

# Regulation of Charges over Book Debts in Nigeria

Dr. KUNLE AINA  
LL.B, LL.M, Ph.D

Senior Lecturer, Faculty of Law, University of Ibadan, Nigeria

## Abstract

There has been considerable debates or whether it is possible to create a fixed charge over book debts and recycling proceeds. The courts have clearly stated that it will go beyond the nomenclature ascribed by the parties to the debenture and ascribe its own interpretation on the debenture, it follows that the intentions of the parties is not useful in the categorisation of charge over book debts. This paper examined the difference between the Fixed charge and the Floating charge, why the creditors will prefer a fixed charge to a floating charge. This paper also examined the nature of Book debts, the problems of categorisation of the charge on Book debts and position of the law in Nigerian law. There is total absence of regulation, categorization and legal framework of Book debts in Nigeria. Though mentioned in the CAMA which perhaps show its recognition, the near absence of regulation has left the position in an unsatisfactory position. This paper calls for a proper regulation of the charge on Book debts in Nigeria. It is important that the proper principles of law must be well understood to enable us determine whether a transaction that is described as fixed or floating charge over Book debts is to all intents and purposes one.

**Keywords:** Book debts, floating charge, categorization of charges

## 1.0 INTRODUCTION

Most probably due to the extensive advantages of the fixed charge over floating charge lenders have always preferred the fixed charge over the floating charge. The characterisation of a charge as a fixed or floating charge have drawn much more concerns in relation to book debts. Generally Banks have always drawn their debentures with their customers as fixed charge over the borrower's book debts by ensuring that they impose sufficient levels of control which seems to show some level of restriction to the assets charged and therefore will qualify as fixed charges. Receivers and liquidators have always resisted this moves and are equally well prepared to oppose the debentures as being unregistered and void. As we shall soon discuss below, the fixed charge are not required to be registered while the floating charge must be registered. The result has been considerable number of litigations. Legal Scholars<sup>1</sup>( Lowe R.and Bearle S., 2005) have also proffered varying arguments and solutions to the problems of classifying a charge as fixed or floating. In England prior to 1986 it is possible to avoid the argument by simply stating that the floating charge has crystallised and therefore has become fixed, however section 251 of the Investment Act ( UK) has blocked this loophole by simply providing the definition of a floating charge to mean, 'a charge which, as created , was a floating charge'. In spite of this, set back, lenders were not discouraged but continues to devise other means of achieving their purpose. The Companies and Allied Matters Act 2004<sup>2</sup> ( hereinafter called CAMA) lists floating charge and book debts as registrable charge. However, the law does not define the book debt , and did not make any attempt to define how the book debt may be classified as a fixed or floating charge. The implication is that where it is classified as a fixed charge , will it require registration or not?, though it is regarded as book debt. Even if we agree that all book debts are registrable no matter the classification , it must still be registered as a fixed or floating charge. This paper examines charges on book debts in Nigerian law exposing the problems of classification of the book debts and confusion that may be created in determining the type of charge over book debts and how to determine its classification, and calls for an amendment to the current law on book debts and the proper registration .

## 2.0 What is Book debts

Book debts is not defined by CAMA, which is a very great omission, this would have assisted business men and women and the courts in the definition, regulation and perfection of book debts in Nigerian law. The term refers to circulating assets in the sense that it is constantly fluctuating and removing. It is the money that the company is entitled to receive and collect as reflected in its accounts and invoices. Gallop J in the Australian case of *Re Developments Property Ltd. (in liquidation)*<sup>3</sup> defined a book debt as follows:

---

1. Lowe R. Bearle S.( 2005). The Spectrum Decision Bad News for Banks. Journal of International Banking Law and Regulation. 482; Wortington S. (1997). Fixed Charge over Book Debts and other Receivables. Law Quaterly Review .Vol. 113.562; Brown D. 2000. Charges over Book Debts: Can Lenders have their Cake and Eat it in pieces. Insolvency Law Journal. Vol. 8.50; Berg A.( 2004) Charges Over Book Debts. Modern Law Review.1007; Goode R. (1994) Charges over Book Debts: A Missed Opportunity. Law Quarterly Review 45.

<sup>2</sup> Companies and Allied Matters Act, Cap C20 Laws of The Federation, 2004

<sup>3</sup> (1994) 13 ACSR 485 at 490.

It is an entitlement to payment. Once payment is made by cheque or otherwise, the book debt is extinguished by the payment. Hence the entitlement to the book debt no longer exists. Any other meaning in the present context would be entirely artificial.

Book debts had gained a controversial history in the commercial world as well as between academic writers. In spite of the lack of definition in the Act,<sup>1</sup> it is recognised and is listed as a chargeable asset of a company,<sup>2</sup> and in this regard is defined as a mortgage.<sup>3</sup> Section 262 (4) of the Australian Corporations Act defines a book debt as:<sup>4</sup>

debts due to or to become due to the company at some future time in account of or in connection with a profession, trade or business carried on by the company, whether entered in a book or not, and includes a reference to a charge on a future debt of the same nature although not incurred or owing at the time of the creation of the charge...

In the course of commercial practice over the years, the term has generated several descriptions, all culminating in the same meaning.<sup>5</sup> Thus in *Re Rex Development Pty Ltd (in liq)*<sup>6</sup> the court defined book debts as follows: “it is an entitlement to payment. Once payment is made by cheque or otherwise, the book debt is extinguished by the payment. Hence the entitlement of the book debt no longer exists...any other meaning in the present context would be entirely artificial.”

*Goode*<sup>7</sup> describes a book debt as a debt arising in course of a traders business which is of such a kind that it would ordinarily be entered in a traders books (or the modern equivalent of books) whether in fact so entered or not. For *Morse*, they are moneys owed to the company, which by their nature are constantly being created and paid off.<sup>8</sup> *Oditah* also sees it as debts incurred in the ordinary course of business entered into properly kept books.<sup>9</sup> Thus the term book debts are circulating assets in the sense that it “varies in amount on some days, a company may have book debts that are worth thousands or millions of naira, on some other days the company may have book debts not even worth the value of few hundred Naira.”<sup>10</sup>

Book debt may also be described as “account receivables”. An account receivable is defined as “a right to receive value arising from an obligation owed by a third party to a debtor including book debts but excluding a negotiable instrument”.<sup>11</sup> In the New Zealand case of *Commissioner of Inland Revenue v Northshore Tavern Ltd (in Liquidation)*<sup>12</sup> the Associate Judge Hole, held that account receivables are limited to book debts of the company. This decision has however been criticised.<sup>13</sup> The New Zealand Law Commission describes account receivables:<sup>14</sup> in this way;

Account receivable describes, for example, the right to payment which a supplier of goods or services becomes entitled upon performance. The term is the equivalent of the New Zealand expression of book debt. Computerized record keeping has made the adjective book misleading. Receivable more accurately describes the direction of the entitlement than does the term debt. Accounts receivable are a type of intangible, the term used by the statute to describe incorporeal personal property which is not represented by either a tangible item or document.<sup>15</sup>

It is now clear that although book debt is not wholly synonymous to an “account receivables.” Computerized systems of trade, has expanded the concept of book debt as most debts are no longer recorded in

<sup>1</sup> CAMA.

