[2012] CCJ 6 (AJ)

IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction

ON APPEAL FROM THE COURT OF APPEAL OF BELIZE

CCJ Appeal No CV 7 of 2011
BZ Civil Appeal No 3 of 2010

BETWEEN

ATLANTIC CORPORATION LTD — **APPELLANT**

AND

DEVELOPMENT FINANCE CORPORATION
NOVELO'S BUS LINE LTD (IN RECEIVERSHIP) — **RESPONDENTS**

Before The Honourables
Mr Justice Nelson
Mr Justice Saunders
Mme Justice Bernard
Mr Justice Wit
Mr Justice Hayton

Appearances

Mr Denys Barrow SC for the Appellant

Mr Fred Lumor SC and Mr Estevan Perrera for the Respondents

JUDGMENT
of
Justices Nelson, Saunders, Bernard, Wit and Hayton
Delivered by
The Honourable Mr Justice Hayton
on the 17th day of August 2012

The basic background

[1] This case is concerned with whether or not an equitable charge covering the chargor's future freehold and leasehold property has priority over a subsequent legal charge taken over such property after the chargor had obtained legal title to the property. The answer needs to be clear for a thriving commercial environment, but providing the answer requires investigation of complex interlocking provisions in the Companies Act (Cap 250), the Law of Property Act (Cap 190) (the "LPA") and the General Registry Act (Cap 327) (the "GRA"). Such investigation led to differing views in the Court of Appeal and thus the appeal to this Court.

[2] By Clause 3 of a Mortgage Debenture Deed ("the Debenture") dated 23 May 2000 the Second Respondent, Novelo's Bus Lines Ltd ("NBLL"), granted the Appellant, Atlantic Corporation Ltd ("Atlantic") an equitable charge over "the freehold and leasehold property both present and future" of NBLL. Being in receivership, NBLL took no part in these proceedings here or below. The Debenture was security for a loan of $2 million to be used to assist NBLL in the purchase of the assets of Batty Brothers Bus Services Company Limited ("Batty Brothers"), in particular, the Batty Bus Terminal Complex in Belize City and the Bus Depot property in Lindo's Alley Belize City.

[3] Indeed, two directors of NBLL, Antonio and David Novelo, had been negotiating with Batty Brothers and had on 31 December 1999 themselves entered into a written agreement with Batty Brothers to purchase the Batty Bus Terminal Complex and the Bus Depot, closing to take place on or before 29 February 2000. To finance the purchase the directors had also been negotiating with Atlantic, a Belize company providing financial services. By letter dated 24 February 2000 Atlantic offered detailed financial assistance to NBLL, including terms for the security of a Debenture over the Bus Terminal Complex and the Bus Depot. The following day the offer was accepted on behalf of NBLL by a letter signed by the two directors.

[4] Closing of the agreement to purchase the Bus Terminal and the Bus Depot had not taken place by the date the Debenture was executed on 23 May 2000, so that NBLL had no freehold or leasehold interest in those properties. In Clause 3.01 of the

Debenture (recorded in Deeds Book Volume 33 of 2000 at folios 91- 130) NBLL charged “the freehold and leasehold property of [NBLL] both present and future”, and in Clause 3.02 described this as a fixed charge. The Schedule of charged assets identified the Bus Terminal and the Bus Depot alongside certain freehold land already owned by NBLL. In Clause 3.03 NBLL covenanted that it would not without the prior written consent of Atlantic create or attempt to create or permit to subsist any mortgage debenture or charge over the charged assets. In Clause 5.01 NBLL bound itself by a covenant for further assurance, if and when required by Atlantic, to execute a legal charge once it had become registered proprietor.

[5] On 30 May 2000 standard short particulars of the Debenture together with a copy of it were duly delivered to the Registrar within twenty-one days after the creation of the charge as required by s 95 of the Companies Act. The particulars stated (1) the existence of the Debenture of 23 May 2000, (2) the amount secured by the charge: $2,000,000 and further advances, (3) short particulars of the charged properties: all the freehold and leasehold property of NBLL both present and future, and (4) the name and address of Atlantic. These particulars were stapled on top of a copy of the Debenture in accordance with standard practice in Belize.

[6] Surprisingly, no Memoranda of Transfers of the Bus Terminal and the Bus Depot (comprising five registered titles) were lodged with the Registrar to make NBLL the registered proprietor until 5 February 2002. Under s 27(2) of the GRA this date ranks as the date when the new proprietor became the registered owner of the legal estate, though the Transfer Certificates of Title issued to NBLL were dated 14 February 2002.

[7] Merely four days later on 18 February 2002, NBLL, in breach of its express obligations under Clause 3.03 of the Debenture, by a Deed of Supplemental Mortgage charged the five titles to the First Respondent, Development Finance Corporation (“DFC”), by a charge by way of legal mortgage (“the Legal Charge”).

