IN THE COURT OF APPEAL OF BELIZE AD 2010

CIVIL APPEAL NO 3 OF 2010

DEVELOPMENT FINANCE CORPORATION Appellant

v

(1) **ATLANTIC CORPORATION LIMITED**

(2) **NOVELO'S BUS LINE LIMITED** (In Receivership) Respondents

AND

CIVIL APPEAL NO 7 OF 2010

ATLANTIC CORPORATION LIMITED Appellant

v

(1) **DEVELOPMENT FINANCE CORPORATION**

(2) **NOVELO'S BUS LINE LIMITED** (In Receivership) Respondents

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BEFORE

The Hon Mr Justice Elliott Mottley	President (Up to 31 December 2010.)
The Hon Mr Justice Manuel Sosa	Justice of Appeal (President as from 1 January 2011)
The Hon Mr Justice Dennis Morrison	Justice of Appeal

F Lumor SC and A McSweaney McKoy for Development Finance Corporation.
E A Marshalleck SC for Atlantic Corporation Limited.
Novelo's Bus Line Limited (In Receivership) not represented.

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17 March 2010 and 16 May 2011.

MOTTLEY P

[1] I have read the Judgment in draft of Justice of Appeal Sosa. I concur with his reasons and conclusions.

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MOTTLEY PA

SOSA JA

Introduction: The General Shape of the Case

[2] Atlantic Corporation Limited ('Atcorp', save where another designation seems apt to enhance clarity) and Development Finance Corporation ('DFC') are, respectively, a company incorporated under the Companies Act and a body corporate established under the Development Finance Corporation Act which are both separately engaged in the business of lending money for profit. (There is no evidence in this case indicating that either is a bank.) Novelo's Bus Line Limited ('NBLL', save where another designation seems apt to enhance clarity) is, like Atcorp, a company incorporated under the Companies Act and, for its part, formerly carried on business as a provider of bus services.

[3] In 2000, for the purpose of securing the repayment of a loan, NBLL, as principal debtor, executed in favour of Atcorp a deed self-styled a 'Debenture' and dated 23 May 2000 ('the Atcorp debenture'). In 2002, for a similar purpose, NBLL, as guarantor, executed in favour of DFC a deed calling itself a 'Deed of Supplemental Mortgage' and dated 18 February 2002 ('the DFC mortgage').

[4] On 3 March 2005, both NBLL and the relevant principal debtor being in default in the repayment of the respective loans granted to them by Atcorp and DFC, the court below, on the application of DFC, ordered the sale of the five charged properties in question (compendiously referred to, apart from being described in detail, in the schedule to the claim form as, respectively, 'the Batty Bus Terminal Complex in Belize City' and 'the Bus Depot Property in Lindo's Alley, Belize City'). Following the sale of these properties (which, when jointly referred to in the rest of this judgment, shall be called 'the properties') but before the pertinent proceeds could be distributed, Atcorp filed its claim form, dated 15 February 2006 and seeking two declarations against DFC and NBLL.

[5] On 26 November 2009, a defence having been previously filed and delivered and the action having been heard in July 2009, Hafiz J, by an order which came to be perfected on 13 January 2010, refused the first declaration, granted the second and ordered NBLL to pay Atcorp's costs in the sum of $12,500.00. The appeals now before the Court for determination are that filed by

DFC on 19 January 2010 against the grant of the second declaration and that filed by Atcorp on 29 January 2010 against the refusal of the first declaration.

The Claim Form and Statement of Claim

[6] The claim form sought against DFC and NBLL:

> 'declarations that:
>
> (i) The charge by way of legal mortgage created on [the properties] by way of [the DFC mortgage] to secure the repayment of the principal sum of BZ $30,000,000.00 is void and of no effect being a transfer of property made with the intent to defraud creditors within the meaning of section 149 (1) of the Law of Property Act; and/or
>
> (ii) The charge created on [the properties] by [the Atcorp debenture] ranks in priority to the charge by way of legal mortgage created on [the properties] by [the DFC mortgage].'

(In this judgment the expressions 'the first declaration' and 'the second declaration' refer, respectively, to the declarations set out at (i) and (ii) above, respectively.)

