intended to create fixed charge or floating charge can be construed by the language of the instrument. To emphasis on this point Lord Millett held that it is not enough to provide in the debenture that the account is a blocked account if it is not operated in fact. So, if the language of the instrument becomes inconsistent with the nature of actions, rights and obligations of the parties, the court will make decision on the basis of the rights and obligations of the parties conferred to each other.

And from this we see that, many unfettered features for categorising fixed and floating charge over book debts and its proceeds have been given by this case and

---

[14] 1 BCLC 449.

[15] UKPC 28; (2001) 2 AC 710.

much uncertainty has been given over *Siebe Gorman*case, though it was also criticised by lawyers and academicians. But there still remains the question whether it is possible or not to create floating charge over book debts and its proceeds? If it is possible then what would be its impact, prospective or retrospective? Is it possible to overturn customary rules? And how much control is necessary for creating fixed charge over book debts? Whether the *Siebe Gorman* was rightly decided or not? These all are resolved by the decision of the *National Westminster Bank Plc v. Spectrum Plus Limited & Others* (2005).[16]

5. ESTABLISHMENT OF FLOATING CHARGES OVER BOOK DEBTS: THE END OF *SIEBE GORMAN*

The decision of the House of Lords on 30 June 2005, in the case of *Spectrum Plus* overruled the 25 years old decision in *Siebe Gorman* resolving the controversial issue regarding fixed and floating charge and concluded that floating charge can be created over book debts of a company. This decision has a significant impact on the banking and other financial industry because banking company had been relied on Siebe Gorman's decision for 25 years and now it has been overturned. So, they have to be more cautious when taking debentures as security (Poon and Susan W M 2005)

Spectrum Plusltd was a manufacturer of dyes and other chemical products for the paint industry. Spectrum Plus ltd opened an account with overdraft facility in the bank of National Westminster and granted the bank a debenture, which was expressed to include a fixed charge over all book debts and other debts due or owing to Spectrum, essentially the terms of the debenture in Spectrum were almost similar to *Siebe Gorman*. The debenture restricted Spectrum's right to dispose of or charge the uncollected book debts but allowed it to deal with its debtors and collect the debts. The debts once collected were required to be paid into a designated account with the bank and prohibited the company from charging or assigning them without bank's prior consent. The account was in all respects a normal current bank account with an overdraft facility. While the overdraft facility varied from time to time, Spectrum's account was never in credit. The proceeds of the book debts were collected by Spectrum and paid into its account with the bank, thereby reducing the overdraft. Spectrum drew on the account as and when it needed to and thereby increased the overdraft.

The main issue of the case was whether the charge over book debts, present and future, which it was expressed to be, or merely a floating charge. The bank argued that the debenture was a fixedcharge; the crown creditors said it was a floating charge. In this case Lord Scott mentioned thatif it was a floating charge and Spectrum's preferential creditors would be entitled to have their debts paid out of the proceeds of the book debts in priority to the bank. If it was not a floating charge the preferential creditors had no such priority and the bank would be entitled to all of the proceeds of the book debts. There was also a subsidiary issue whether the House of Lords had the power to hand down a prospective overruling of *Siebe Gorman*.

---

[16] UKHL 41.

This case was decided at three instances: firstly, by the Chancery Court; secondly, by the Court of Appeal and lastly by the House of Lords. In the Court of Chancery it was held by Morritt VC that the charge was a floating charge because *Spectrum* was able to deal with it in the ordinary course of its business with no further restrictions on the use of the account, though it was labeled as a fixed charge over book debts and there was also the requirement to pay the proceeds into an account with the bank and prohibition on disposing of the book debts to any other party without the consent of the bank. In determining this the court analysed the characteristics of floating charge laid down by *Re Yorkshire Woolcombers Association* (1903) and held that the charge did not impose any restriction on how the company was to withdraw from the overdraft account held with the bank, the company was free to withdraw the collected proceeds and in determining the rights and obligations that the parties intended to grant each other, regarding the book debts, it was held that the purpose of the debenture between the *Spectrum Plus and NatWest* was to provide working capital for *Spectrum Plus* and these were sufficient for deciding the charge as floating (Pouge 2005). It was concluded by Morritt VC that though *Siebe Gorman* had been stood for 25 years with little criticism and it was taken by most of the banks as the standard form of debenture and thousands of liquidations had been conducted on the same assumption, *Siebe Gorman* was wrongly decided by Slade J.