<sup>2</sup> Section 197 (2) (e); section 860 (7) (f) UK, 2006.

<sup>3</sup> Section 197 (11); Section 861 (5) UK.

<sup>4</sup> Corporations Act 2001 (Cth) section 262(1) (f) (4). this Act has however been repealed by the Personal Property Securities (Corporations and Other Amendments) Act 2010 (Cth) schedule 1 item 18.

<sup>5</sup> Thai, L. (2007) Charges over Book Debts in the United Kingdom and Australia: The Way Forward. *MqJBL*. 4:267-294, at Pg. 269.

<sup>6</sup> (1994) 13 ACSR 485 at 490, per Gallop J.

<sup>7</sup> Goode, R. & Gullifer, L. (2006). *Goode on Legal problems of Credit and Security* 4<sup>th</sup> ed. London: Sweet & Maxwell. Pg. 109

<sup>8</sup> Morse, G. (1995) *Charlesworth & Morse Company Law*. 15<sup>th</sup> ed. London: Sweet & Maxwell. Pg. 629

<sup>9</sup> *Oditah, F. (1991) Legal Aspects of Receivables Financing London: Sweet & Maxwell. Pgs. 19-32; Shipley v Marshall (1863)14 CB(NS) 566*

<sup>10</sup> Thai, L. (2007) Thai, L. 2007. Charges over Book Debts in the United Kingdom and Australia: The Way Forward. *MqJBL*. 4:267 at 269.

<sup>11</sup> Paragraph 2 (1) of the Collateral Registry Regulations, issued by the Central Bank of Nigeria, September, 2014.

<sup>12</sup> (2008) 23 NZTC 22,074 (Northshore Tavern)

<sup>13</sup> Stumbles, G. h. John. (2013) The Impact of the Personal Property Security Act on Assignment of Accounts. *Melbourne University Law Review*.37:416-464 particularly at 424; Gedye, M. (2009) What is an “account receivable”? *New Zealand Business Law Quarterly*. 15:170-171

<sup>14</sup> Paragraph 80, the New Zealand Law Commission (Personal Property Securities Act for New Zealand NZLCR8, 1989)).

<sup>15</sup> Paragraph 80 of the *Law Commission Report*. *ibid*

the books but rather on computer tapes.<sup>1</sup> It is the right to receive payment in cash upon the performance of an obligation such as the supply of goods in credit, or for rendering a service.

From the above, it is clear that book debts are sums of money due or owed to the company. It is “a money asset”, meaning therefore, that it falls under the debit account of a company and can be relied on by the company as asset due to it. Nevertheless, the point to note here is that there is nothing fixed or in any way permanent about a company’s book debts other than the fact that they will (or certainly should) continue to accrue for so long as the company remains in business.<sup>2</sup> They are sums recorded in the company’s books as being owed to the company and thus cease to be book debts when they are paid or otherwise discharged. A book debt therefore has a circulating/fluctuating nature.<sup>3</sup>

### 3.0 Charges

It is important to note from the onset that companies have power to borrow money for the purpose of their businesses and for business certainty may secure the repayment of such money by charging or mortgaging of all or part its properties<sup>4</sup>. Mayson, French and Ryan,<sup>5</sup> explains that “a charge is used to describe all forms of security contract which gives a creditor a security interest in the property without the transfer of possession of the property and may be legal or equitable”.<sup>6</sup> It may include a mortgage,<sup>7</sup> and is either fixed or floating charge. CAMA defines a charge<sup>8</sup> to include a mortgage;<sup>9</sup> this is the same position in UK<sup>10</sup>. Section 166<sup>11</sup> provides that:

A company may borrow money for the purpose of its business and objects and may mortgage or charge its undertaking, property and uncalled capital, or any part thereof and issue debentures, debenture stock and other securities whether outright or as security for the debt, liability or obligation of the company or of any third party.

Debenture is likewise defined to include debenture stock, bonds, and other securities of a company, whether constituting a charge on the assets of the company or not.<sup>12</sup> The CAMA mandates companies to register all charges created by them,<sup>13</sup> both at the registered office and the companies’ registry and shall be open to inspection by the public.<sup>14</sup> This includes a charge on the book debts of the company.<sup>15</sup> A book debt may therefore be used as security by a company by way of a charge, thus the phrase “charges over book debt.”<sup>16</sup>

### 3.1 Categorization of charges

In practice and as flowing from the above, most companies heavily finance their transactions or operations through these debt securities.<sup>17</sup> This is usually done by the use of debentures, secured by either a fixed or floating charge on the assets of the company or both<sup>18</sup> and where it is secured by a fixed asset, it is a fixed charge but if secured by a circulating capital asset, then it is a floating charge.<sup>19</sup>

<sup>1</sup> Referred to by Associate Judge Gendall in *Grant Edward Burns & Richard Dale Agnew v The Commissioner of Inland Revenue* (2010) 404-7387 at paragraph 59

<sup>2</sup> This is why there has been this contention as to whether it would be possible to create a fixed charge over book debts.

<sup>3</sup> Ibid.

<sup>4</sup> Section 166, CAMA.

<sup>5</sup> Mayson, S., French, D. & Ryan, C. (2006). *Mayson, French & Ryan on Company Law*. 22<sup>nd</sup> ed. Oxford University press. Pg. 344.

<sup>6</sup> A legal interest gives priority to the title holder or the interest holder, while an equitable interest, a legal bona fide purchaser for value without notice of the equitable interest at the time of the acquisition takes priority over the equitable interest holder

<sup>7</sup> Section 197(11) of CAMA; Section 861 (5) Companies Act 2006. UK.

<sup>8</sup> In part VII of CAMA.

<sup>9</sup> Section 197 (11) CAMA: this definition only applies to securities of the company.

<sup>10</sup> Section 860 (7) 2006.

<sup>11</sup> CAMA.

<sup>12</sup> Section 567 (1) of CAMA it includes perpetual debenture, convertible debentures, secure or naked debentures, and redeemable debentures. Section 171-174 of CAMA respectively.

<sup>13</sup> Section 191 and 197 (1) of the CAMA; Section 860 (7) (f) of the UK Companies Act 2006 Act, now amended by The Companies Act 2006 (Amendment of Part 25) Regulations 2013 wherein Chapter 1 and 2 of the 2006 Act have been repealed while The Companies (Particulars of Company Charges) Regulations 2008(b) are revoked. The provisions amending the Companies Act 2006 set out in Schedule 1 and the consequential amendments set out in Schedule 2 of the 2013 Regulations apply to charges created on or after 6th April, 2013

<sup>14</sup> Section 192 & section 198 (3) of the CAMA.

<sup>15</sup> Section 197 (2) (e) of the CAMA.

<sup>16</sup> Section 197 (2) (f) of the CAMA.