[7] The statement of claim pleaded the purported charging by NBLL of the properties, first, in favour of Atcorp and, subsequently, in favour of DFC, significantly describing the relevant effect of the Atcorp debenture simply as a charging and that of the DFC mortgage as a charging by way of legal mortgage, whilst drawing attention to the fact that the Transfer Certificates of Title ('TCTs') in respect of the properties and in the name of NBLL were all issued after the first charging but before the second. Further averred was the allegation that the second charging was effected in breach of a covenant in the Atcorp debenture whereby NBLL was not to create, or attempt to create, or permit to subsist, among other types of securities, any mortgage upon, as relevant for present purposes, the properties. The other main averment in the statement of claim was to the effect that NBLL had, at the time of the creation of the charge in favour of DFC, actual and/or constructive notice of the existence of the Atcorp debenture.

The Defence

[8] Responding to Atcorp's pleaded case for the grant of the second declaration, DFC, the sole defendant to take part in the trial, denied in its defence the very charging in favour of Atcorp of, *inter alia*, the properties, averring that

NBLL was not the registered proprietor of, and had no interest in, the properties at the material time. This amounted, as should be clear, to a denial even of an equitable charge, since Atcorp's pleading related plainly and simply to a 'charge', a term wide enough to embrace an equitable charge. In the words then following of the defence (para 6(e)), '[the Atcorp debenture] therefore cannot operate to give [Atcorp] priority over [the DFC mortgage].' The defence further pleaded, in the same connection, the failure to register (as opposed to 'record') the Atcorp debenture in the Land Charges Register (Legal Charges), an inevitable consequence of the fact that NBLL was not the registered proprietor of the properties at the material time, DFC taking the position (at para 11) that, in the circumstances, the Atcorp debenture 'did not or could not have constituted notice, actual or constructive to [DFC].'

[9] As regards the prayer for the grant of the first declaration, the very proposed terms of which sought to affirm that the DFC mortgage was a transfer of property for the purposes of section 149(1) of the Law of Property Act ('the LPA'), the defence (at para 13) propounded as a proposition of law that a charge by way of legal mortgage is not a 'transfer' of land and asserted that, in consequence, section 149(1) of the LPA did not apply to the DFC mortgage.

The Evidence

[10] David H Novelo and Antonio David Novelo (to whom, for simplicity and without intending any disrespect, I shall in this judgment refer as 'David' and 'Antonio', respectively) are well-known businessmen of Benque Viejo del Carmen and members of a family which has for many years been involved in the provision of bus services in Belize. They were at all material times directors of NBLL as well as of other companies formed from time to time by members of the Novelo family. Sometime prior to the end of 1999, they entered into discussions with Batty Brothers Bus Service Company Limited ('Batty') concerning the possible purchase by them of certain assets owned and used by Batty in its rival business of bus service providers. These discussions led to the signing of an agreement (made effective 31 December 1999) amongst David, Antonio and Batty for the sale/purchase of those assets ('the agreement'). A copy of the agreement appearing in the Record as an exhibit to the witness statement of Arsenio Burgos, a witness for DFC, indicates that the real property the subject of the agreement is listed in Schedule II thereto but does not, in fact, contain this schedule. The litigation has, however, proceeded on the common understanding that the properties together comprised the real property which is the subject of the agreement. Under the terms of the agreement, closing was to take place 'on or before the 29th day of February 2000' and it was made clear that '[a]ll transfers of title to the assets purchased … shall be effected on the date of the closing …'

[11] Worthy of note, also, is the fact that the agreement provided for the purchase price of $5.6 million to be paid in two parts, the first (in the sum of $1 million) on signature thereof and the second (in the sum of $4.6 million) at closing.

[12] It is, admittedly, not absolutely clear (yet important in my view) at what point of time NBLL sought financing from Atcorp in regard to the purchase of the assets in question of Batty. What is fairly obvious, however, is that it was a point of time no later than 24 February 2000, for, by a letter of that date ('the letter of 24 February'), Atcorp advised David and Antonio not only that their application for financing had been approved but also that the approved loan of $5.6 million 'to assist with closing out an agreement to purchase the assets of [Batty] would increase the total loan granted to you for the purpose to $6.6 million', a clear indication that $1 million (which happened to be the sum payable, as noted above, to Batty on signature) had already been advanced. The inference that financing was sought from Atcorp prior to the signing of the agreement therefore seems logical and is one to be kept in mind throughout the remainder of this judgment.

