CASE REVIEW SECTION

Notice Filing and the Law Commission Consultation Paper No. 164 on Registration of Security Interests

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The broad thrust of this July 2002 consultation paper is that English law should move over to a system of notice filing, first developed in the US under Article 9 of the Uniform Commercial Code[1] and then refined in Personal Property Security legislation in the common law provinces of Canada and more recently in New Zealand with the Personal Property Securities Act 1999.[2] A final report is awaited but there are indications that while the Law Commission will stick to main features of the proposed scheme they are prepared to modify the details. This engagement with consultees is very welcome and bodes well for a thorough and convincing final report. It remains to be seen however whether the Law Commission's proposals will ultimately translate onto the statute book. Unfortunately, the precedents of the Crowther[3] and Diamond Reports[4] do not augur well in this respect. Be that as it may, this short article will address the principal aspects of the consultation paper.[5]

Notice filing versus transaction filing

The present company charge registration regime laid down in Part 12, Companies Act 1985 may be dubbed a "transaction filing" system. Once a charge has been created, particulars of the charge along with the instrument of charge must be delivered to the registrar of companies within 21 days of creation and, if this is not done, the charge is invalid in the event of the corporate borrower going into liquidation. The legislation is premised on the assumption that the registrar compares the filed particulars with the charging instrument and, if satisfied that there is a concordance, issues a certificate of due registration which is stated to be conclusive evidence that all the requirements of the Act as to registration have been complied with. Under the "notice filing" system however, only a bare bones statement needs to be submitted which states that the lender either has taken or intends to take a security interest in the debtor's property.

There are definite advantages in moving over to a system of notice filing. These advantages stem from deep-rooted problems with the existing process.[6] For a start the process is a burdensome, time-consuming one and the duties imposed on the staff at companies house may not be ones that are capable of easy fulfillment. Secondly, there is not much flexibility in the procedure as far as the secured lender is concerned. There is no procedure whereby registration may be achieved in advance of negotiations for a loan agreement and moreover, a single filing cannot cover more than one instrument of charge. Thirdly, the time of registration does not determine priorities if there is more than one charge over the same property.

The Law Commission in their consultation paper concluded that the current English system for registration of company charges has a number of weaknesses such that reform was needed. Moreover, the Commission concluded that a notice-filing system would have very significant advantages over any

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1 Brief descriptions of Article 9 that are particularly useful for English lawyers can be found in P. Winship "Selected Security Interests in the United States" in J.J. Norton and Mads Andenas eds. *Emerging Financial Markets and Secured Transactions* (1998) at p. 267 and Richard F. Broude "Secured Transactions in Personal Property in the United States" in M. Bridge and R. Stevens eds. *Cross-Border Security and Insolvency* (2001) at p. 45 and see also McCormack *Secured Credit under English and US Law* (Cambridge University Press, 2004): McCormack "Notice Filing versus Transaction Filing – A comparison of the English and US Law of Security Interests" [2002] Insolvency Lawyer 166.

2 For up-to-date information on the New Zealand legislation see the website ‹www.ppsr.govt.nz/›.

3 Report of the Committee on Consumer Credit (Cmnd. 4596, 1971)

4 "A Review of Security Interests in Property" (HMSO, 1989)

5 The consultation paper is considered in more detail by McCormack [2003] LMCLQ 80 and [2003] Insolvency Lawyer 2 and by Louise Gullifer [2003] LMCLQ125.

6 See generally pp. 48-50 of the Law Commission Consultation Paper.

amended version of the current system. In the Law Commission's view:[7]

> "A system of notice-filing would make it substantially easier for companies ... to register security interests. Filing could be done electronically by the completion of a simple on-screen form and the information filed would appear on the public register without imposing on registry staff the burden of checking the information submitted. Although less information would have to be submitted, there would be little reduction in the practical value of the register as a source of information about the company's financial affairs. Further, a potential creditor could have confidence that any charge it filed would have priority over any earlier charge that does not appear on the register and any subsequent charge (other than a purchase-money interest). The system would permit filing in advance of the creation of the security, in order to preserve priority during negotiations; and a single financing statement could be filed to cover future transactions, thus obviating the need to register successive security interests as and when they are created. This might lead to an increase in the amount of information available to the public, as it would be possible to register charges that, under the present system, have to be excluded from registration requirements because registration of each charge is impractical."