[8] On 23 December 2004, in order to recover outstanding monies owed to it by NBLL, DFC duly applied to the Supreme Court pursuant to s 68(1)(a) of the LPA for an order for sale of the five titles covered by the Legal Charge (“the Charged Properties”). An order was obtained and the sale by auction of the Charged Properties was advertised

in the Amandala newspaper on 29 January 2006. This led Atlantic's attorneys to write to DFC challenging its right to sell the Charged Properties free from Atlantic's equitable charge on the ground that the equitable charge had priority over the Legal Charge. The letter gave notice of Atlantic's intention to institute legal action for a declaration as to such priority and requested a written undertaking from DFC not to deal in any way with the proceeds of sale of the Charged Properties until those proceedings were concluded. DFC's attorneys replied that in "accordance with your request" DFC would "hold the proceeds of sale of the [Charged Properties] in trust until such time as your intended action is concluded". In due course the Charged Properties were sold at public auction and transferred to the purchaser free from the Debenture and the Legal Charge.

[9] Atlantic duly brought its legal action claiming two declarations: (1) a declaration that the Legal Charge was void under s 149 of the LPA because it was a "transfer of property" made "with intent to defraud creditors" and (2) a declaration that the charge created by the Debenture ranked in priority to the Legal Charge.

The judgments of Hafiz J and the Court of Appeal

[10] In a lengthy and well-crafted judgment Hafiz J granted the second declaration. She held that DFC acquired its Legal Charge at a time when it was bound by a fixed equitable charge over the Charged Properties created under Atlantic's Debenture. This equitable charge had been duly recorded under s 95 of the Companies Act in May 2000 and fell outside the provisions of the LPA and the GRA. In such circumstances, one fell back on the charge, as an equitable interest, being subject to the fundamental rule that an equitable interest binds everyone but a bona fide purchaser of a legal interest for value, who (or whose agent) has no actual or constructive notice of the equitable interest. DFC had at least constructive notice of the contents of Atlantic's Debenture and so was bound by the charge.

[11] Hafiz J refused to grant the first declaration, because she held that a "transfer of property" under s 149 of the LPA did not extend to a charge by way of legal mortgage. She did, however, go on to hold that NBLL had granted the Legal Charge to DFC with "intent to defraud" Atlantic, but further held that s 149 could not apply

unless there was evidence of fraud on the part of DFC, entailing actual knowledge of the contents of the Debenture and there was no such evidence.

[12] Despite Hafiz J having held DFC's Legal Charge to be subordinated to Atlantic's Debenture, Counsel for DFC, maintained that DFC was entitled to the proceeds of sale of the Charged Properties. He submitted that the equitable charge under the Debenture had been extinguished as a result of the court-ordered sale and that sections 84 and 88 of the LPA, addressing how a mortgagee, like DFC, which had obtained the order should deal with the proceeds of sale, rightly did not provide for the payment of any prior equitable charge that had been extinguished. Hafiz J held that the security interest under the Debenture creating the equitable charge had not been extinguished and that an equitable charge over future-acquired land fell outside the scope of the LPA and GRA: the exchange of letters between Atlantic and DFC, referred to at [8] above, clearly indicated that the question as to which party received the benefit of the purchase money was to remain at large, turning upon the legal action for determining which security had priority.

[13] On appeal, Morrison JA (dissenting from the majority judgment delivered by Sosa P) was prepared to grant the second declaration on the same basis as Hafiz J. He did, however, point out that, since Atlantic had an equitable fixed charge, DFC was bound merely by having constructive notice of the existence of the Debenture from the particulars filed with the Registrar of Companies under s 95 of the Companies Act. It had thus been unnecessary for the judge to have gone further and held that there was constructive notice of the contents of the copy of the Debenture stapled to the particulars.

[14] Morrison JA agreed with the reasoning of Hafiz J that the first declaration could not be granted. He also agreed that Atlantic had priority over DFC in respect of the proceeds of sale of the Charged Properties but did so on the basis of the reference in s 86(1) of the LPA to Order XLII of the Supreme Court Rules, particularly Rule 4. Under this Rule a mortgagee can be deemed, like a judgment creditor, to hold a judgment for a sum of money which binds the lands of the judgment debtor-mortgagor "subject to Crown debts and to any bona fide mortgage, charge or

encumbrance thereon," so that the proceeds of sale of the Charged Properties held by DFC could be bound by any prior bona fide charge, equitable or legal, of Atlantic.