[13] As regards the securing of the relevant liability, Atcorp evinced an intention wisely to avoid placing all its eggs in one basket, so to speak. That much is evident from the letter of 24 February, which stated:

‘5. The loan will be secured with the following securities:

(i) Mortgage Debenture on Assets being purchased to be stamped for the sum of $2.0 million to include the following:

(a) Batty Bus Terminal Complex in Belize City.

(b) Bus Depot Property in Lindo’s Alley, Belize City.

(c) …

(d) …

(e) …

(ii) Legal Charge on Freehold Properties listed below …

(a) …

(b) …

(c) …

(d) …

(iii) …

(iv) Cash Security, which is being addressed under separate cover will be provided to [Atcorp] within forty-five (45) days from the acceptance of this Offer.

(v) Personal Guarantees from [David] and [Antonio] for the sum of $1.6 million each.'

[14] In terms of security over the properties, the evidence of what was said and done, both before and at trial, on behalf of Atcorp is instructive in deciding whether or not Atcorp obtained through the Atcorp debenture the security which it had initially set out to obtain (a matter of obvious significance). In his witness statement on behalf of Atcorp, Celso Rodríguez, Credit Manager of Atlantic Bank Limited ('Atlantic Bank'), a member of the Atlantic group of companies, in dealing with the topic of security, stated that, on or before 24 February 2000, he was requested by the Manager of Atcorp to draft, and did in fact draft, a letter from Atcorp to David and Antonio (obviously the letter of 24 February) offering to lend to NBLL the sum of BZ $6.6 million and informing David and Antonio, *inter alia*, 'that the loan was to be secured in part by a Mortgage Debenture on the assets being purchased stamped for the sum of $2,000,000.00 and to include [the properties]'. [Emphasis added.]

[15] The statement of Mr Rodríguez goes on to set out how Atcorp proceeded to procure, in his words, 'the preparation, execution and filing of the security documents for [NBLL] pursuant to the terms of the aforesaid letter [a reference to the letter he had drafted, ie the letter of 24 February]'. He leaves it in no doubt whatever that these 'security documents' included the Atcorp debenture, which was, in due course, prepared, executed and recorded. Nowhere in Mr Rodríguez' statement is it stated or suggested that Atcorp meant at any stage to take further or better security over the five properties in question. The overall tenor, rather, is that the security obtained by Atcorp over the five relevant properties was exactly the same security it had always intended to take.

[16] Sandra Bedran, appointed the attorney-in-fact of Atcorp in October 2001, did not in either of her two witness statements disclose anything that can be said to run counter to the general tenor of Mr Rodríguez' witness statement. Nowhere did she state or suggest that Atcorp intended at any stage to take further or better security from NBLL. Specifically, there is no indication of any intention to register the charge of Atcorp as an incumbrance in due course, let alone to convert it into a legal charge or to take a legal charge from scratch, so to speak, in replacement of the existing charge. Besides, faithfully echoing the statement of Mr Rodríguez, she said that 'the loan was to be secured in part by a Mortgage Debenture on the assets being purchased.' [Emphasis added.]

[17] Apart from, and consistently with, the fact that Atcorp was not looking exclusively to the proposed debenture (and the charge, of whatever nature, that it was then intended later to create over, *inter alia*, the properties) for its security , it was the case that Atcorp chose not to adopt the common lender's precautionary measure of ensuring that the transfer certificates of title to these properties would, on issue, be delivered by the Registry directly to its own attorneys-at-law rather than to NBLL or its attorneys-at-law. It would hardly have been a novel arrangement for Atcorp to have insisted that its own attorneys-at-law handle the purchase/sale of Batty's relevant assets to NBLL given that it was going to be the lender providing all the necessary financing to NBLL. Failing the insistence on such an arrangement, Atcorp would be placing itself at the mercy, so to speak, of NBLL, in a situation where, as sound legal advice would have revealed, as far as the properties were concerned, the best it could hope to obtain from a debenture made before the actual transfer of title from Batty to NBLL, would be an equitable charge (a point not in dispute in this appeal). What Atcorp in fact purported to do in terms of obtaining security over the properties is reflected in paras 6 and 7 of Mrs Bedran's first witness statement, which read as follows:

> '6. By the terms of [the Atcorp debenture] [NBLL] charged to [Atcorp] all of its assets including all leasehold and freehold property of [NBLL] both present and future including [the properties], which were at the time of execution and delivery of [the Atcorp debenture] to be acquired by

[NBLL] with the proceeds of the loan as part of the acquisition of the assets of [Batty].