The system of notice filing proposed by the Law Commission would eliminate these disadvantages enabling, inter alia, notice to be filed in advance of the actual conclusion of a security agreement. While there seems little doubt that notice filing is more convenient and flexible than notice filing, on the other hand, it is also easy to overestimate these advantages. For example, after-acquired property clauses, future advances clauses and "floating" security interests are fully recognised by English substantive law and while registration must relate to a particular instrument of charge rather than the entire credit relationship of the parties, the registered particulars can capture the full flexibility of the legal provisions. The major difference between the two systems lies in the fact that in England the registrar checks off the registered particulars against the instrument of charge whereas under Article 9, of necessity, no such checking function is performed. The security agreement may not yet be in existence and therefore it is impossible to match it up against the financing statement.

On the other hand, there are critics who suggest that the so-called practical problem – absence of any facility for advance registration – is not a major one and that the notice filing system leads to the overproduction of useless information and the underproduction of valuable information.[8] A searcher of the register does not whether a particular registration relates to an actual transaction or to an intended transaction that never in fact materialised. Moreover, much less details of the transaction are available than under a transaction filing system. One might ask the rhetorical question whether, in the modern electronic information age, there is any justification for providing less detailed information on a publicly accessible register as to the state of debtor's borrowings? Similar considerations appealed to the Scottish Law Commission in their Discussion Paper *Registration of Rights in Security by Companies*[9]. The Scottish Law Commission canvassed the possibility of requiring registration of the deed of charge rather than summarised particulars. In their view, the proposal would reduce the chances of error in that a system which registers only particulars, and not the deed itself, runs the risk of the particulars being inaccurate. According to the Scottish Law Commission[10]

> "by making the security document publicly accessible, the proposed system would provide those searching the register with precisely the information they would wish to have, namely the nature and extent of the security. From the point of view of a third party, a copy of the deed itself is almost always better than an abbreviated summary .... In any event it may be assumed that existing creditors would prefer to consult a public, and online, register than to have the inconvenience, and possible embarrassment, of making an approach to the company itself."

Perhaps the only answer to these critics is to say that the register merely alerts searchers to the possible existence of conflicting third party rights and no matter how perfect the information on the register it would be unrealistic to expect any register to render

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7 Para 1.50 of the Consultation Paper.

8 See the unpublished paper prepared by Richard Calnan, a Partner in Norton Rose, for the Queen Mary, University of London, Conference on *Registration of Security Interests* (September 2002).

9 October 2002.

10 *Registration of Rights in Security by Companies* (October 2002) at p 47. The Commission recognised that there were counter-arguments such as the fact that registration of the deed might reveal more information than the parties to it would wish. Moreover, internet registration of a deed was likely to be awkward and internet registration was the way of the future. See also R. Calnan "Registration of Company Charges: Proposals for Reform" [2001] Butterworths Journal of International Banking and Financial Law 53 at 56.

obsolete inquiries being made of the debtor or of the third party.

Clearer priority principles

Apart from simplifying the registration process, the great merit of the Law Commission proposals is the move over to a simpler and more logically coherent method of determining priorities between more than one security interest in the same property with priorities being determined by a simple first to file rule subject to an exception for purchase money security interests. With a purchase money security interest the release of funds is tied to the acquisition of particular property and the lender acquires a security interest in the property. The economic justification for recognising purchase money security interests (PMSIs) is based on the proposition that the release of funds by the creditor increases the debtor's total pool of assets. The debtor is enabled to acquire new assets as distinct from merely rolling over existing debt. The proposition has been neatly put as follows:[11]

> "Purchase money lenders always involve debtors who acquire new assets at the same time they acquire new liabilities. Giving a superpriority to purchase money lenders does not raise the fear that the debtor is simply using the new loan to roll over old debt. It may be that this characteristic of purchase money loans explains why they receive superpriority. Showing that other kinds of loans brought increases in the debtor's net worth equal to the value of the security interests transferred may be much more difficult."