[15] Sosa P (with whom Mottley P agreed, the latter having retired after hearing the case but before judgment) refused to grant either declaration. He held that no equitable charge could be created over the Charged Properties until NBLL acquired title to them as new registered proprietor. Under s 27(2) of the GRA this occurred on 5 February 2002 when the relevant Memoranda of Transfer were lodged with the Registrar, leading to the issue of the Transfer Certificates of Title dated 14 February 2002, which enabled NBLL to create DFC's Legal Charge on 18 February 2002. No particulars of Atlantic's equitable charge first attaching to the Charged Properties on 5 February were delivered to the Registrar of Companies within twenty one days after the date of its creation, so that under s 95 of the Companies Act the equitable charge was void against the liquidator and creditors of NBLL.

[16] Sosa P went on to say that the equitable charge created on 5 February 2002 should have been registered as an encumbrance within s 103(1)(b) of the LPA and noted on the certificates of title. Nevertheless, even if the equitable charge had been so registered before DFC's Legal Charge, he pointed out that it would still not have bound DFC because s 103(4) states in relation to encumbrances within s 103(1)(b) and (d) that "a legal charge in the case of registered land shall have priority over every encumbrance noted on a certificate of title, whenever that encumbrance was registered".

[17] Sosa P did, however, hold that a "transfer of property" under s 149 of the LPA extends to a charge by way of legal mortgage. He upheld Hafiz J's findings that, while NBLL had created the Legal Charge in favour of DFC with "intent to defraud" Atlantic, there was no necessary evidence of fraud on the part of DFC.

The main issue for this Court

[18] The main issue for this Court is whether the Debenture has priority over the subsequent Legal Charge, so that Atlantic should be granted the second declaration that its charge under its Debenture has priority over DFC's Legal Charge. After all, once this declaration is granted, NBLL's attempt to deprive Atlantic's Debenture of

its priority has not prejudiced Atlantic so that there is then no need for it to seek the first declaration avoiding the Legal Charge under s 149 of the LPA. Indeed, this reality is reflected in the inapplicability of s 149 in such circumstances because the section is only available to a person "prejudiced" by the relevant transfer with intent to defraud creditors: see s 149(1) set out at [39] below.

[19] To determine the main issue two questions need to be answered. (1) Was the equitable charge created by the Debenture void because it was not registered within the period of twenty one days after its creation as required by s 95 of the Companies Act? (2) If the charge was not void by virtue of s 95, can DFC still take free from it by virtue of provisions in the LPA or GRA or of being a bona fide purchaser without actual or constructive notice of it?

(1) Was the charge void under s 95 of the Companies Act?

[20] The answer to the first question hinges upon the date of creation of the equitable charge. Equity has developed a very useful device to enable a person to obtain money that is needed immediately for commercial purposes by borrowing it upon the security of future-acquired property. Such property would often be future choses in action that would be assigned outright by the borrower to the lender as security for the loan, just as mortgages of land were originally created by outright conveyance of the land subject to a right to a reconveyance on payment of capital and interest. As Lord Watson stated in *Tailby v Official Receiver*[1]:

> "The rule of equity which applies to the assignment of future choses in action is, as I understand it, a very simple one. Choses in action do not come within the scope of the Bills of Sale Acts, and though not yet existing, may nevertheless be the subject of present assignment. As soon as they come into existence, assignees who have given valuable consideration will, if the new chose in action is in the disposal of their assignor, take precisely the same right and interest as if it had actually belonged to him, or had been within his disposition and control, at the time when the assignment was made."

[1] (1888) 13 App Cas 523 at 533. Note, too, that a trust of a covenant relating to future property is a trust of a subsisting proprietary interest, though not enforceable until the future property materializes: *Re Landau* [1998] Ch 223 at 232.

[21] Moreover, in *Re Lind* [2] Bankes LJ stated:

> "It is true that the security was not enforceable until the property came into existence, but nevertheless the security was there, the assignor was the bare trustee of the assignee to receive and hold the property for him when it came into existence."

[22] Similarly, the position of a chargee, who has given valuable consideration for future-acquired land of the chargor, is that as soon as land has actually been acquired by the chargor, the chargee takes the same interest as if the land had been owned by the chargor at the time the charge was executed.

[23] As stated in Goode on *Legal Problems of Credit and Security*[3], "Whilst, in a sense, an agreement for security over after-acquired property cannot attach to that property prior to acquisition, yet the agreement constitutes a present security. In other words it creates an inchoate security interest which is waiting for the asset to be acquired so that it can fasten on to the asset but which, upon acquisition of the asset, takes effect as from the date of the security agreement".

[24] Thus the equitable charge created by the Debenture was not void: s 95 of the Companies Act was satisfied when particulars of the 23 May 2000 Debenture, together with a copy of the Debenture, were delivered to the Registrar of Companies on 30 May 2000. If the law were otherwise, and registration was required from time to time within twenty one days of each acquisition of future property, the law would not be commercially sensible. The chargee is not in a position to know when the chargor from time to time acquires relevant property, while other chargees with later charges over future-acquired property could gain priority over earlier charges of which they knew by registering their charge against subsequently acquired property before the earlier chargees were able to do so. Indeed, once the relevant property had actually been acquired without the chargee's knowledge, any new chargee of the property could obtain priority by registering his charge.