<sup>17</sup> Aina, K. (2011) The Machinery of Raising Capital by companies Through Debt Finance in Nigeria. *International Journal of Advanced Legal Studies and Governance*. 2.1: 85-101

<sup>18</sup> Section 193 (2) Of the CAMA.

<sup>19</sup> Orojo, K. (2008). *Company Law and Practice in Nigeria*. 5<sup>th</sup> ed. South Africa: LexisNexis. Pg. 175; Section 178 CAMA.

### 3.2 Fixed charges

A fixed charge is a charge which precludes the company from dealing with the charged asset,<sup>1</sup> or a floating charge which has been caught up with the events of crystallization.<sup>2</sup> *Morse* defines a fixed charge as: “A mortgage of ascertained and definite property, e.g. a legal or an equitable mortgage of a specified factory, and prevents the company from realizing that property, i.e. disposing of it free from the charge, without the consent of the holders of the charge.”<sup>3</sup>

*Gullick* explains that “a fixed charge is a suitable and convenient method of giving security over fixed assets as land, buildings or plant which the company is likely to retain for a considerable period.”<sup>4</sup> The features of a fixed charge includes:<sup>5</sup>

- a. The chargor is precluded from dealing with the charged asset either by sale, assignment or recharge without the prior approval of the charge. This is otherwise called “control.”
- b. The charge grants the chargee an immediate proprietary right in equity but is subject to any prior existing interest where the terms or agreement creating the said charge prohibited the company from granting any other charge and the chargee had actual notice at the time the charge was granted to him.<sup>6</sup>
- c. During insolvency of the company, the fixed charge can exercise the rights to acquire the legal possession of the charged assets other than creditors whom notice and consent have been given prior to the company’s insolvency.
- d. A fixed charge is ranked in accordance with the date of registration<sup>7</sup> or the date of creation.<sup>8</sup>

According to *Worthington*, fixed charges have long been recognised as security devices, but their existence was always conditional on an obligation on the chargor to preserve the secured asset for the benefit of the charge.<sup>9</sup> A charge is fixed if, and only if, it imposes restrictions on the activities of the chargor that are sufficient to ensure that the charged assets are preserved for the benefit of the security holder. If the charge does not do this then it is floating, with all the statutory consequences that entails.<sup>10</sup> *Romer LJ* explained the characteristics of a floating charge in *re Yorkshire Woolcombers’ Association Ltd.*<sup>11</sup> thus:

I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge: *If it is a charge on a class of assets of a company present and future; If that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and 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.*

*Lord Millett* modified the *Romer LJ* characterization in *Agnew*<sup>12</sup> ruling that the first two of the characteristics identified by *Romer LJ* are not necessarily inconsistent with a fixed charge and that “*It is the third characteristic which is the hallmark of a floating charge and serves to distinguish it from a fixed charge*”<sup>13</sup> Therefore we can easily conclude as has also been established in *Agnew* and *Spectrum Plus*<sup>14</sup> cases that the hall mark of a fixed charge is the control of the chargor’s use of the charged asset either by prior consent or total restraint by the chargee<sup>15</sup>. Thus as *Lord Macnaghten* noted in *Illingworth v. Houldsworth*<sup>16</sup> “a specific charge, I think, is one that without more fastens on ascertained and definite property or properties capable of being ascertained and defined”

### 3.3 Advantages of a fixed charge: The reason for its preference.

We have made mention of the preferential creditors, during the insolvency of the company. At this point, we

<sup>1</sup> Section 178(1)

<sup>2</sup> Section 178(2): such as winding up, appointment of a receiver by the court or by the debenture holders or any circumstance in the term that warrants crystallization

<sup>3</sup> *Morse*, G. *Morse*, G. (1995) *Op. cit.* Pg. 625

<sup>4</sup> *Gullick*, J. M. (1987). *Ranking & Spicer’s Company Law*. 13<sup>th</sup> ed. London: Butterworths. Pg. 149

<sup>5</sup> *Ibid*; *Thai*, L. *Op. cit* ; Section 178 , CAMA .

<sup>6</sup> Section 197 of the CAMA.

<sup>7</sup> In the case of fixed charges that belong to the category of the registrable charges

<sup>8</sup> For those that fall under the non registrable charges or where both parties have failed to register their charges.

<sup>9</sup> *Worthington*, S. (2010) An 'Unsatisfactory Area of the Law' - Fixed and Floating Charges Yet Again. *International Corporate Rescue*. 7. 4

<sup>10</sup> *Ibid*.

<sup>11</sup> (1903) Ch. 284 at 297.

<sup>12</sup> *Agnew v Commissioner of Inland Revenue (( Re Brumark Investments Ltd)* (2001) 2 AC 710.

<sup>13</sup> *Ibid*. p724.

<sup>14</sup> *Re Spectrum Plus Ltd* (2006) 2 AC 680.

<sup>15</sup> See judgement of *Lord Scott* at para. 107.

<sup>16</sup> (1904) AC 355



would now look at how this affects business transactions and why it is preferred by creditors.

Section 494 of the CAMA provides for preferential payments in a winding up in priority to all other debts. Examples of preferential creditors are: The taxation office;<sup>1</sup> the National Provident Fund;<sup>2</sup> and the employees of the company.<sup>3</sup> By virtue of Section 494(4) (b) the law gives priority to the above debts where the assets of the company available for payment of general creditors are insufficient to all other creditors, except the fixed chargee, thus the debts are paid out of the assets which would have been paid to the floating chargees.<sup>4</sup> This provision is *impairi-materia* with section 175 of the Insolvency Act.<sup>5</sup>

However, the passing of the Enterprise Act (UK)<sup>6</sup> abolished the crown preference,<sup>7</sup> but the Act inserted a new section,<sup>8</sup> which secures a “prescribed part” of the net property<sup>9</sup> of a company which has gone into liquidation, administration or receivership to keep for the satisfaction of unsecured debts in preference to the claims of floating chargees to those assets.

Thai,<sup>10</sup> has identified four reasons why lenders would prefer fixed charges over floating charges, these are; (1) Control and consent factor- In a fixed charge, the financier has control over the assets and the company must obtain consent or approval to deal with those assets. This thus confers on the charge a greater security as soon as the charge is created. (2) Immunity from the law on priority- This involves preferential creditors who have a statutory right to be paid in priority over the floating charge holders. The fixed charge thus is not affected by these statutory rules and thus more attractive to lenders. (3) Threat of invalidity- There is a potential for floating charges to be invalidated. It is therefore safer for lenders to insist on a fixed charge if possible as it is not affected by the invalidity provision.<sup>11</sup> (4) The nature of book debts- where the charge is created floating, the chargee may not have the right or ability to monitor the said book debts to ascertain whether it is still an existing security. It is therefore safer to insist on a fixed charge over book debts, during negotiation stage.