The overseas systems relied upon by the Law Commission generally distinguish between PMSIs in inventory and in capital equipment with PMSI status in inventory being more difficult to establish. The acquisition of new inventory and its associated debt is believed to be more threatening to earlier lenders than the acquisition of new capital equipment but more threatening still is a general all-purpose loan.

The Law Commission in addressing the purpose of the filing system highlighted the failure of the present English system in sorting out priorities. This echoes concerns expressed in the earlier Company Law Review Steering Group Report. This Report suggested that the express intention of the existing system is to penalise the concealment of secured credit and thus to prevent markets being misled by the apparent ownership by companies of assets which were in fact already encumbered in favour of prior creditors. The system provides public notice of any charges over a company's specified assets and only determines priorities as an incidental effect of failure to register in timely fashion. This, in their view, was a major failing.[12] The Law Commission spoke in similar terms, stating:[13]

> "We believe that a registration scheme should perform two basic functions: (1) to provide information to persons who are thinking of extending secured lending (and occasionally unsecured lending, where the amount is large), credit rating agencies and potential investors about the extent to which assets that may appear to be owned by the company are in fact subject to securities in favour of other parties, in particular creditors: and (2) to determine the priority of securities ...
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> In relation to priority the system should, in general, enable potential secured parties to be confident (1) that they can take a security without any risk that it will be subject to other existing interests of which they had no reasonable means of knowing: (2) that, having checked the register, they will be able by taking simple steps to ensure the priority of any security they subsequently take over one that is taken in the meantime by another party; and (3) that registration will ensure the priority of their security against any subsequent security interest (unless there are good reasons of policy for the later interest to have priority)."

A simpler system for determining priorities and the floating charge

The basic Law Commission recommendation is that all types of charge over property, whether fixed and floating, should be registrable under a system of notice filing and that, irrespective of the nature of the charge, priorities between one or more charges over the same property should generally be determined on the basis of the principle that the first to file has priority.[14] This proposal cuts through a lot of the complication associated with existing law. At the moment, and as a matter of broad principle, a duly registered floating charge ranks after a duly registered fixed charge irrespective of the respective dates of creation of the

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11 D.G. Baird and T.H. Jackson *Security Interests in Personal Property* (2nd ed. 1987) at p. 401. The priority of purchase money security interests is discussed generally by Jackson and Kronman "Secured Financing and Priorities Among Creditors" (1979) 88 Yale L.J. 1143 at 1171-78.

12 *Final Report: Modern Company Law for a Competitive Economy* (July 2001) at pp 248-249.

13 Consultation Paper No 164 *Registration of Security Interests* (July 2002) at pp 46-47.

14 See Para. 4.122 and following paragraphs of the Consultation Paper.

two charges.[15] A floating charge however, has priority over a subsequent fixed charge, assuming that both charges have been duly registered where the subsequent fixed chargeholder has actual notice of a restrictive clause in the earlier floating charge.[16] A restrictive or negative pledge clause is a provision which prohibits the creation of subsequent fixed charges ranking prior to, or pari passu with the earlier floating charge. It is actual, and not just constructive notice, of a restrictive clause in the floating charge debenture that is required before the priority of a fixed chargeholder is displaced in favour of a floating charge holder. In *G & T Earle Ltd v Hemsworth Rural District Council* Wright J said:[17]

> "... the debentures having been duly registered...the plaintiffs, like all the world, are deemed to have constructive notice of the fact that there are debentures. But it has never been held that the mere fact that persons in the position of the plaintiffs have constructive notice of the existence of debentures also affects them with constructive notice of the actual terms of the debentures or that the debentures are subject to the restrictive condition to which these debentures were subject. No doubt it is quite common for debentures to be subject to this limiting condition as to further charges, but that fact is not enough in itself to operate as constructive notice of the actual terms of any particular set of debentures."