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[2] [1915] 2 Ch 345 at 374

[3] 4th Edition edited by L Gullifer at 2-13. See also Goode on Commercial Law (4th Edition edited by E McKendrick) at 676-677.

(2) Can DFC still take free from the equitable charge?

[25] Counsel for Atlantic submitted that Hafiz J and Morrison JA were correct to hold that the equitable charge over future-acquired land created by the Debenture fell outside the scheme under Part IV of the LPA dealing with "Legal charges" (ss 64-90), "Encumbrances" (ss 103-117) and "Equitable mortgages" (ss118-122) that are registrable as encumbrances in the "Encumbrances" part of the Land Charges Register kept under s 44 of the GRA. It does seem, however, that equitable charges rank as "equitable mortgages" within ss 118-122. It would, after all, be most odd if those sections did not deal comprehensively with both equitable mortgages and equitable charges. "Mortgage" is defined in s 2(1) of the LPA to include "any charge on any property for securing money or money's worth", while s 120(2) indicates that the "charge" created by an equitable mortgage will not have preference over a registered "subsequent equitable mortgage" unless registered as an encumbrance, and there is no reason why the position of a subsequent equitable charge should be any different from that of a subsequent equitable mortgage. Moreover, there is no reason why s 121 should not cover both equitable mortgages and charges so that, in order to obtain repayment of the mortgage monies, they can be converted into a legal mortgage, the date of which is the date of the registered equitable mortgage or charge.

[26] As Counsel accepted, the problem with equitable charges over future-acquired land is that the scheme of the LPA and GRA provides that no registration of a legal charge or of an encumbrance can take place until a chargor, like NBLL, has the Transfer Certificates of Title. The reason is that, by virtue of sections 48 and 52 of the GRA, notice of the relevant legal charge or of an encumbrance has to be noted on the registered certificate of title and on the proprietor's duplicate certificate, as duly happened in respect of DFC's Legal Charge of 18 February 2002. It follows that the 23 May 2000 Debenture could not be registered as an encumbrance until NBLL acquired the Transfer Certificates of Title on 14 February 2002. In our view, an encumbrance in respect of registered title to land is implicitly restricted to an encumbrance affecting a specific registered title so that it is capable of being noted on that title and the proprietor's duplicate certificate. Indeed s 18(3) of the GRA recognises that, outside the GRA Land Charges Register scheme, dealings may create

contractual rights or equitable interests in or over registered land, so that recourse can then only be made to the equitable doctrine of notice to resolve priorities.

[27] We disagree with the view of Sosa P that Atlantic's Debenture fell within s 103(1)(b) of the LPA. Section 103(1) defines as "encumbrances" registrable in the "Encumbrances" part of the Land Charges Register "the following rights, burdens and dealings other than legal charges, that is to say-

> (a) rights for life or any other limited or conditional rights in or over the land enduring for three years and upwards;
>
> (b) burdens, securities, mortgages or liens upon land, arising in equity by which the land is subjected to *particular interests* in favour of *individuals*, or the revenues thereof or affected for the payment of annuities or temporary charges;
>
> (c) dealing with the land which, in the event of sale, would limit the free use and disposal thereof by the purchaser, such as leases for three years and upwards, restrictive covenants, easements, rights and privileges in, over or out of the land arising out of any trust or settlement, whether created by will or deed;
>
> (d) judgments or orders of the Supreme Court affecting the land or to recover a sum of money against the proprietor thereof;
>
> (e) an option to purchase the land for which a consideration amounting to five hundred dollars or upwards has been given."

[28] By s 103(3) an encumbrance described above in (a), (c) or (e) has priority over a legal charge registered subsequent to such encumbrance, but by s 103(4) in respect of an encumbrance described in (b) or (d) "a legal charge shall have priority over every encumbrance noted on a certificate of title, *whenever* that encumbrance was registered." Intriguingly, however, in the case of an equitable mortgage or charge when it is converted into a legal mortgage under s 121(1), then by s 121(2) "the date of the legal mortgage shall be the date of registration of the equitable mortgage".