The Bank appealed against the decision of the Chancery Court and held that in this case the charge over book debts was a fixed charge and they also concluded that the reliance on *Siebe Gorman's* debenture for over the last 25 years can not be overturned because customary usages had given it the meaning and effect of a fixed charge. The Court of Appeal also concluded that they are bound to follow the earlier decisions made in the cases of In *Re Atlantic Computer Systems Plc* (1992)[17] and *Re New Bullas Trading Limited* (1994).[18]

The Court of Appeal decided the charge over book debts was fixed on the basis that the book debts shall not be disposed of prior to their collection and the proceeds collected shall be paid to the Bank and once they were paid into the Bank's account they were held with the Bank or belonged to the Bank. The rights and obligation which were conferred on the parties by the terms and conditions of the contract did not allow the company to deal with assets charges in the ordinary course of business and as it was said that the assets were not to be withdrawn from the security without the consent of the charge holder, this was held by the Court of Appeal as fixed charge.

The Court of Appeal's decision was appealed to the House of Lords and there were two important issues for the House of Lords to decide, firstly, whether the charge, which was mostly in form of *Siebe Gorman*, was fixed charge or floating and the other one is, whether the decision of the House of Lords would have prospective effect or retrospective effect. It was held by the House of Lords that *Siebe Gorman* was wrong and by overruling this House of Lords unanimously upheld the first

---

[17] Ch 505.

[18] 1 BCLC 485.

instance decision that the charge over book debts in this case was floating charge. And in doing this the 'blocked account model' was not only considered by them but also the extent of the restrictions imposed by the debenture; the rights retained by *Spectrum* to deal with its debtors and collect the money owed by them ; *Spectrum's* right to draw on its account with the bank - were also considered by them. It was also considered that to characterise the floating charge the key question was whether the account was one which allowed *Spectrum* to continue to use the proceeds of the book debt as a source of cash flow or whether it was one that kept the proceeds intact for the benefit of the bank's security. In short the crucial question was whether or not the account was blockedexplained by Lord Hope at para 55 of the judgment of the case.

It was held by the House of Lords as *Spectrum* was able to draw from the account in the ordinary course of business within the agreed limit of overdraft, the charge over book debts was a floating charge irrespective of whether the account was in credit or in debit. Though there was intention to create fixed charge, blocked account did not operate in practice and the bank had no sufficient control to prevent the company to draw from the account in the ordinary course of business. If the bank had sufficient control over the account, fixed charge would be there but what would be consisted as 'sufficient control' was not given by the House of Lords (Hanloon and Heywood 2006). Thus by the decision of the House of Lords *Siebe Gorman* was overruled and this overruling would have prospective effect only that means the overruling would not affect any debenture granted before the date on which the judgment was delivered.

Thus from the three instances decision of the *Re Spectrum Plus* case it is well settled that floating charge can be created over book debts and it has overruled the customary usage of following precedents by overruling the 25 years old decision of *Siebe Gorman* and it has also been said that the decision has prospective effect only.

6. IMPACT OF FLOATING CHARGES OVER BOOK DEBTS IN COMMON LAW JURISDICTIONS

The House of Lords decision in the case of *Re Spectrum Plus* has given an end to the long debated issue of categorising charges over book debts and from this it has been seen that floating charges can be created over book debts and for creating fixed charges over book debts some special procedure must be maintained such as 'blocked account', sufficient control and so on. Sometimes it has been seen that the impact of floating charge has more positive, constructive or reformative attitude towards common law, again sometimes it has been seen that it is not so more supportive in financial relation because after *Re Spectrum Plus* case, in the commercial world banks or other financial organisations want more security, where the company wants more relaxation and this circumstances it has been seen that floating charges or the decision of the *Re Spectrum Plus* case does not give the borrower or the lender a balanced position. So the floating charges over book debts have both positive impact and also some negative impact and here discussion is made on both.