One of the major objectives of the Law Commission proposals is to devise a simpler system of priority determined principally by the date of filing. Consequently, the new legislation, in its view, should provide that a floating charge should no longer give a company authority to create subsequent fixed charges that automatically get priority over an earlier floating charge.[18] On another view however, the proposals are unnecessarily complex because they involve retaining the floating charge and indeed, preserving the importance of the distinction between fixed and floating charges. Other jurisdictions such as New Zealand that have gone down the route of personal property security law reform have not proceeded along this path.

Under the new dispensation proposed in England floating charge language employed in a loan agreement is more than a matter of mere terminology and would have major substantive impact. Preferential creditors have priority over the floating charge and the Law Commission seems anxious to preserve this position though the point is not articulated at any great length. The Law Commission said:[19]

> "Since a charge that permits the debtor to dispose of the assets in the ordinary course of business free of the charge may still be described accurately as a floating charge, it would still be subject to the provisions of the Insolvency Act 1986 requiring that preferential creditors be paid before the floating charge-holder, but if preferential debts are to be retained it would be sensible to provide this expressly in order to avoid any doubt. The same applies to the provisions for the avoidance of certain floating charges contained in the Insolvency Act 1986, section 245."

It is easy to see why the Law Commission recommendations are cast as they are. Firstly, as various commentators have remarked, the floating charge is very much the workhorse of the secured credit industry and has been the mainstay of bank lending for over a century.[20] One of the precursors to the Law Commission Consultation Paper, the Crowther Report, observed that the floating charge was so fundamental a part of commercial lending practice that its abolition could not seriously be contemplated.[21] The

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15 A floating charge permits a company to carry on business in the ordinary way insofar as the class of assets charged is concerned. This would include the creation of fixed charges in the ordinary course of business. For statements on the ingredients of a floating charge see the judgment of Romer L.J. in *Re Yorkshire Woolcombers Association Ltd.* [1903] 2 Ch. 284 and 285 and the famous "ambulatory" metaphor employed by Lord Macnaghten in the House of Lords in that case which is reported under the name *Illingsworth v. Houldsworth* [1904] A.C. 355 at 358.

16 For criticism of knowledge based priority systems see Baird and Jackson "Information, Uncertainty and the Transfer of Property" (1984) 13 Journal of Legal Studies 299 at 314: "An inquiry into knowledge is likely to be expensive and time consuming. It is simply much easier to live in a world in which everyone knows that he must comply with a few simple formalities or lose than to live in a world where the validity of someone's property rights turns on whether certain individuals had knowledge at some particular time in the past. Those who are required to make appropriate filings, in the main, either are professionals or engage the services of professionals. We think it likely that everyone is ultimately better off with a clear rule than with a legal regime that is somewhat more finely tuned but much more expensive to operate. Ferreting out those who took with knowledge despite a defective filing generally is not worth the undertainty and the litigation it generates."

17 (1928) 44 T.L.R. 605

18 Para 4.142 of the Consultation Paper.

19 Para. 4.133 of the Consultation Paper.

20 See Ziegel "The New Provincial Chattel Security Regimes" (1991) 70 Canadian Bar Review 681 at 712.

21 *Consumer Credit* Report of the Committee on Consumer Credit (1971,Cmnd. 4596) at para. 5.7.77. See also more generally the 1989 report by Professor Aubrey Diamond commissioned by the Department of Trade and Industry *A Review of Security Interests in Property* (HMSO 1989)

centrality of the floating charge in English lending practice was also acknowledged recently by the Privy Council in *Agnew v Commissioner of Inland Revenue.*[22] Lord Millett said:

> "The floating charge is capable of affording the creditor, by a single instrument, an effective and comprehensive security upon the entire undertaking of the debtor company and its assets from time to time, while at the same time leaving the company free to deal with its assets and pay its trade creditors in the ordinary course of business without reference to the holder. Such a form of security is particularly attractive to banks, and it rapidly acquired an importance in English commercial life which ... should not be underestimated."