[29] The scope of s 103(1)(b) is most uncertain, but it cannot apply to Atlantic's Debenture because Atlantic is not an "individual". Sosa P regarded the word "individual" as meaning "person" so as to cover a corporation, without noting that "individual" was used when "person" had been used in the preceding ss 101, 97, 96, 95, 94, 93, 91, 90 and 89. Indeed, it does not appear that the word "individual" features elsewhere in the LPA. Surely the change from "person" to "individual" has significance, especially when there is reference to "*particular* interests in favour of *individuals*" who alone can have the "rights for life" mentioned in s 103(1)(b). Moreover, if an equitable charge were to fall within paragraph (b), then even if it was registered before a legal charge it would have no priority over it unless advantage had been taken of s 121(2) above, which is doubtful if objection were taken based upon s 103(4) above. Such a priority would wholly undermine the commercial utility of equitable charges. If such charges do not fall within paragraph (b) then a commercial balance is struck between the interests of companies benefiting from equitable charges over future land (or existing land) and the interests of subsequent chargees by the notice given to the latter from registration at the Companies Registry of the particulars of the equitable charge with an annexed copy of the deed creating the charge (or in the case of existing land, also, by the registration of an encumbrance under s 120(1)).

[30] Thus we hold that Atlantic's Debenture did not become a registrable encumbrance under s 103(1)(b) once NBLL acquired the titles to the Charged Properties so that the Debenture could be noted against those titles and the duplicate certificates. Did the Debenture, however, become a registrable incumbrance as an equitable mortgage once it matured into an equitable charge attached to those titles? It was not so registered before 18 February 2002, when DFC took its duly registered Legal Charge and, indeed, was never so registered, so that DFC claims priority over it.

[31] As indicated in [20]-[24] above, the unique feature of an equitable charge over future property is that from the outset it confers a security interest which subsequently matures into a full equitable charge. Such security interest would confer little security if it had to be registered from time to time as an encumbrance in the Encumbrances part of the Land Charges Register as the chargor acquired relevant land from time to time without telling the chargee. There would be a clear risk of priority being lost,

whether to some subsequent chargee over future property nipping in to register its charge over acquired property or to some new chargee securing its loan upon the chargor's newly acquired property and registering its charge.

[32] Thus Counsel for Atlantic appears to be correct in submitting that the priority accorded to the Debenture of 23 May 2000 does not hinge upon provisions contained in the LPA and the GRA.

[33] In default of applicable statutory provisions in the LPA and GRA one thus falls back of necessity to the equitable doctrine of notice. If DFC is to take free from Atlantic's equitable charge it needs to show that it had no actual or constructive notice of Atlantic's charge in the Debenture when it took its Legal Charge. Both parties accept that Hafiz J rightly held that the equitable charge is a fixed, not a floating, charge.

[34] In the absence of proof of actual notice or knowledge, Hafiz J considered that for DFC to be bound by the Debenture it would need to have constructive notice not just of the existence of the Debenture but also of the restrictive terms in Clause 3.03 of the Debenture. Section 95(1) of the Companies Act requires that "the prescribed particulars of the mortgage or charge, together with the instrument (if any) by which the mortgage or charge is created or evidenced, are delivered to or received by the Registrar for registration in manner required by this Act within twenty-one days after the date of its creation" or the mortgage or charge will be void against the liquidator and any creditor of the company. There was clear evidence of Mr Pennil of the Companies Registry that the standard practice in Belize after delivery to the Registry of short particulars of the charge (see s 95(2) together with a copy of the deed creating the charge is to retain the copy at the Registry. Ms Bedran, who had worked as general manager of DFC and then as general manager of Atlantic's associated Atlantic Bank Ltd, gave evidence that it was "unthinkable" for a commercial lender to proceed with a sizeable loan without having a search made at the Companies Registry that would examine the copy deed deposited there with the particulars. It follows that if DFC, a commercial lender, had made the reasonable obvious inquiries that it was usual to make it would have seen the restrictive contents of Clause 3 of the Debenture. It thus had constructive notice of those contents.

[35] We agree with Morrison JA that Hafiz J was fully entitled to take this view. In passing, we note that the position in Belize is clearly distinguishable from that in England and Ireland, because in those countries a copy of the charge is *not* kept at the Companies Registry with the short required particulars of charge, and so there is long-standing authority for there being no constructive notice of the terms of the charge.

[36] We also agree with Morrison JA that for the Debenture to bind DFC there was no need for it to have constructive notice of the terms of the Debenture restraining dealings with the Charged Properties. Because the Debenture created a fixed equitable charge, the chargor has no actual or ostensible authority to deal with the Properties free from the charge. It is only in the case of a floating charge that a third party dealing with the chargor is entitled to assume that the chargor is free to deal with the charged property in the absence of notice of restrictions on any such dealings. Thus DFC was bound by the Debenture because its very registration gave constructive notice of its existence.