### 3.4 Floating charge

Floating charge was developed by commercial lawyers and the courts of equity in the middle of the 19<sup>th</sup> Century as a new type of charge.<sup>12</sup> Hoffmann J. in *Re Brightlife Ltd*<sup>13</sup> states that: “Floating charge was invented by Victorian lawyers to enable manufacturing and trading companies to raise loan capital on debentures. It could offer the security of a charge over the whole of the companies undertaking without inhibiting its ability to trade”. Modern corporate practice began in the early 18<sup>th</sup> century in the form of trading companies like the South Sea Company required funds to expand their trade, thus in 1862, and in an apparent unconnected decision in the case of *Halroyd v Marshall*<sup>14</sup> approved the floating charge as legitimate form of charge. The issue was whether after-acquired property was subject to a charge in favour of the secured creditor who had never taken hold of the asset.<sup>15</sup> The court held that a fixed charge created over future assets must be given consideration and the property must be properly described.<sup>16</sup> This decision thus began a practice which allowed the charging of assets in lieu of their being owned by the company.

### 4.0 Characteristics of the Floating Charge

A great advantage of the floating charge is that the company continues to trade with and utilise its assets in the

<sup>1</sup> Section 494(1) (a) CAMA, all local rates and charges due from a company as well as tax payable by the company.

<sup>2</sup> Section 494(1) (b) CAMA, under the National Provident Fund Act Cap 88, L.F.N, 1990.

<sup>3</sup> Section 494 (1) (c)-(f) CAMA. All wages or salary of any servant or clerk, workmen, labourers.

<sup>4</sup> Subject to the cost and expenses of winding up, preferential debts shall be discharged so far as the assets are sufficient to meet them. Section 494(5)

<sup>5</sup> 1986.

<sup>6</sup> 2002. See schedule 6 of the Act which still provides for preferential creditors retaining the Secretary for Trade and Industry as a preferential creditor by subrogation. Section 252

<sup>7</sup> section 176A, Enterprise Act (E. A.) 2002,

<sup>8</sup> Applying only to floating charges. See section 176A(9) E. A 2002. UK

<sup>9</sup> A net property is defined as the amount of the company’s property which, for section 176A, would be available for the satisfaction of floating charge holders’ claims.

<sup>10</sup> Thai, L. *Op. cit.* Pg. 271

<sup>11</sup> Under section 498 of the CAMA, a floating charge created within three months of the commencement of a winding up shall be invalid, unless it is proved that the company immediately after the creation of the charge was solvent. This also applies in Australia under section 588FJ of the corporations Act, 2001. See also section 245 Investment Act 1986 UK. In contrast to the Nigerian position, the floating charge must have been created within twelve months before liquidation.

<sup>12</sup> Lerner, S. Floating Charges over Assets of Individuals in Israeli Law. Retrieved April 9, 2013 from [www.Law.Utoronto.Ca/.../IACCL10-Lerne.Pg.3](http://www.Law.Utoronto.Ca/.../IACCL10-Lerne.Pg.3)

<sup>13</sup> (1986) 2 All E. R. 673 (Ch.)

<sup>14</sup> (1862) 10 HCL 191 see the history of a floating charge

<sup>15</sup> Lord Scott of Foscote in *Spectrum Plus Ltd (In Liquidation)* (2005) UKHL 41

<sup>16</sup> Amour, J. (2004) The Chequered History of the Floating Charge. *Griffith Review* 25. 2725. 27

ordinary course of its business. The assets are therefore in a continuous state of changing and the chargee cannot interfere with or say at a particular point that this are in fact the assets over which I will lay execution on liquidation. Most authorities have tried to give descriptions of what the floating charge is all about, but there has not been any consistent agreement on the most appropriate definition of the term, this may be because in the words of Goode, the floating charge is the most subtle creations of equity, and despite the volume of case law and literature devoted to its analysis it remains conceptually elusive<sup>1</sup> it may also be because "there are continued uncertainties about the nature and consequences of a floating charge".<sup>2</sup>

In the case of *Re Florence Land and Public Works Co.*<sup>3</sup> the Master of the Rolls Jessel M.R described the floating charge as a charge on the property of the company as a going concern, subject to the powers of the directors to dispose of the property of the company while carrying on its business in the ordinary course. In the same case Lord Justice James defined it as 'a charge on the assets of the company for the time being which does not prevent the company from carrying on its business'<sup>4</sup> the above did not take into consideration the type of interest held by the chargee or chargor or the events and circumstances that will enable the chargee to realise his security. In the case of *Re Panama, New Zealand & Australian Royal Mail Co.*<sup>5</sup> Giffard L.J explains the position thus:

I take the object and meaning of the debenture to be this, that the word undertaking necessarily infers that the company will go on and that the debenture holder could not interfere until either the interest, which was unpaid, or until the period has arrived for the payment of his principal, and the principal was unpaid. I think the meaning and object of security was this, that the company might go on during that interval and furthermore that during the interval the debenture holder would not be entitled to an account, mesne profits, or of any dealing with the property of the company in ordinary course of carrying on their business. I do not refer to such things as sales or mortgages of property but to the ordinary application in the usual course of business.

The court also held that the holder of a floating charge security stands in a better position and takes priority over the unsecured creditors but the fixed chargee takes priority over the floating charge. In the case of *Governments Stock Investment Co. v Manila Railway Co.*<sup>6</sup> Lord Macnaughten described the floating charge thus,

A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying conditions in which it happens to be from time to time. It is of the essence of such a charge that it remains dormant until the undertaking charged ceases to be a going concern or until the person in whose favour the charge is created intervenes. His right to intervene may of course be suspended by agreement. But if there is no agreement for suspension he may exercise his right whenever he pleases after default.

Romer L.J in the case of *Re Yorkshire Woolcombers Association Ltd*<sup>7</sup> gave the three classical characteristics of the floating charge (quoted above).

He identified the three as follows:

- (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.
- (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.

In essence, all definitions must take into consideration the main characteristics of a floating charge, these are:

- (1) There must be a business which is a going concern.
- (2) There must be an agreement or decision of the parties to enter into a transaction involving a form of advancement or loan secured by a charge on the business or undertaking of the company. The nature or nomenclature used by the parties notwithstanding, the contents of the agreement and implications thereof is of paramount importance than the nomenclature used.

<sup>1</sup> Goode R. (2008). *Goode on Legal problems of credit and security*. Gullifer ed. 4<sup>th</sup> ed. London, Sweet and Maxwell p.123.

<sup>2</sup> Farran E. (1988). *Floating charges. The nature of the security*. Cambridge Law Journal. 47. 2. 213-237. Pg. 214

<sup>3</sup> (1878-9) 10 Ch.D520 at 530

<sup>4</sup> (1878-9)10 Ch.D 5 at 547.

<sup>5</sup> (1876) 5 ch.App.318.

<sup>6</sup> (1904)A.C 355.

<sup>7</sup> (1903) 2 Ch. 284 at 197.

- (3) The charge is on the changing assets for the time being assets of the company which is continuously changing.<sup>1</sup>
- (4) Full and total control of the assets of the company in spite of the charge, the ability to use, sell or add other assets to the original fund is a crucial difference between the floating charge and the fixed charge<sup>2</sup>.