7. Further by the terms of [the Atcorp debenture] [NBLL] covenanted not without the prior consent in writing of [Atcorp] to create or attempt to create or permit to subsist any mortgage debenture charge or pledge upon the goodwill undertaking property assets revenues and rights charged by [the Atcorp debenture] or any part thereof.'

[18] In paragraph 8 of her first written statement, Mrs Bedran speaks of Atcorp having repeatedly made inquiries (presumably orally, since letters, which might have been helpful, are not exhibited) of NBLL as to the receipt by the latter of titles to the properties. There is, however, no indication of the reason/s for the making of such inquiries and no reason to believe, in those circumstances, that they were inquiries motivated by anything other than a natural desire to have, as chargee, possession of all relevant documents of title. In this regard, no witness statement or *viva voce* evidence advanced a direct assertion, or even a suggestion, as to the reason why NBLL only obtained the issue by the Registrar of the TCTs to the properties on 14 February 2002. But the key to the solution (at least in general terms) of this mystery is to be found in the copies of the TCTs, which reveal, in the respective marginal notings made by the Registrar, that the corresponding memoranda of transfer were not lodged with the Registrar

until 5 February 2002, an astonishing fact which may well have been unknown to Atcorp for some time (at least).

[19] Mrs Bedran, at para 16 of her first witness statement, deals with the action taken by NBLL upon obtaining the issue of the TCTs as follows:

> 'On the 18th February 2002 [NBLL] without informing [Atcorp] nor seeking nor obtaining the consent or approval of [Atcorp] by way of [the DFC mortgage] charged [the properties].'

[20] The state of the relationship between Atcorp and NBLL during the period beginning around May 2001 and ending on 18 February 2002 is of a significance which cannot be overemphasised. Such state is to be gleaned from the content of paras 10 to 14 of Mrs Bedran's first witness statement, which, in my view, need not be here reproduced. The import is sufficiently captured in para 10, which notes the falling of NBLL into default in its repayment to Atcorp and the resultant need for discussions between lender and borrower, and in para 14, which indicates the reaching of a point at which NBLL was being allowed by Atcorp to seek financing to enable it to effect repayment. (See the conclusion of Mrs Bedran's cross-examination at p 338, Record.) Atlantic's main concern at this stage was, manifestly, to collect what was owed to it and be on its way. In

this light, the absence of indications from Mrs Bedran or any other Atcorp witness (or indeed from any pertinent document) that Atcorp was at this stage in any way concerned to seek to improve its existing security or to obtain better security is hardly surprising. There is, interestingly, an absence of illumination in Mrs Bedran's first statement, where she deals with NBLL's quest for new financing from other sources, as to Atcorp's expected curiosity over how the need to provide security to a new lender might impact on the yet-to-be-issued titles to the properties. But, as an experienced lender, how would Atcorp have failed to realise that a real impact was very likely indeed?

[21] Another topic of importance in this appeal is the knowledge, at the material times, of DFC. According to the evidence of Mrs Bedran (para 9 of her second witness statement), she spoke in or about May 2001 with a Mr Bautista, the then General Manager of DFC (who was not the General Manager at the time of trial nor a witness in the case), DFC having by then already agreed to lend to Novelo's Limited (not to be confused with NBLL) the sum of $30 million. She goes on to assert in the same paragraph that DFC knew at that time not only of the monies owed by NBLL to Atcorp but also 'that the loan had been made to purchase the assets of [Batty]'. The source of Mrs Bedran's knowledge is, however, a mystery. She does not go so far as to say that she ever gave such information to DFC or that DFC ever claimed to have the relevant knowledge. What is more, there is no evidence from Mrs Bedran, or anyone else for that matter, that DFC was ever told by Atcorp that it had already taken security, or