6.1 Floating Charges over Book Debts

Floating charges over book debts can be created after the *Re Spectrum Plus* case. It has been seen that the main feature which distinguished a fixed charge from a floating charge is the charger's ability to control and manage the charged assets and withdraw them from the proceeds, freely and without the chargee's consent. And in the *Re Spectrum* case it has been seen that the charge was held as floating charge because the charger was never be prevented to withdraw the proceeds of the book debts held with the bank and as per Walker LJ, 'the labeling of the charge document can not be decisive if the rights created by the debenture...are inconsistent with the label'. It was repeatedly mentioned in the *Re Spectrum Plus* case that *Sibe Gorman* construed the wrong decision regarding categorising the charges over book debts. It was also mentioned as the main characteristic of floating charge in *Re Spectrum Plus* case that when a customer was entitled to draw on the account whenever it wished, within the overdraft limit, then the account was not a blocked account and the collected proceeds deposited to the account were subject to a floating charge only (Lang 2007).

6.2 Banks need to be Aware

As *Siebe Gorman* type of debenture is more secured for bank company, it was mainly followed by them but as preferential creditor's rights were given more priority in the *Re Spectrum Plus* case, banks need to be aware of that. And for this, banks began to re approach their customers and renegotiate some of the terms of their overdraft facility with the customers.

6.3 Preferential Creditor's Rights Established

If book debts such as those of the *Spectrum Plus* would be a fixed charge, the rights of the preferential creditors would be defeated which was happened in the case of *Siebe Gorman.* But by *Re Spectrum Plus* case it has been seen that preferential creditors are entitled to take an action in order to establish their rights.

6.4 Customary Usages Overturned

In *Re Spectrum Plus* case, it was observed by the Court of Appeal that the history of reliance over the last 25 years upon the form of debenture approved by Justice Slade as creating a fixed charge would probably have been sufficient to cause the court to conclude the customary usage had given it the meaning and effect of a fixed charge. But as the decision of *Siebe Gorman* was repeatedly held wrong by different judges of the House of Lords, they did not hesitate to conclusively demonstrate that the proper course was to overrule the *Siebe Gorman* decision. And thus 25 years old customary usage was overturned.

6.5 Prospective Overruling

The House of Lords has the power to give prospective overruling and also retrospective overruling. And if prospective overruling is given, it will be applied only to transactions or happenings occurring after the date of the court decision but retrospective effect of a change in the law can have disruptive and seemingly unfair consequences because it would have its effect on transactions and happenings occurred in the past. And *Re Spectrum Plus* case has prospective effect only inorder to protect the rights of the banks, who entered into transactions relying on the *Siebe Gorman*, until the date of the House of Lord's judgment in *Spectrum Plus*.

6.6 Characterisation of Fixed Chargesover Book Debts

Some special features are provided by House of Lords in the *Spectrum Plus*case in order to categorise fixed charges over book debts. According to Hope LJ, one of the four ways in which a charge over book debts could be fixed, would be:

i. Prevent all dealings with the book debts so that they are preserved for the benefit of the lender's security.
ii. Prevent all dealings with the book debts other than their collection and require that the proceeds when collected be paid to the lender in reduction of the borrower's outstanding debt.
iii. Prevent all dealings with the book debts other than their collection and require that the proceeds when collected be paid into an account with the lender.
iv. Prevent all dealings with the book debts other than their collection and require that the proceeds when collected be paid into a separate account with a third party bank. The lender then takes a fixed charge over that account so as to preserve the proceeds for the benefit of the lender's security (Lang 2007).