### 5.0 Definition of a floating charge in Nigerian law

The CAMA 2004 defined floating charge in Section 178 (1) as follows:

A floating charge means an equitable charge over the whole or a specified part of the company's undertaking and assets, including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until:

- (a) the security becomes enforceable and the holder thereof, pursuant to a power in that behalf in the debenture or the deed securing the same, appoints a receiver or manager or enters possession of such assets, or
- (b) the court appoints a receiver or manager of such assets on the application of the holder, or
- (c) the company goes into liquidation.

The definition offered by CAMA 2004 merely adopts the Common Law position without taking into consideration the many defects and substantial injustice and inefficacious manner of securing a loan from the lenders point of view. The Nigerian Law ought to offer beyond the Common Law perspective, but to go ahead to offer a more peculiar solution to the very unfair position offered by the common law. The Nigerian position ought to be able to block the exploitative mechanism which only facilitates the transfer of insolvency wealth from unsecured to secured creditors and in fact it will seem as if the floating charge was designed for this very purpose.<sup>3</sup>

The Nigerian definition includes charge over all the company's undertaking including cash, of both current and future assets are normally sucked in and included in the charge without control or delimitation as to the type and value of the assets included in the assets charged. There are also no provisions for protection of fresh injection of capital by the Lender into the business. The Nigerian definition also left out whether the companies in dealing with the assets are limited to only 'ordinary course of business' clause, and so leaves the company to continue to deal with the assets composed in the charge in any way or manner without any restriction whatsoever. Whilst it will seem advantageous to the lender to be happy that all new acquisitions by the company is automatically part of the charge and so will be available as security for the charge, coupled with the excessive interest rate enjoyed by them. The other side of the coin is that the power of control over the assets by the company may in fact render the advantages a mere fluke which may in fact be totally unrealisable.<sup>4</sup>

### 6.0 Categorisation of charges over book debts

Book debt has for years suffered the problem of categorisation varying from various debates by courts as to whether it is possible to create a fixed charge over book debts.<sup>5</sup> First was the decision of Slade J's judgment in *Siebe Gorman Ltd v. Barclays Bank Ltd*<sup>6</sup> and this had been the subject of judicial and academic debate for years. This was followed by the case of *Re Brightlife Ltd*,<sup>7</sup> *Re Keenan Bros Ltd*,<sup>8</sup> *the New Bullas Trading Ltd*,<sup>9</sup> *Agnew v. Commissioner of Inland Revenue (Re Brumark Investment Ltd)*<sup>10</sup> and then the recent decision of the House of Lords in *Spectrum Plus Ltd (in Liquidation)*<sup>11</sup> which seems to have settled the legal issues that, it is possible to create a fixed charge over book debt but the determining and distinguishing element is the element of control over the charged asset.<sup>12</sup>

Following the above decision, *Sealey & Worthington* has opined that the culminating effect of the decision is to indicate that there may indeed be a way forward for bankers especially those seeking fixed charges over book debt provided that they can adapt the procedures in a manner that satisfies the requirement of the house of lords in *Spectrum Plus* and in a manner that does not thwart the ongoing day to day business activities of the

<sup>1</sup> Millet LJ in *Re Cosslett (Contractors) Ltd* (1998)2 W.L.R. 131

<sup>2</sup> Vaughan Williams L.J in the case of *Re Yorkshire Woolcombers Association Ltd* (1903) 2 Ch. 284 at 197

<sup>3</sup> Finch V.( 2002). *Corporate Insolvency Law-perspectives and principles* Cambridge: Cup. At page 80

<sup>4</sup> Finch V ( 2002). *Corporate Insolvency Law-perspectives and principles*. Cambridge, cup at 455

<sup>5</sup> Paul, L. D. *Gower and Davies, Principles of Modern Company Law*. 7<sup>th</sup> ed. London: Sweet and Maxwell. Pg. 1179

<sup>6</sup> (1979) 2 Lloyds's Rep 142 ("*Siebe Gorman*")

<sup>7</sup> (1987)Ch. 200

<sup>8</sup> (1986)BCLC, 242

<sup>9</sup> ((1994) 1 BCLC, 485

<sup>10</sup> (2001) UKPC 28.

<sup>11</sup> (2005) UKHL, 41.

<sup>12</sup> Ibid.

borrowers.<sup>1</sup>

The decision further raises an issue of policy: whether it is actually commercially possible to create a fixed security over all the present and future debt of the company? Tang,<sup>2</sup> is of the view that, the distinction between fixed and floating charges, though being of considerable significance under English law, remains an obsolete concept past its time, serving no useful purpose. He suggests a more coherent and streamlined approach to be implemented gradually and with conscientious application, taking into account the delicate balance that must be struck between calls for a coherent legal frame work for personal property security law on the one side, and the interests of creditors and debtors on the other.

### 7.0 Significance of characterisation of charge over Book Debts

Book debts are debts which arise in a business in which it is the proper and usual course to keep books of accounts, and which ought to be entered in such books<sup>3</sup> it is common for the customers of a company to owe the company for goods and services rendered by the company. Instead of waiting for these debts to be paid the company may decide to convert the debt to cash by borrowing money from creditors (mainly their Banks) against the debts that remain unpaid. The arguments and debates had been whether a fixed charge can be created over such circulating form of assets given their fluctuating nature. In practice, as we mentioned above, when a charge is categorised as fixed, the fixed charge holder has full control over the charged assets and the company is not allowed to deal with or dispose of those assets without the consent of the chargee. While, where the charge is classified as floating charge the third leg of Romer L.J. characterisation of the floating charge is critical, which is the level of control by the chargor is full and total and does not permit of any interference from the chargee.<sup>4</sup> In real terms, a floating charge holder has very little security especially when the charged assets are book debts and recycling proceeds by which the company deals with them regularly in the ordinary course of its business. The House of Lords in England recently seem to have laid the whole matter in controversy to rest in the case of *National Westminster Plc v Spectrum Plus Limited and others*<sup>5</sup> (*Spectrum Plus*) when the House of Lords unanimously held that despite the charge being expressed as a fixed charge, only floating charge had been created over the company's book debts. The over 25years old rule laid down in *Siebe Gorman & Co v Barclays Bank Ltd*<sup>6</sup> (*Siebe Gorman*) was overruled. The House of Lords even by way of *Obita*, cautiously expressed the view that fixed charges on book debts may be possible if exceptional circumstances are met. They however remained firm on the view that the traditional method of categorising charges is still the preferred approach<sup>7</sup>.

The Companies and Allied Matter Act 2004 requires that a charge on the book debts of the company as well as a floating charge on the undertaking or property of the company must be registered<sup>8</sup>. It is important that we must understand what exactly is a book debt and whether it is a floating or fixed charge in order to determine whether it ought to be registered or not. The complication here is that in determining whether a charge is fixed or floating the courts will look at the substance of the matter rather than the documents presented or the description the parties use in categorising it. Lord Millet explained this position in the case of *Agnew v Commissioner of Inland Revenue*<sup>9</sup> as follows:

In deciding whether a charge is fixed 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 right and obligations which the parties intended to grant each other in respect of the charged assets. Once those 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.