[37] Having based ourselves on the approach taken by Counsel and the courts below (treating the consolidation of the LPA and the GRA as to the law as at 31 December 2000 as not having altered the law in any way as required by s 10(1) of the Law Revision Act (Cap 3)) to hold that Atlantic's Debenture has priority over DFC's Legal Charge, we note that Atlantic might well have had priority simply by virtue of the fact that Atlantic, as well as registering the Debenture under s 95 of the Companies Act, recorded it under Part VI of the GRA in Deeds Book Volume 33 of 2000 at folios 91 to 130. We have held that the Debenture of 23 May 2000 was not an instrument required to be registered in the Land Charges Register under Part IV of the GRA so that under s 70(b) of the GRA it fell to be recorded in the Deeds Book under Part VI of the GRA. In the case of two or more mortgages or charges they have priority according to s 66 of the LPA in the order in which they were registered in the Land Charges Register under Part IV of the GRA or recorded in the Deeds Book under Part VI of the GRA: the reference to "recorded under Part V" is clearly a typographical error, taking account of the scheme appearing from sections 74, 103(1), and 105. Atlantic's charge was recorded in the Deeds Book well before DFC's charge was registered in the Land Charges Register.

Has the court-ordered sale of the Charged Properties affected priority as to the proceeds of sale?

[38] In case we held, as we have done, that Atlantic's equitable charge under the Debenture had priority over the Legal Charge, leading Counsel for DFC audaciously referred to sections 84 and 88 of the LPA that came into operation once the court-ordered sale was completed and extinguished the equitable charge. He submitted that DFC held the proceeds subject only to paying off sale costs, Government and council debts relating to the property, and legal mortgages as laid down in s 88, which made no reference to equitable charges. If, however, priority was to be determined wholly in favour of DFC by these statutory provisions as he argued, why proceed with the action concerned to establish the priority of the competing charges before the sale? In context, the exchange of letters between the attorneys for Atlantic and DFC referred to in [8] above must be construed as DFC agreeing to hold the net proceeds of sale on trust to be allocated to Atlantic or DFC according to the priority established in the legal action now before this Court. Thus the proceeds must first be used to satisfy Atlantic's claims under the Debenture.

The issue as to the application of s 149 LPA to the Legal Charge

[39] By s 149(1) of the LPA "every transfer of property made with intent to defraud creditors shall be voidable at the instance of any person thereby prejudiced". Nevertheless, by s 149(3), "This section shall not extend to any estate or interest in property transferred for valuable consideration and in good faith... to any person not having, at the time of the transfer, notice of the intent to defraud creditors". It is not disputed that, as found by Hafiz J, NBLL executed the Legal Charge with "intent to defraud" Atlantic by depriving its Debenture of priority over DFC's Legal Charge, but can granting a legal charge amount to a "transfer of property"?

[40] While s 149 is based on s 172 of the English Law of Property Act 1925, it does not use the phrase "conveyance" of property that s 172 uses and which is defined in s 205 of the English Act to include "a mortgage, charge, lease, assent, vesting declaration, vesting instrument, disclaimer, release and every other assurance of property or an interest therein by any instrument, except a will". With the prevalence of registered land which one "transfers" rather than "conveys", the draftsperson appropriately

thought in terms of transfers despite a significant amount of land not yet being registered. "Transfer", however, extends to a conveyance, because "transfer" is defined in s 2(1) of the General Registry Act to mean "the conveyance of the proprietorship in land or any interest in land from a proprietor to another person"; and s 2(3) of the LPA states that words and expressions defined in the GRA shall bear the same meaning in the LPA as they have in the GRA. A "memorandum of transfer" is defined in s 2(1) of the GRA as "the document signed and executed by the registered proprietor of any legal estate, interest or right in land held under a certificate of title requesting the Registrar to transfer such legal estate, interest or right to another person".

[41] So far, it would appear as though a transfer requires a registered proprietor to transfer some legal estate, interest or right in land held under a certificate of title from himself to another person. A memorandum of transfer, however, can be considered a special narrow form of transfer of a major legal interest in property for which a certificate of title can be issued. "Property" is defined in s 2(1) of the LPA as including "anything in action and any interest in real and personal property", while s 149(3) of the LPA itself refers to "any estate or interest in property". Section 67(1) of the LPA makes clear that "the legal *estate*, right or interest of the mortgagor in any property shall ... continue to be vested in him, and the mortgagee shall take no estate in the property mortgaged", but the mortgagee can still have a legal *right or interest* in the property. Indeed, in s 2(1) of the LPA "purchaser" is defined to cover a "mortgagee who for valuable consideration acquires an interest in property", except that in Part II of the LPA and elsewhere where expressly provided, "purchaser" "only means a person who acquires an interest in property for money or money's worth, and in reference to a legal estate includes a charge by way of legal mortgage". Thus such a chargee can rank as a purchaser of a legal estate even though under s 3(3) of the LPA he no longer has an estate in land.