proposed in the future to take further security, over the properties. Mrs Bedran speaks, in particular, of a conversation of 8 February 2002 with Mr Bautista (para 10 of her second witness statement). The disclosure is, however, less than self-explanatory. At that time, according to Mrs Bedran, Atlantic Bank (not to be confused with Atcorp, although the judge herself referred to the latter as 'Atlantic Bank' throughout her 95-page judgment) was tightly controlling NBLL's chequing account and the amounts of such cheques as NBLL was being permitted to draw. A request made of Atlantic Bank by NBLL on 8 February for the honouring of a cheque for $1.5 million was followed on the same day by a telephone conversation between Mrs Bedran and Mr Bautista in the course of which the latter promised to make a disbursement of $5 million in favour of NBLL through Atlantic Bank if NBLL's cheque for $1.5 million was honoured. According to the witness statement, the cheque was honoured but the disbursement was never made through Atlantic Bank. In paras 15 and 16 of her first witness statement, Mrs Bedran represents that, by a letter of 13 February which went unanswered, the bank informed DFC that, upon receipt of the sum of $5 million from DFC, it would release a particular property in Belmopan from 'a mortgage'. The relevance of this not uninteresting story is not, however, made clear. As already noted above, Atlantic Bank and Atcorp are separate entities; and, whilst the former's keeping of a current account for someone is entirely unremarkable, the latter is, as has also been adumbrated above, nowhere in the evidence said to be a bank and so can hardly be regarded as likely to have had something to do with the account in question.

[22] The relevant letter of 13 February 2002, included in the Appeal Bundle of Documents (p 191, Record), is also revealing (for what it says as well as for what it does not say). Whilst it embodies an undertaking to 'release [Atlantic Bank's] mortgage interest' in the Belmopan property of a Hipólito Novelo upon receipt of $5 million, it quite strikingly says nothing of any previous oral promise by Mr Bautista to make the alleged disbursement through Atlantic Bank, let alone of any reneging by DFC on that promise. Moreover, the caption of the letter refers not to NBLL but to Antonio. (The reference to Antonio is in fact explained by a letter dated 28 December 2001 from Atlantic Bank to DFC written on behalf of the selfsame Antonio regarding the same charged property.)

[23] At trial counsel for Atcorp was content, as far as the witness Mrs Bedran was concerned, to rely on her two witness statements and thus forego the opportunity to have her give further evidence, an indication that he considered the evidence contained in her statements to be full and complete. Mrs Bedran was, however, cross-examined by counsel for DFC and led to make a most intriguing disclosure as to her alleged proposal to Mr Bautista during their telephone conversation of 8 February. What she proposed to him, in her own words, was: 'I will give you Batty plus this other one I'm holding if you pay me 5 million.' This was a significant variation from what she had said in her second witness statement insofar as she was now saying that the Belmopan property was in truth a mere extra being thrown into the 'mix' (of which the ingredients were the properties, ie those supposedly already purchased from Batty.) A

proposal of this sort would be consistent with a desire such as that suggested above (para [20]) of a wearied lender anxious simply to be paid off and be on its way. It would not be consistent with a desire to strengthen one's existing security. Atcorp was, evidently, at this point seeing itself as being at the end of the tunnel, so to speak. As Mrs Bedran, without equivocation, put it in the final answer of her cross-examination:

> '[Antonio] told me he was borrowing 30 million to be able to pay off everyone and that included paying me off.' [Emphasis added.]

[24] There was also evidence from an employee of Atcorp's attorneys-at-law to the effect that, on conducting a search of the records kept at the Companies Registry in Belmopan, she found, in the file pertaining to NBLL, particulars, as well as a copy, of the Atcorp debenture. To the details of what she found stated in those particulars, there is no need to refer: see further para [29], below.

[25] For reasons which shall become apparent as I proceed, I consider that the foregoing is the only evidence of relevance adduced by Atcorp in the instant appeal.

[26] DFC filed but one witness statement for use in the court below and called its maker, Mr Burgos, so as to make him available for cross-examination, a test to which counsel for Atcorp chose, in the event, not to subject him.