The Law Lord went on to declare that the intention of the parties is immaterial in this context when he said,  
It does not depend on the intention, properly gathered from the language of

<sup>1</sup> Sealey, L. & Worthington, S. (2013) *Sealey & Worthington's Cases and Materials on Company Law*. 10<sup>th</sup> ed. Oxford University Press. Pgs. 628-629

<sup>2</sup> Tang, Y. (2014). *Op. cit.* 107

<sup>3</sup> *Official Receiver v Tailby* (1886) 17 QBD 85.

<sup>4</sup> *Re Yorkshire Woolcombers Association* (1903) 2 Ch. 284 per Romer L.J.; *Re Bond Worth Ltd.* (1980) Ch. 228, *Agnew v Commissioner of Inland Revenue* (2001) 2 A.C 710.

<sup>5</sup> (2005) UKHL 41.

<sup>6</sup> (1979) 2 Lloyds Report 142.

<sup>7</sup> Thai L. (2007) Charges over book debts in the United Kingdom and Australia. The way forward. *Macquarie Journal of Business Law* Vol. 4. P. 267.

<sup>8</sup> Section 197 (2) (e) and (f)

<sup>9</sup> (2001) A.C. 710 at 720



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 described it.

Another important reason why a proper understanding of the charge on book debts is crucial is that Section 179 CAMA 2004 clearly stipulates that a fixed charge on any property shall have priority over a floating charge affecting that property. Preferential creditors have priority over the floating charge, while the floating charge has priority over all unsecured creditors, the ranking is important during the liquidation and we must therefore decide whether the charge over the book debts will be regarded as a floating or fixed charge.

## 8.0 Development of the Law in United Kingdom

### 8.1 Siebe Gorman Charge.

In the case of *Siebe Gorman & Co Ltd v Barclays Bank Ltd*.<sup>1</sup> the issue was whether the charge created was a fixed charge as described by the parties or a floating charge as contended by the plaintiff. The facts of the case were as follows:

A company gave a debenture to the defendant bank which provided (inter alia) that to secure its present and future indebtedness the company as beneficial owner charged to the bank by way of first fixed charge all book debts and other debts then and from time to time due to owing to the company, and undertook to pay all monies received in respect of such debts into the company's account with the bank and not to charge or assign the same to any other person without the written consent of the bank.

Among the debts charged by the debenture were certain bills of exchange<sup>2</sup> the same bills were subsequently assigned outright by the debtor company to the plaintiffs in reduction of the company's indebtedness to them. Later, the defendant bank collected in the bills and declined to account to the plaintiffs for the proceeds. The plaintiffs pleaded (inter alia) that the purported fixed charge was in reality a floating charge and was thus overridden by the assignment to the plaintiffs.

Slade J, applying the decision in the Canadian case of *Evans Coleman & Evans Ltd v R.A Nelson Construction Ltd*<sup>3</sup> held that there was no reason why book debts could not be subject of a fixed charge if that was the intention of the parties. He held that the vital element distinguishing a floating charge from a fixed charge, which is the debtors freedom to manage its assets in the ordinary course of business was lacking. The debenture gave the chargee control over the debts by prohibiting the debtor company from disposing of the charged debts without the plaintiffs' consent; it also imposed some control on receipts by requiring these to be paid into an account with the chargee. Slade J, having found that the charge created was a fixed charge, concluded that this gave the chargee the right to assert its lien on the proceeds in the account at any time, even when the account was in credit, Slade J reasoning was based on the fact that there were restrictions placed on the company's power to deal with the proceeds of the debts together with the banks right to prevent the company making withdrawals from the account even when it was in credit, gave the bank a degree of control that was inconsistent with a floating charge.

The element of control is vital to the characterisation of the charge. There may in fact be no problem where the debenture prohibits total control on the issue of the proceeds of the debts charged by the chargor, and where he is left to control the proceeds in the course of its business. However, where there is limited level of control the courts may need to fully scrutinise the debenture and determine whether what has been created is in fact a fixed or floating charge.<sup>4</sup> In the case of *Re Brightlife Ltd*.<sup>5</sup> Where the debtor company though prohibited from selling, factoring or discounting the charged debts without the consent of the debenture holder, was left free to collect the debts, pay proceeds into the bank account and use them as its own money. It was held by Hoffman J. that the charge though described as fixed charge, was in truth a floating charge, for the ability to deal with receipts as its own was inconsistent with a fixed security.<sup>6</sup>

### 8.2 Decision in *National Westminster Bank Plc. v Spectrum Plus Limited & others*.<sup>7</sup>

Goode has identified two lines of cases developing side by side.<sup>8</sup> On one side were the cases of *Re Brightlife*<sup>9</sup>, *Re Keenan Bros*<sup>10</sup> and *William Gaskell Group Ltd v Highley*<sup>1</sup> while on the other hand, cases like *Re Atlantic*

<sup>1</sup> (1974) Lloyds Rep. 142

<sup>2</sup> See Section 861 (3) Companies Act 2006. (U.K) .

<sup>3</sup> (1958) D.L.R (2d) 123

<sup>4</sup> (2000) 2 BCLC 361.

<sup>5</sup> Goode op.cit. p139.

<sup>6</sup> (1987) Ch. 200.

<sup>7</sup> Goode op.cit. 138.

<sup>8</sup> Goode R. (1994). Charge over book debts; a missed opportunity. *Law Quarterly Review*.110 . 592.

<sup>9</sup> (1987) Ch. 200.

<sup>10</sup> (1985) I.R.401.

*Computers*<sup>2</sup> and *Re New Bullas Trading Ltd.*<sup>3</sup> The first line of cases followed the orthodox principles, and have now been approved by the House of Lords in *Spectrum Plus*. The second line of cases are a little more complicated because they merely concern charge on sub-leases and rentals which the Court of Appeal held were fixed charges because they were not ambulatory in character but related to rights under specifically identified sub-lease in existence at the time of the charge, and was thus contrasted with the type of charge described by Romer L.J and covering a class of present and future assets. The distinction will turn on whether the security was over existing and future property. The courts have already established that there may be fixed charge over after acquired property<sup>4</sup>.

The decision in *New Bullas Trading Ltd* had received much criticism<sup>5</sup> though not without its supporters.<sup>6</sup> The Privy Council in the case of *Agnew v Commissioner of Inland Revenue*<sup>7</sup> a case where a debenture which was expressed to confer a fixed charge on the company's book debts and proceeds, excluding those proceeds which were received by the company before the charge crystallised or the bank required them to be paid into an account with self, which it never did, proceeds received by the company while the charge remained uncrystallised therefore fell within the floating charge which the debenture imposed on the company's other assets. The debenture was similar to that of *Re New Bullas*, despite the fact that the lender in *Agnew* was a bank. The effect of the debenture was that while the bank reserved the power to intervene and take control of the proceeds, that power was never exercised. The Privy Council had no hesitation in coming to the conclusion that *Re New Bullas* was wrongly decided, and that the charge was a floating charge. The decision also cast doubts on whether the charge created in *Siebe Gorman* was actually a fixed charge as decided by Slade J.