[42] Finally, one needs to remember that the definition sections are prefaced by the clause "unless the context otherwise requires", while s 65 of the Interpretation Act (Cap 1) states "that a construction which would promote the general legislative purpose underlying the provision is to be preferred to a construction which would not." Since the Statute of Elizabeth 1571, common law legislatures have been trying to deal with

dispositions of property owners made with intent to hinder creditors. Is it sensible to enable only a transfer of a transferor's specific interest from him to another person to be set aside under s 149 and not the grant by the transferor of a new interest to another person that dramatically diminishes the transferor's interest, especially when the grantee of a legal charge can rank as a purchaser of a legal estate and so be regarded as having received something from the proprietor of the legal estate? Is it sensible that transferring property to another for a sale price of $30 million can be set aside under s 149 but not the grant of a legal charge over such property for $25 million or the grant of a long lease of such property that dramatically diminishes the value of the freeholder's interest? Clearly not.

[43] Accordingly, we hold that NBLL's grant of the Legal Charge with intent to defraud Atlantic amounted to a "transfer of property" within s 149 of the LPA. DFC, however, will not be affected by this if not having notice of NBLL's intent to defraud Atlantic and so having the protection of s 149(3). It is worth noting that "intent to defraud" suffices without there being any need for the "fraud" to be achieved. As we have held, however, where the fraud is not achieved, because NBLL's activities could not detract from the priority of Atlantic's Debenture over DFC's Legal Charge, Atlantic is not a "person thereby prejudiced" and thus is not able to invoke s 149. Conversely s 149 cannot be invoked so as to circumvent and undermine the statutory scheme in the LPA and the GRA whereby an unregistered or unrecorded legal charge or an encumbrance cannot bind a subsequent registered or recorded legal charge or encumbrance. It is not "fraud" to take advantage of statutory rights, as held in *Midland Bank Trust Co Ltd*[4], where the earlier chargee is prejudiced purely as a result of his own failure duly to protect his interest under the statutory scheme.

[44] Since, however, there were errors in the courts below as to the proper application of s 149 we need to deal in more detail with the section. It seems clear to us from *Glegg v Bromley*[5] and *Lloyds Bank Ltd v Marcan*[6], that as with the burden of proof in s 172(1) and (3) of the English LPA, mirrored in s 149 of the LPA, so the burden under s 149(1) lies on the person seeking to avoid the transfer, and that under s 149(3) lies on

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[4] [1981] AC 513 at 531 per Lord Wilberforce endorsing *Re Monolithic Building Co* [1915] 1 Ch 643 at 663
[5] [[1912] 3 KB 474 at 492
[6] [1973] 2 All ER 359 at 368 and 369

the transferee. This latter burden reflects the normal burden placed on a person who claims that he is not bound by some legal property interest because he is a bona fide purchaser of a legal estate for value without notice: *Barclays Bank plc v Boulter*[7].

[45] In *Lloyds Bank v Marcan* Pennycuick V-C rightly made two useful points. First[8], he emphasised that the history and case law on s 172 of the LPA and its predecessors made clear that the word "defraud" was not concerned with deceit at common law, but merely carried "the meaning of depriving creditors of timely recourse to property which would otherwise be available for their benefit". Second[9], to escape liability, the transferee had to show that he had no notice, actual or constructive, of the intent to defraud: it was not enough to show that he was not fraudulent or was not implicated in the fraudulent intention.

[46] It follows that we disagree with Hafiz J (and also Sosa P and Morrison JA) in requiring there to be evidence evincing fraud on DFC's part which would require DFC to have actual knowledge of the terms of the Debenture. Indeed, Atlantic's Statement of Claim only alleged that DFC had actual or constructive notice of the Debenture, not that DFC had full knowledge of the Debenture so as to be party or privy to the intent to defraud of NBLL. In the absence of Atlantic pleading that DFC was privy to any intent to defraud of NBLL, this issue should not have been investigated at all. Thus the efforts of counsel for DFC were misplaced in submitting that Atlantic's claim was vitiated by not pleading and proving that DFC was implicated in NBLL's intent to defraud Atlantic.

[47] Here it is necessary to emphasise the difference between "notice" and "knowledge" because errors creep in if the concepts are equated. "Notice" is used in the context of proprietary liability to enable a person to escape a proprietary liability if he or his agent has no actual or constructive notice of a proprietary interest. "Knowledge" is relevant for determining whether a person's conscience is sufficiently affected to render him personally liable in equity for unconscionable or dishonest behaviour. As

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[7] [1999] 4 All ER 513 at 518 per Lord Hoffmann endorsing *Re Nisbet and Potts' Contract* [1905] 1 Ch 391 at 398
[8] [1973] 2 All ER 359 at 367
[9] At 369

Megarry V-C has remarked,[10] "the cold calculus of constructive notice" is not an appropriate instrument for determining whether a man's conscience is sufficiently affected for him to be made personally liable; and, as Lord Denning MR has stated[11], "Negligence in not knowing the truth is not equivalent to knowledge of it".

