

Banking and Finance

GOALPOSTS HAVE MOVED FOR SECURED LENDERS - Updated e-Alert on recent judgment that crystallisation of a floating charge does not gain priority over Revenue Commissioners in winding up

Irish Litigation and
Dispute Resolution
Law Firm of the
Year 2010
Finance Monthly Magazine

*LK Shields Solicitors
punches above its
weight on the financial
services side ... and
acts for an impressive
roster of clients*
Legal 500

This is an update to our recent e-Alert with respect to High Court judgments dated 25 March 2011 and 11 July 2011 delivered by Finlay Geoghegan J. in the case of *J.D. Brian Limited (In Liquidation)* otherwise known as the *Belgard Motors case*.

The key issue arising in the case was whether the crystallisation of a floating charge (into a fixed charge) prior to the winding up of the chargor company would give the chargeholder bank priority over preferential creditors (such as Revenue Commissioners and employees) in respect of the distribution of the proceeds of the charged assets (in this case motor vehicles).

In her decisions, which represent a clear divergence from the position in the English courts, Finlay Geoghegan J. held that under Section 285(7) of the Companies Act 1963 a pre-winding up crystallisation of a floating charge into a fixed charge does not displace the priority of preferential creditors. She said:

“... in my judgment the proper meaning of s. 285 (7) is that the preferential debts rank in priority to the claim of the Bank, as debenture holder, to the funds realised from the assets subject to the floating charge pursuant to clause 5 of the debenture, irrespective of whether the floating charge crystallised prior to the commencement of the winding up”

It appears that the effect of the judgments is that under the current legislation a floating chargeholder may not be able to gain priority over preferential creditors, such as the Revenue Commissioners, by effectively crystallising a floating charge. The judgments have come under considerable scrutiny, not least because of their divergence from persuasive judgments in England.

The decisions may be appealed to the Supreme Court. In the meantime, commercial lenders ought to liaise with their legal advisers to discuss the implications of the decisions in the particular circumstances of the security they hold. Pending the outcome of that appeal, lenders might consider:

1. Obtaining fixed charges as opposed to floating charges where possible;
2. Ensuring that the chargor company is contractually bound to deliver up control over the assets which are subject to a floating charge after crystallisation and to remove such assets from ordinary trade use so as not to be available for disposal without the consent of the chargeholder; and



www.lkshields.ie

GOALPOSTS HAVE MOVED FOR SECURED LENDERS

Lawyers understand the business angles and provide practical advice tailored to specific needs

Legal 500

Highly responsive and able to meet clients' requirements in a pragmatic way and excellent to work with - the lawyers are proactive, easy to deal with and well connected with all the necessary regulators

Chambers Europe

The team [see] off some high-quality competition to win lucrative instructions

Legal 500

3. Actively exercising control over the charged assets such as by segregating stock in trade in a warehouse in its control or notifying the relevant bank and debtors of control of trading accounts and book debts.

In a wider sense, the decision in *Belgard Motors*, whilst not invalidating floating charges, has the potential to devalue floating charges as a form of security. However, floating charges are likely to remain an integral part of security over trading companies, given the flexibility for chargor companies to deal with their assets in the ordinary course of business, and equally the benefit for the chargeholders of priority over unsecured creditors generally.

** This e-Alert replaces the previous e-Alert on the topic, is for general information purposes only and is not to be construed as legal advice.*

For more information please contact



Neil O'Keeffe, Partner, Banking and Financial Services

T +353 1 638 5876
E nokeeffe@lkshields.ie



Andrew Power, Associate, Banking and Financial Services

T +353 1 638 5832
E apower@lkshields.ie

About LK Shields Solicitors

LK Shields Solicitors is one of the leading law firms in Ireland. Founded in 1988, we have consistently grown and we now have upwards of 130 staff. We enjoy and take pride in our work and offer clear commercial advice to our clients. We ably meet the full legal services needs of both international and national businesses across a large range of industry and service sectors.

Copyright

If you would like to reproduce any of this publication, please contact Emer Craig - ecraig@lkshields.ie.
© LK Shields Solicitors - August 2011. All rights reserved.

The material in this publication is for general information purposes only. Professional legal advice should always be sought in relation to any specific matter. No liability will be accepted for any losses incurred by those relying solely on this publication.

LK SHIELDS SOLICITORS

39/40 Upper Mount Street, Dublin 2, Ireland

T +353 1 661 0866 | F +353 1 661 0883 | E info@lkshields.ie | W www.lkshields.ie