Secondly, and relatedly, banks and bank lending documentation are very rooted in the language and concepts of the floating charge and might be most reluctant to see its disappearance.[23] Thirdly, abolishing the floating charge as such, or in other words assimilating fixed and floating charges, would disadvantage preferential creditors – that is, unless some alternative provisions were put in place to safeguard the interests of this category of creditors. In other words, if fixed and floating charges were brought together in a new unitary concept of a single security interest, the Law Commission would have to craft a whole new set of provisions.

The principle behind the Law Commission consultation paper that the floating charge is to be preserved generates a number of complications. Firstly, what is a "floating charge" under the new dispensation? The Law Commission does not offer much in the way of real guidance. The second complication in the consultation paper is the seeming ambiguity on the effect of labeling. Under existing law, it is clear that characterisation of the nature of a security interest by the parties is not conclusive. To use an analogy, and to borrow language used in a different context, a four-pronged instrument for manual digging cannot be changed into a spade merely by the parties calling it a spade.[24] If a security agreement has the usual attributes of a floating charge in terms of debtor autonomy the parties cannot transform the agreement into a fixed charge merely by calling it as such. There is a whole line of cases, particularly in the context of receivables financing, where the courts have disregarded the characterisation applied to a security interest by the parties and instead construed the parties' agreement in the round and in the light of the surrounding circumstances.[25] Nevertheless, in this respect, while the Consultation Paper is ambiguous, it may involve a change in existing law. At one point it is said that if the charge is stated in the financing statement to be a floating charge the purchaser can be confident that, provided the sale is in the ordinary course of business, she will take free of it.[26] At another juncture however, the report provides that a financing statement should not be required to state the nature of the charge.[27]

Thirdly, it is unclear where the report leaves execution creditors. The fourthly difficulty arising from the Law Commission recommendation is that in a new, supposedly simpler and conceptually more coherent system, it proposes retaining the concept of crystallization of a floating charge. The Consultation Paper suggests that it should not be necessary to register the existence of an automatic crystallization clause, but it should be necessary to register the fact in the event that such a charge has crystallized if the chargeholder wishes to rely on it. The floating charge has been described as an instrument of great power and even greater mystery.[28] Part of the mystique derives from the concepts of crystallization and automatic crystallisation.

Application of notice filing to "quasi-securities" – retention of title clauses

The Law Commission considered that the notice-filing system could be applied just to the charges that are currently registrable under the Companies Act 1985.[29] The Commission added however, that there

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22 [2001] 2 A.C. 710.

23 See, for example, the comments by Professor Bridge: "the English bank has obtained all the freedom it needs to make its position ironclad. It is therefore hardly surprising that the banks are not pressing for reform along the lines of Article 9. The position in English law is a world away from the strict line on accounts receivable financing by the United States Supreme Court in *Benedict v. Ratner*. If England were to adopt an Article 9 statute, these hard-won gains would be surrendered for something new whose implications would take some time to be felt." (1996) 27 Canadian Business Law Journal 196 at 221.

24 See the judgment of Lord Templeman in *Street v. Mountford* [1985] A.C. 809.

25 Cases indeed like *Agnew v. C.I.R.* [2001] 2 A.C. 710.

26 Para. 4.141

27 Para. 4.144.

28 See generally Goode "TheExodus of the Floating Charge" in Feldman and Meisel eds. *Corporate and Commercial Law: Modern developments* (1996) 193 at 203.