It has also been seen that the House of Lord's decision in the *Spectrum Plus* or floating charges over book debts was criticised in many ways, such as:

i. After *Spectrum Plus* case banks become more aware and they began to claim more security at the time of giving loans, even they began to claim director's personal guarantee in order to obtain loan in future. As a result the small companies mainly the companies with less capital or the companies who have to depend more on loan, were begun to have a very difficult position at the time of getting loan. For this it has been seen that charges on book debts become less used by banks, borrowers and other forms of receivables financing such factoring or invoice discounting become more commonly deployed and also at the same time, the cost of lending become more costly day by day as a result of *Spectrum Plus* decision and particularly for the borrowers who want to seek loan by floating charge (Hanlon and Heywood 2006).
ii. In *Spectrum Plus* case, it has been seen that the House of Lords has tried in different instances to define 'control' but they never explain what type of control or degree of control is necessary for creating fixed charges over book debts.
iii. It is seen that the House of Lord's did not make any comment regarding the thing whether book debts and its proceeds can be separated or not.
iv. It was considered by Walker LJ that the company borrower is required to obtain prior 'consent' of the charge holder when making withdrawals on the account. As it stands, it is unclear whether the company is required to obtain consent for each and every withdrawal; or whether it would be sufficient for the company to seek consent once and make as many withdrawals as considered necessary until the charge holder removes that consent.

Floating charges over book debts is criticised in different ways but the above are significant. Despite these, the House of Lord's judgment in *Spectrum Plus* is followed in many common law jurisdictions around the world. The decisions of House of Lords are binding on lower courts in UK and persuasive in other common law jurisdiction (Lang 2007).

7. CONCLUSION

So, from discussions made above and in the course of analysing case laws starting from *Siebe Gorman* it is seen that labeling of charges reflects the intention of the parties but mere intention is not enough. There must be some positive action for the enforcement of their intention. Again rights and obligations conferred to each other are also to be considered for characterising the charges. The question whether the charge is a fixed or floating charge must be decided on the basis of rights and obligations of the parties conferred on them by the instrument not merely language of the instrument which does not even come into effect. In order to be a fixed charge there must be a blocked account, adequate control and borrowers will never be able to deal the accounts or free to withdraw them without the prior consent of the charge holder. Otherwise it'll be considered as a floating charge. At the time of fixing terms and conditions for a blocked account and extent of control on that it is necessary to fix whether consent is needed for each and every withdrawal or have consent once is sufficient.

It is also seen that it is not acceptable to treat the book debts and its proceeds separately as they can not be isolated from each other. Thus the above points are more effective in categorising fixed and floating charges and whether the parties will have fixed or floating charge that must be fixed by the mutual understanding of the parties which would be more suitable for them.

Another implication of the paper is that by House of Lord's judgment in the *Re Spectrum Plus* case 25 years old decision can be overturned or customary rules can be overruled. So, it has a significant impact on common law jurisdiction and it can be followed in other case laws. And for this, banks become more cautious and seek more security from the borrower companies and sometimes they (borrower companies) do not have suitable or balanced terms and conditions for them especially small companies who have nothing but book debts and its proceeds only to use as security. As a result, companies without security can not flourish more or become more interested on the other source of capital. In the *Re Spectrum Plus* case preferential creditor's rights in floating charge has been established and by overruling the *Siebe Gorman* the House of Lord's has established a new law in the realm of common law jurisdiction which is very persuasive to follow.

REFERENCES

C S Yeo, Victor. 2002.'Is the Fixed Charge Over Book Debts a Viable Security Arrangement?' *Singapore Academy of Law Journal* 14:69 -84.

Dignam, Alan; Lowry,John. 2006. *Company Law.* USA. Oxford University Press.

Ferran, Eilis. 2008 *Company Law and Corporate Finance.* USA:Oxford University Press.

Hanlon, James; Rob. Heywood, 2006. 'Spectrum Plus and Book Debts: The Final Chapter?' *Web Journal of Current Legal Issues.* [Online]. Available at<http://webjcli.ncl.ac.uk/2006/issue1/hanlon1/html.com>, accessed on 30 January 2012.

Pouge, Lauren. 2005. 'The Spectrum Plus Case: Fixed or Floating charges over Book Debts in England?' *North Carolina Banking Institution* [Online]. Available at <www.studentsorgs.law.unc.edu.com>, accessed on 23 January 2012.

Lang, Thai. 2007. *Charges over Book Debts in the United Kingdom and Australia: The Way Forward.* Macquarie Journal of Business Law. [Online]. Available at *http://www.austlii.edu.au/au/journals/MqJlBLaw/2007/13.html.com,* accessed on 30 January 2012.