[48] Constructive notice is based upon a prospective purchaser of an interest in property deliberately or recklessly or negligently failing to take the usual standard precautions. In the case of purchasing land or taking a mortgage or charge over land there are standard conveyancing precautions to be taken. As we have held at [35] above, Hafiz J rightly held that if DFC had made the usual standard inquiries at the Companies Registry it would have discovered not just the existence of the Debenture but also its restrictive terms. Thus DFC had constructive notice of those terms which would have revealed that, NBLL, in breach thereof, was intending to "defraud" or prejudice Atlantic by keeping quiet about its acquisition of title to the Charged Properties enabling further security to be provided for loans, and by not seeking Atlantic's written permission for granting a Legal Charge to DFC within four days of receiving the Transfer Certificates of Title to those Properties.

[49] Since Hafiz J did examine whether DFC had actual knowledge of the Debenture and was a party to any fraud of NBLL and held this not to be the case, this Court needs to point out that Hafiz J and counsel did not take account of a person being regarded as having knowledge of something where he has actual knowledge or its equivalent, best described as "blind-eye" knowledge. "Blind-eye" knowledge extends beyond shutting one's eyes to the obvious so as to cover deliberately and recklessly failing to make the inquiries and inspections an honest and reasonable person would make when having a strong suspicion that they would lead him to discover something to his disadvantage. This blind-eye knowledge, according to Lord Scott in *The Star Sea*[12]:

> "requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord

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[10] *Re Montagu's Settlement Trusts* [1987] Ch 264 at 273
[11] *The Eurysthenes* [*1977*] QB 49 at 68

[12] [2003]1 AC 469 at [112] and [2001] UKHL 1 as *Manifest Shipping Co Ltd v Uni-Polaris Shipping Co Ltd*

> Blackburn in *Jones v Gordon*[13] distinguished a person who was 'honestly blundering and careless' from a person who 'refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his secret mind – I suspect there is something wrong and if I ask questions and make further inquiry, it will no longer be my suspecting it, but my knowing it, and I shall not be able to recover'. Lord Blackburn added 'I think that is dishonesty'."

[50] In investigating DFC's state of knowledge Hafiz J should have considered whether, in all the circumstances, DFC had "blind-eye" knowledge. Had it refrained from making the elementary customary search of the Companies Registry out of fear that it was probable that the search would give it knowledge of the binding terms of the Debenture under which Atlantic could not lose its priority under the Debenture without its written consent? Hafiz J could have investigated this possibility to a conclusion. This Court, however, does not have before it the actual evidence provided by relevant witnesses, except for what is found in Hafiz J's judgment, and so needs to leave open this question, especially when Atlantic's case succeeds without the need to rely on any type of knowledge of DFC.

Conclusion

[51] The equitable charge created by Atlantic's Debenture has priority over DFC's Legal Charge. Thus the net proceeds of sale of the Charged Properties held by DFC must first be applied in satisfaction of all monies due to Atlantic under the Debenture before DFC can have resort to any remaining proceeds for repaying moneys due to it under its Legal Charge. DFC is to pay the costs of Atlantic, to be taxed if not agreed, so far as concerns the appeal to this Court and the Court of Appeal, and to pay Atlantic's costs of $12,500 specified in the order of Hafiz J.

[52] The declaration sought under s 149 of the LPA is refused. A declaration is granted that the charge created on the Properties by a Debenture dated 23 May 2000, given by Novelo's Bus Line Limited (the Second Respondent) as continuing security to secure the repayment of all monies, obligations and liabilities owing or incurred to Atlantic Corporation Ltd (the Appellant) by Novelo's Bus Lines Limited ranks in priority to the charge by way of legal mortgage created over the Properties by a Deed of

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[13] (1877) 2 App Cases 616 at 629

Supplemental Mortgage dated the 18 February 2002, and given by Novelo's Bus Lines Limited to Development Finance Corporation (the First Respondent) to secure the repayment of the principal sum of $30 million. It is further declared and ordered that the proceeds of sale of the Properties are to be applied by the Development Finance Corporation in satisfaction of all monies due to Atlantic Corporation Ltd under its Debenture before the Development Finance Corporation can have any resort to any remaining proceeds of sale in satisfaction of any monies due to it under the Deed of Supplemental Mortgage.

/s/
The Hon Mr Justice R Nelson

/s/
The Hon Mr Justice Saunders

/s/
The Hon Mme Justice D Bernard

/s/
The Hon Mr Justice J Wit

/s/
The Hon Mr Justice D Hayton