29 See para 1.17 of the Consultation Paper.

would also be advantages in following a functional approach to what amounts to a security interest thereby bringing into the scheme such quasi-securities as without a system of registration, may be misleading to potential creditors or purchasers.[30] Retention of title clauses and factoring arrangements are singled out in this regard. The Commission pointed out that the US, Canada[31] and New Zealand[32] have all adopted systems that take a functional approach to the creation and registration of security interests. It also wondered[33] "whether there might be a risk that in time overseas investors may be hesitant before investing in United Kingdom companies if we persist in having a system that does not take a functional approach, instead retaining the application of any system only to charges." Such speculation might be regarded as somewhat farfetched especially considering the fact that North American and Commonwealth developments have not held sway in Continental Europe.[34]

The Law Commission considered that retention of title clauses should be registrable.[35] In its view even "simple" retention of title clauses served a clear security purpose and it was pointed out that in the case of an "all monies" clause, security was effectively being taken over goods already delivered and paid for. With a simple retention of title clause the seller retains title to a particular consignment of goods until that particular consignment has been paid far and, in the case of an "all-monies" or "current account" clause the seller retains title until all debts owing from the buyer have been discharged and not just those arising from the particular contract of sale. On the other hand, as a partly counterbalancing measure, the Commission canvassed the possibility that at least simple retention of title clauses should enjoy super-priority status i.e. such clauses would rank ahead of pre-existing security interests granted by the debtor which contain an after-acquired property clause. The recognition accorded purchase money security interests constitutes an exception to the first-to-file-has-priory principle. It was suggested that not having a concept of purchase-money super-priority under a functional system of security interests would make it more difficult for a company to obtain vendor credit.[36] In other words, a seller of goods, instead of affording the buyer time to pay and employing a retention of title clause in the sale of goods contract, might, under the new dispensation and in the absence of purchase money super-priority, insist upon cash on delivery. Nevertheless, the Commission was tentative on the point and, instead of making a definite recommendation, asked consultees whether secured parties who have given value should, to the extent of that value, be given priority over existing perfected security interests.[37]

Notice filing and the assignment of receivables[38]

The Law Commission provisionally recommended that sales of receivables, for example under a factoring or block agreement or as part of a securitisation, should be registrable.[39] It was suggested however that there should be an exception to the requirement to register when book debts are sold as part of a larger transaction (such as the overall sale of the business), and that there should be an exception also in the case of negotiable instruments. Essentially, the Law Commission gave two reasons for their recommendations in this regard. Firstly, receivables form an important part of the assets of a business and arrangements such as debt factoring are often closely akin to providing security for loans. Secondly, applying a system of notice filing to assignments of receivables would make it easier to determine priorities between competing

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30 See para 7.8 of the Consultation Paper.

31 On the Canadian position see generally Ziegel "Canadian Perspectives on How Far is Article 9 Exportable?" (1996) 27 Can.Bus.L.J. 226; McCormack "Personal Property Security Law Reform in England and Canada" [2002] J.B.L. 113

32 Personal Property Securities Act 1999 as amended; on which see generally the website www.ppsr.govt.nz

33 See para 7.10 of the Consultation Paper.

34 See generally the chapters on taking security in France and Germany in M. Bridge and R. Stevens ed. *Cross-Border Security and Insolvency* (2000) and note the following comment on German law (at p.94): "Apart from charges on land which have to be registered in the land register, none of the security based on the BGB (namely the pledge over goods and rights, the transfer of title for security purposes, the security assignment, and the reservation of title) require registration against the asset."

35 See para 7.24 of the Consultation Paper. See generally on retention of title clauses McCormack *Reservation of Title* (2nd ed. 1995) and also McMeel "Retention of Title: The Interface of Contract, Unjust Enrichment and Insolvency" in Francis Rose ed. *Restitution and Insolvency* (2000).

36 See the statement at para 7.71 of the Consultation Paper that "secured party has enabled new assets to be brought into the company and that, without this priority scheme, it would be hard for companies to benefit from advantageous vendor-credit."