The stage was therefore set for the House of Lords to set the proper position of the Law, and this came up in the case of *Spectrum Plus*. In the case, the debenture secured an overdraft of GBP. 250,000 crucially, it specified that the security was by way of specific charge over all present and future book debts and other debts, and that the chargor was prohibited from charging or assigning the debts and was required to pay the proceeds of collection into an account with the lending bank. The debenture did not specify any restrictions on the chargor's operation of that account. The issue was whether this charge was fixed or floating. At first instance Sir Andrew Morrit V-C decided that the charge was a floating charge<sup>8</sup>. He held that as a matter of law, that if a chargor is entitled to use proceeds in the normal course of business unless and until the chargee intervenes, then the charge will necessarily be floating notwithstanding other restrictions on the dealings with the book debts. This followed the decision and approach of the Privy Council in *Agnew v Commissioner of Inland Revenue (or Brumark case)* a well criticised decision.<sup>9</sup> The Court of Appeal in England has agreed with the lower court and held (per Lord Phillips M R. read the only reasoned judgment)<sup>10</sup> that the Court of Appeal was not entitled to follow the Privy Council decision in *Brumark*. Because that decision was in direct conflict with an earlier Court of Appeal decision in *Re New Bullas Trading Ltd*<sup>11</sup>. *New Bullas* decision was to the effect that it was possible to have a fixed charge over book debts regardless of what might then happen to the proceeds. In particular a charge over book debts could be fixed even though the chargor was at liberty to collect and use the proceeds in the ordinary course of its business. The Court of Appeal from the interpretation of the debenture concluded that it was a fixed charge just as in *Siebe Gorman*. Worthington<sup>12</sup> has criticised this position taken by the Court of Appeal 'as impossible to defend'. The House of Lords however rejected the position taken by the Court of Appeal in totality and held that the debenture did not provide sufficient control on the part of the chargee for a charge to be a fixed charge. The House of Lords overruled the decision of Slade J in *Siebe Gorman* because it is not possible to defend the decision on any rational basis. The House of Lords decision confirmed that the only deciding criterion for deciding whether a charge was fixed or floating was the degree of control exercised by the chargee over the charged assets and that the presence or absence of the other two characteristics of a floating charge pointed out

<sup>1</sup> (1993) B.C.C. 200.

<sup>2</sup> (1992) Ch. 505.

<sup>3</sup> (1992) Ch. 505.

<sup>4</sup> *Holroyd v Marshall* (1862) 10 H.L Cas 191; *Tailby v Official Receiver* (1888) 13 App. Cas. 523.

<sup>5</sup> (1994) 1 B.C.L.C 485

<sup>6</sup> For example, Goode R. (1994) Charges over book debts: missed opportunity. *Law Quarterly Review*. 110 .592, Worthington S. (1997) Fixed charges over book debts and other receivables. *Law Quarterly Review*. . 113 ..562

<sup>7</sup> See, for example, Berg, A (1995) Charges over book debts. A Reply *Journal of Business Law*. 4.33. McLaughlan D.W. Fixed charges over book debts-New Bullas in New Zealand; Round Two 2000. *Law Quarterly Review*. 116. 211; Walds, P. (1999) Fixed charges over book debts. *New Zealand Law Report* . 46.

<sup>8</sup> (2001)UK.PC.28

<sup>9</sup> See, Worthington S. (2010) An unsatisfactory area of the Law-fixed and floating charges yet again. *International Corporate Rescue-special issue* p. 175

<sup>10</sup> (2004) 2 WLR 783

<sup>11</sup> (1994) B.C.C.36

<sup>12</sup> See, Worthington S. (2010) An unsatisfactory area of the Law-fixed and floating charges yet again. *International Corporate Rescue-special issue* p. 175

by Romer L.J in *Re Yorkshire Woolcombers Association Ltd.*<sup>1</sup> notwithstanding. Lord Hope in *Spectrum Plus* clearly explained the distinguishing difference between the fixed and floating charge when he said

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.

Lord Millet in his own words in *Agnew* made the point clearer when he said that,

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 in another way, whether the charged assets were intended to be under the control of the company or of the charge holder.<sup>2</sup>

There is no longer any doubt that the floating charge on book debts have come to stay, the only challenge outstanding may be as the commercial circumstances change, the law must be up and doing to adopt principles either new or based on old doctrines that may be applied in order to meet changing circumstances. The Nigerian Law has failed woefully to move with the modern trends. The CAMA 2004 severally recognised that book debts should be registered with the C.A.C<sup>3</sup> as well as a floating charge on the undertaking or property of the company<sup>4</sup>. Fixed charges are not included in the list of registrable instruments in Section 197 of CAMA 2004. The charge on book debts as we said is inclusive, and must be registered. The challenge and great omission is that the Act does not give a guide or definition of what it refers to as debts of the company. How do we determine whether the book debts is floating or fixed charge, since the list specifically included floating charges, it follows that fixed charges are exempted. The determination of what is fixed or floating charge does not depend on the nomenclature on the deed but on a careful consideration of the debenture itself which can only be carried out by the court. Commerce is not helped if the commercial men have to wait for the court before entering into transactions, or after entering the transactions, their intentions are varied later by the court. The opportunity here presented is for the legislature to intervene and specify when and how the characterisation can be made and also the guidelines to follow in order to come to definite and workable criteria for the determination of the fixed or floating charge over book debts. The law also must be amended to classify charge on rent or other periodical payments out of land as a floating charge as well as registrable debenture transaction.<sup>5</sup>

In view of the serious lack of a proper legal framework for the regulation of Book debts in Nigeria, it is hereby suggested that a proper distinction be made statutorily between the fixed or floating charge on Book debts in Nigerian law. This will no doubt have serious implications for business and secured credit in Nigeria. The current position of the law has been left in a most disorganized and haphazard state very unfavourable for business and commercial certainty. In regulating the Book debts it is proper to characterise the fixed charge in a manner as to leave no doubt as to the distinguishing factors from a floating charge. An important element in the categorisation of charge over book debts is the control factor, as Lord Hope explains in *the Spectrum* case is very helpful and it is hereby suggested that Fixed charge over Book debts must include any of the four means of blocking a Book debts account. According to Lord Hope<sup>6</sup> one of the ways to ensure that a charge over book debts is fixed is:<sup>7</sup>

1. To prevent all dealings with the book debts so that they are preserved for the benefit of the chargee's security and insists upon assignation of the book debts to the security holder and its intimation to the company's debtor as the equivalent of their delivery. One can, of course, be confident where this method is used that the book debts will be permanently appropriated to the security which is given to the charge
2. Another is 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.
3. A third is to prevent all dealings with the debts other than their collection, and to require the collected

<sup>1</sup> (1904)A.C 355

<sup>2</sup> Worthington S. (2010) An unsatisfactory area of the Law-fixed and floating charges yet again. *International Corporate Rescue-special issue* p. 176.

<sup>3</sup> Section 197(2)(e).