[27] In this statement, dated 2 November 2006, Mr Burgos described himself as the Chairman of the Board of Directors of DFC but omitted to say whether he had held that post at any of the material times. According to the statement, following an approach made sometime in 2001 by NBLL, DFC by letter dated 2 March 2001 offered NBLL a loan of $30 million. The reference here to NBLL is, in fact, inaccurate, the letter in question (addressed to Novelo's Limited, a separate entity, as already indicated at para [21], above) showing that the loan was in fact offered to the latter. Inaccurately again, the statement further represents that NBLL was a party to a 'Mortgage Debenture' thereafter created in favour of DFC to secure the repayment of the loan of $30 million. A mere glance at the document in question discloses that the only parties to it were Novelo's Limited and DFC. In a further inaccuracy, Mr Burgos states that NBLL obtained titles to the properties on or about 14 November 2002, as part of its obligation under the agreement there mentioned 'and the Mortgage Debenture'. [Emphasis added.] However, not being a party to the debenture in question, NBLL did not have, and could not have had, any obligations under it. Mr Burgos proceeds to refer to the execution and registration of the DFC mortgage, the surrender by NBLL to DFC of the TCTs to the properties and the noting of the relevant charge on those certificates.

[28] As Mr Burgos goes on to narrate in his statement, there followed default by NBLL on the loan, the joint appointment by DFC and Atcorp of one and the same person as receiver/manager of NBLL and the obtaining by DFC, on or about 3 March 2005, of an order of the court below (in Action No 670 of 2004) for the sale by DFC of the properties. The publication thereafter of a notice in a newspaper of the intended sale of the properties triggered an exchange of letters between the attorneys-at-law of Atcorp and DFC, the result of which was that DFC undertook to hold any proceeds of sale in trust until the determination of Atcorp's then intended action.

[29] The statement of Mr Burgos also deals, in a manner of speaking, with the matter of DFC's own knowledge, or otherwise, of the Atcorp debenture. It discloses that a search was conducted at the Companies Registry in Belmopan on DFC's behalf. Nothing is, however, said as to who conducted such search and when, an omission which can hardly be other than deliberate and is, certainly insofar as the matter of time is concerned, in my view, deplorable. It is not in dispute that the results of this search would inevitably have been the same as the results of the search conducted by Ms Alpuche and referred to above. The importance of both these results is, however, reduced to nil in view of the opinions to be formed and conclusions to be reached at paras [57] to [61] and [63] to [70], below. Cross-examination having been dispensed with, the court below never heard from Mr Burgos whether DFC had an opportunity to obtain, and in fact obtained, timely legal advice as regards these results.

[30] Mr Burgos draws attention in his statement to two additional undisputed facts as follows (paras 19 and 20):

> '19. When [NBLL] executed in favour of [Atcorp] [the Atcorp debenture] [NBLL] had no title to the said properties or (*sic*) was not the registered proprietor.
>
> 20. [NBLL] acquired title to [the properties] after [the Atcorp debenture] was executed … '

After directing attention to other matters which need not be here noted, Mr Burgos asserts that the Atcorp debenture does not enjoy priority over the DFC mortgage and, further, that DFC was not a party to any act intended to defraud Atcorp of the benefit of the Atcorp debenture.

The Judgment of the Court Below

[31] The 95-page judgment of the court below evidences, by its sheer length, a commendable effort to be thorough. That said, however, it needs must be observed that there are also in that judgment a number of fundamental errors which, to me, suggest lack of care to a somewhat high degree. I will do no more than briefly note the more glaring of these errors since none of them appears to me to impinge on what, in my view, are the vital issues in this appeal. But I can

appreciate how, to someone with a different view as to the issues that are alive for present purposes, at least some of these errors could be regarded as far from immaterial.

[32] First, a mistake creeps into the opening line of the judgment, where the judge for some reason gives the name of the claimant before her, ie Atcorp, as Atlantic Bank Corporation Limited. The judge proceeds thereafter repeatedly to refer to Atcorp as Atlantic Bank, even after recognising (para 155, judgment), or seeming to recognise, that Atcorp and Atlantic Bank are separate entities.

[33] Secondly, after making it plain (para 3, judgment) that she will thereafter refer to the second defendant before her, ie NBLL, as the Novelos, the judge proceeds to say (para 9, judgment) that DFC offered the loan of $30 million to the Novelos, when in fact the offer was made to Novelo's Limited (letter dated 2 March 2001 from DFC to the General Manager of Novelo's Limited). Later, without the slightest acknowledgement of her earlier mistake, the judge correctly states that the loan was made to Novelo's Limited (para 15, judgment), only to revert to misrepresentation in the sentence immediately following (para 16, judgment) as well as much later on (para 62, judgment), in both of which instances the loan is again said to be the Novelos', ie NBLL's. The value of another correct statement of the position (para 46, judgment) is not enhanced by the circumstance that it is, in a sense, sandwiched between these two misleading

statements. And the judge again misstates the position much later in the judgment (para 117) when referring to provisions of the relevant agreement for the $30 million loan.