37 Para 7.74 of the Consultation Paper.

38 See generally Oditah *Legal Aspects of Receivables Financing* (1991).

39 Para 7.45 of the Consultation Paper.

assignments which would be worked out on the basis of the first-to-file-has-priority principle.[40]

Currently, priority between successive assignments goes to the first assignee who gives notice of the assignment to the account debtor provided that this assignee does not have actual or constructive notice of an earlier assignment at the time her own assignment was taken.[41] This rule – the rule in *Dearle v. Hall* [42] – and the rule has been widely criticised as an unsatisfactory basis for determining priorities. Under the rule, a private party, namely the account debtor, is more or less transformed into some sort of public official for the receipt of notices. The rule also disadvantages a common form of factoring arrangement where notices of assignment are not given to account debtors. There is much to be said for the Law Commission view that applying a notice filing system to all assignments and stating that priority goes to the first assignee to file is a more straightforward and logically coherent way of resolving priority matters.[43]

Despite the assimilation in terms of notice filing of charges over receivables and absolute assignments of receivables, the distinction between the two concepts remains of fundamental importance however, in areas such as bankruptcy and securitisation.[44] If an assignment by way of charge is taken over receivables then the assignor retains an equity of redemption which can be reached by the assignor's liquidator or trustee in bankruptcy whereas if receivables are sold outright, then the seller retains no equity of redemption.

A restatement of the law of security interests

The Law Commission were of the view that, long-term and as a matter of strong desirability, there should be a restatement of the law on the creation of security interests, the rights of the parties and enforcement of security interests, that would set out the extent to which such rules should apply to each kind of security interest including quasi securities.[45] As an interim measure however, it was suggested that the notice-filing scheme proposed for quasi-securities could be introduced without any provision that quasi-securities are to be subjected to the rules governing traditional security instruments. It is questionable whether this approach is wholly satisfactory in this context. At the very least, there will have to be legislative clarification of the priority rules applicable to competing assignments of receivables.

Conclusion

The Law Commission Consultation Paper on Security Interests has much to commend it. It proposes replacing the cumbersome transaction-based system for registering company charges contained in Part 12 Companies Act 1985 with a modern, streamlined notice-filing system. It also provides for the introduction of a simpler, more straightforward and conceptually more coherent method for determining priorities between competing security interests in the same property. The Consultation paper should be accorded a warm welcome but there are various shortcomings which need to be addressed in time. The Consultation Paper tries to marry the old and the new by proposing the retention of the floating charge instead of its assimilation into a new unified concept of security interest. It is submitted that in this respect the Consultation Paper creates unnecessary complications. In Canada and New Zealand the advent of reform has spelt the demise of the traditional floating charge. Not so in England where the legacy of the past lives on and which means that business, lawyers and financiers may have to cope with two systems running in tandem – the old and the new. In a sense the Law Commission recommendations are couched with at least one eye to the political realities. The obliteration of the floating charge would have meant upsetting the traditional bedrock of the secured finance industry in England and overturning over a century of learning. It would also impact adversely on existing categories of creditors unless alternative provisions were put in place to protect their interests. Nevertheless, the particular proposals may give to complexity and anomalies. It is hoped that the final Law Commission Report achieves the necessary accommodation of interests in a less complicated fashion. The consultation period should provide the opportunity to iron out incongruities.

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40 Para 7.43.

41 Note the observations of Cotton L.J. in *Mutual Life Assurance Society v. Langley* (1886) 32 Ch.D. 460 at 468: "It is not a question of what a man knows, when he does that which will better or perfect his security, but what he knows at the time when he took his security and paid his money."

42 (1828) 3 Russ 1. See generally on the rule De Lacy "Reflections on the ambit of the rule in *Dearle v. Hall* and the priority of personal property assignments" (1999) 28 Anglo-American Law Review 87 and 197.

43 See Walsh "Registration, Constructive Notice and the Rule in *Dearle v. Hall*" (1997) 12 Banking & Finance L.R. 129.

44 For a development of this idea see generally McCormack "Personal Property Security Law Reform in England and Canada" [2002] J.B.L. 113 at 128-132.

45 Para 11.47.