<sup>4</sup> Section 197.

<sup>5</sup> Section 197 (2) (e) CAMA 2004.

<sup>6</sup> ( see paragraph 47 to 51) His lordship after pointing out the disadvantages of a floating charge agreed that: It is not easy to reconcile the company's need to continue to collect and use these sums for its own business purposes with the lender's wish to escape from the priority which section 175(2)(b) gives to preferential debts over the claims of the holder of a floating charge by subjecting the uncollected book debts to a security which will operate as a fixed charge over them. see paragraph 52

<sup>7</sup> Adopting Sarah Worthington's An 'Unsatisfactory Area of the Law' *Op. cit.* note 52 Pg. 8

proceeds to be paid into an account with the chargee bank. That account must then be blocked so as to preserve the proceeds for the benefit of the chargee's security.

4. A fourth is to prevent all dealings with the debts other than their collection and to require the collected proceeds to be paid into a separate account with a third party bank. The chargee then takes a fixed charge over that account so as to preserve the sums paid into it for the benefit of its security.

## 9.0 Conclusion

A fixed charge is one which restricts the debtor's power to dispose of or otherwise deal with the property charged without the consent of the creditor<sup>1</sup>. A floating charge, however, allows the debtor unrestricted freedom in dealing with the charged property in the ordinary course of business without the need to seek the consent of the creditor. There is absolutely no definition of the fixed charge in the CAMA, though, the description of the floating charge was provided in the CAMA there is nothing to differentiate between the floating charge and a fixed charge in the legislation .

The problems of identifying the categorisation of a charge over Book debt was also not resolved in the Act. In England, the old assumption that a fixed charge could be created over a Book debt even where there is limited control provision in the debenture and in fact and practice, where no control over the proceeds was exercised by the creditor as shown in the case of *Siebe Gorman*<sup>2</sup> was eventually overruled by the House of Lords in the case of *Re Spectrum Plus*<sup>3</sup> because the debenture did not provide sufficient control for the charge to be considered to be a fixed charge. The decision in the *Spectrum Plus* case however does not specify the level of control that is sufficient to classify a charge over Book debts to be accorded the status of a fixed charge. It is also noteworthy that the nomenclature used by the parties on the debenture does not matter, in fact, the intention of the parties is not the deciding factor in law, but as Lord Millet puts it,

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 it in another way , whether the charged assets were intended to be under the control of the company or of the charge holder.<sup>4</sup>

The parties may therefore be required to create blocked accounts as suggested by Lord Hope in the *Spectrum Plus*. This is a good idea for effective creation of fixed charge over book debts which the legislature is called upon to consider in the legislative regulation of the Book debt. Further, the registration of the Book debt<sup>5</sup> cannot be possibly done without a proper statutory regulation of the charge on Book debts. The Company Registrar is not equipped to engage in the two stage analysis and categorisation as explained by Lord Millet in *Agnew v Commissioner of Inland Revenue*<sup>6</sup> most especially the second stage of the categorization which is a matter of law and which only the court can determine. It is important for purposes of commercial certainty that the law must provide a framework for the regulation, identification and categorization of the charge over Book debts in Nigeria.

## References

- Aina, K.( 2011) The Machinery of Raising Capital by companies Through Debt Finance in Nigeria. *International Journal of Advanced Legal Studies and Governance*. 2.1: 85-101
- Amour, J. (2004)The Chequered History of the Floating Charge. *Griffith Review* 25. 27
- Berg A. (2004). Charges Over Book Debts. *Modern Law Review*.1007
- Berg, A (1995) Charges over book debts. A Reply *Journal of Business Law*. 4.33
- Brown D.( 2000). Charges over Book Debts: Can Lenders have their Cake and Eat it in pieces. *Insolvency Law Journal*. Vol. 8.50
- Ferran E. ( 1988) *Floating charges. The nature of the security*. Cambridge Law Journal . 47. 2 .213-237. Pg. 214
- Finch V.( 2002). *Corporate Insolvency Law-perspectives and principles* Cambridge: Cup. 80
- Goode R. (1994). Charge over book debts; a missed opportunity. *Law Quarterly Review*.110 . 592.
- Goode R. (2008). *Goode on Legal problems of credit and security*. Gullifer ed. 4<sup>th</sup> ed. London, Sweet and
- Goode R.(1994). Charges over Book Debts: A Missed Opportunity. *Law Quarterly Review* 45.
- Goode, R. & Gullifer, L. (2006). *Goode on Legal problems of Credit and Security* 4<sup>th</sup> ed. London: Sweet & Maxwell. Pg. 109
- Lerner, S. Floating Charges over Assets of Individuals in Israeli Law. Retrieved April 9, 2013 from [www.Law.Utoronto.Ca/.../IACCL10-Lerne\\_Pg.3](http://www.Law.Utoronto.Ca/.../IACCL10-Lerne_Pg.3)

<sup>1</sup> Sealy L & Worthington S. (2010) *Cases and Materials in Company Law*. London: Oxford University Press. 605

<sup>2</sup> Supra.

<sup>3</sup> Supra.

<sup>4</sup> (2001) A.C. 680 at 710 at 732.

<sup>5</sup> Section 197 (1) (e) CAMA.

<sup>6</sup> (2001) A.C. 710 at 720.

- Lowe R. and Bearle S.( 2005). The Spectrum Decision Bad News for Banks. *Journal of International Banking Law and Regulation*. 482;  
Maxwell p.123.
- Mayson, S., French, D. & Ryan, C. (2006) *Mayson, French & Ryan on Company Law*. 22<sup>nd</sup> ed. Oxford University press. Pg. 344.
- Mclauchlan D.W. Fixed charges over book debts-New Bullas in New Zealand; Round Two 2000. *Law Quarterly Review*. 116. 211
- Morse, G. (1995)*Charlesworth & Morse Company Law*. 15<sup>th</sup> ed. London: Sweet & Maxwell. Pg. 629
- Oditah, F. (1991) *Legal Aspects of Receivables Financing London: Sweet & Maxwell*. Pgs. 19-32
- Orojo, K. 2008. *Company Law and Practice in Nigeria*. 5<sup>th</sup> ed. South Africa: LexisNexis.
- Paul, L. D. *Gower and Davies, Principles of Modern Company Law*. 7<sup>th</sup> ed. London: Sweet and Maxwell. Pg. 1179
- Sealy, L. & Worthington, S. (2013) *Sealy & Worthington's Cases and Materials on Company Law*. 10<sup>th</sup> ed. Oxford University Press. Pgs. 628-629
- Thai, L. (2007) Charges over Book Debts in the United Kingdom and Australia: The Way Forward. *MqJBL*. 4:267 at 269.
- Walds, P. (1999) Fixed charges over book debts. *New Zealand Law Report* . 46.
- Worthington S (.1997). Fixed Charge over Book Debts and other Receivables. *Law Quaterly Review* .Vol. 113.562
- Worthington S. (2010) An unsatisfactory area of the Law-fixed and floating charges yet again. *International Corporate Rescue-special issue* p. 175