[34] Thirdly, the judge states (para 11, judgment) that the Novelos, ie NBLL, executed a 'Mortgage Debenture' in favour of DFC to secure the repayment of the $30 million loan, when the debenture in question was in fact executed by Novelo's Limited.

[35] Fourthly, the judge demonstrates a lack of awareness of the full contents of the schedule to the Atcorp debenture when she states (para 11, judgment) that '[a]t the time of the charge the freehold properties in the Schedule could not be legal charges as they were not vested in [NBLL]'. (See also para 140, judgment.) This statement ignores the fact that the schedule, which she in fact later reproduces (para 110, judgment), refers not only to the properties but also to a lot on Gibnut Street, Belize City and a small acreage on the Western Highway, also in Belize City, neither of which could properly be treated by the judge as 'not vested in [NBLL]'. (Whilst it is the case that neither of these two properties forms part of the subject-matter of the instant appeals, I shall be further referring to them for ease of exposition at para [57], below.)

[36] Fifthly, adopting the term 'mortgage debenture' which was bandied about at trial (but which, in my experience, is more often encountered in banking circles than in legal ones), the judge erroneously states at para 114 of her judgment that the Atcorp debenture 'identifies itself as a Mortgage Debenture'. The truth is, however, that, as already noted above, the document in question unambiguously identifies itself in its two opening words as 'THIS DEBENTURE'. I make this comment fully aware that (a) the affidavits of attesting witnesses accompanying the Atcorp debenture and (b) the relevant particulars of charge filed at the Companies Registry on 30 May 2000 do themselves employ the term 'Mortgage Debenture'.

[37] Sixthly, the judge states, admittedly with some ambiguity, that '[t]he particulars of the future property could not be in the notice [meaning the particulars of charge in respect of the Atcorp debenture] because it attaches only upon being acquired' (para 140, judgment). It is not clear to me whether this was meant by the judge to be a conclusion as to the law or an observation as to the facts. If it was intended to be the latter, it was plainly wrong. The fact that the properties were still in the name of Batty at the time of the execution of the Atcorp debenture did not mean that particulars of them were unavailable to Atcorp. On the contrary, as is well known, particularly in the legal profession, the full description of any property the subject of a TCT is available to the public through inspection of the TCT registered at the General Registry. Therefore full descriptions of the properties could easily have been extracted from the relevant

TCTs at the Registry and included in the particulars filed by Atcorp on 30 May 2000. (The judge does, in fact, comment at para 11 of her judgment that the properties were described in the schedule to the Atcorp debenture, although they had yet to be acquired by NBLL; but there can be no serious suggestion that the descriptions in the schedule are full ones.)

[38] I turn to a short sketch of the judgment of Hafiz J, who reduced her task to the resolution of what she treated as six key issues.

[39] The first of these was whether the Atcorp debenture created a fixed equitable charge on the properties. At the end of a process of reasoning which, towards the end, was interrupted by the remark that 'it would be very harsh to say that Atlantic Bank [meaning, of course, Atcorp] had no charge or had nothing', the judge answered the question raised by this issue in the affirmative.

[40] The second of the issues was whether DFC had notice, actual or constructive, of the existence and content of the Atcorp debenture on or before 18 February 2002. The judge's consideration of this issue, which occupied 18 pages of typescript, ended with her expression of the opinion that DFC had constructive, but not actual, notice of the existence and content of the Atcorp debenture at all material times.

[41] The third issue was whether the DFC mortgage was a transfer of property for the purposes of section 149 and therefore voidable as a transfer made with the intent to defraud a creditor, viz Atcorp. The judge concluded that the DFC mortgage was not a transfer of property within the meaning of section 149 and held, therefore, that the DFC mortgage was not void by reason of section 149.

[42] Fourth amongst the issues was that whether the DFC mortgage was created with an intent by NBLL and DFC to defraud Atcorp (referred to by the judge, of course, as Atlantic Bank). This issue did not, in strictness, arise since the resolution of the third one sufficed to dispose of the contention of voidness by reason of section 149. The judge chose, nevertheless, to consider it and, having done so, held that the DFC mortgage was created with an intent by NBLL, but not by DFC, to defraud Atcorp.

[43] The fifth issue to be raised was whether the equitable charge found to have been created by the Atcorp debenture ranks in priority to the charge by way of legal mortgage created by the DFC mortgage. The judge's answer to the question raised by this issue was, again, in the affirmative.

[44] Sixthly, there was the issue whether Atcorp is entitled to any of the reliefs claimed in the light of the order of the court below in Action No 670 of 2004 that

the properties be sold pursuant to section 68(1)(a) of the LPA. The Court resolved this issue by finding that the relevant order did not *ipso facto* disentitle Atcorp to either of the reliefs (ie the two declarations) claimed.

[45] Reference has already been made above (para [4]) to the purport of the order of the court below.

The Grounds of the Appeals

[46] In support of the appeal of DFC, its counsel filed 11 grounds of appeal, the main ones of which can, in my view, fairly be stated, with their corresponding numbers, as follows:

1. the judge erred in law in determining that a fixed equitable charge was created on the properties;

2. the judge erred in law in deciding that the provisions of the LPA and the General Registry Act ('the GRA') do not apply to the charge created by the Atcorp debenture;

3. the judge erred in law in determining that the charge created by the Atcorp debenture does not fall within the definition of encumbrances contained in section 103(1)(b) of the LPA;

7. the judge erred in law in deciding that, because the charge created by the Atcorp debenture arose in equity as a charge on future property, it could not be registered under the provisions of section 103 of the LPA and that the provisions of section 106 of that Act dealing with the priority of encumbrances from the date of their registration do not apply to the charge created by the Atcorp debenture;

8. the judge erred in law in deciding that the LPA makes no provision for 'equitable charges of which there was notice to a legal chargee'.

Counsel for DFC submitted that DFC's grounds of appeal gave rise to four issues which can, in my view, accurately be stated as follows:

1. whether the judge properly interpreted the provisions of the LPA and the GRA in excluding the charge created by the Atcorp debenture from the purview of both statutes;

2. whether the 'fixed equitable charge' is an 'encumbrance' or equitable mortgage' governed by the provisions of sections 103(1) and 118, respectively, of the LPA;

3. whether the 'fixed equitable charge' was made, constituted or created and registered in accordance with sections 48, 50, 51, 52

and 53 of the GRA and sections 103(1) and (2), 105 and 106 of the LPA; and

4. whether the judge had any statutory authority to exclude the 'fixed equitable charge' from the scope of section 84(1)(b) of the LPA.

[47] For its part, the appeal of Atcorp sought its support from three grounds of appeal which can, I think, be stated, without unfairness, as follows:

1. the judge erred in law in finding, first, that NBBL did not transfer any property to DFC under the DFC mortgage and, secondly, that it followed that a charge by way of legal mortgage is not a transfer of property as envisaged by the provisions of section 149(1) (I personally would have put this the other way around, proceeding from the general to the specific.)

2. the judge erred in law in finding that there was no evidence of fraud on the part of DFC;

3. the judge erred in law in failing to find that the charge by way of legal mortgage created on the properties by the DFC mortgage is void and of no effect being a transfer of property made with the intent to defraud creditors within the meaning of section 149(1).

The appeal of DFC

[48] In my opinion, the first of DFC's grounds of appeal is its strongest, and, on one view (my preferred view), the only one calling for scrutiny in all of the circumstances of this case. It reflects the fundamental position of DFC in the court below, initially referred to by the judge at para 80 of her judgment, where she states:

> '… [c]ounsel submitted that a simple agreement or covenant to charge land where no land exists will create no charge because the Debenture was not registered as Land Charge pursuant to Section 74 of [the LPA].'

On returning to this contention, at para 96 of her judgment, the judge rejected it outright, saying:

> 'I disagree with Mr Lumor SC that the agreement to charge land where no land exists will create no charge. It was a charge but not registrable under the LPA.'

The judge, at this stage in her judgment, had already adverted to what she self-evidently regarded as key provisions of the Companies Act for purposes of the case of Atcorp. I refer to para 94 of the judgment, at which she observes:

> 'However, there is evidence that [Atcorp] registered [particulars of the Atcorp debenture] under the Companies Act …'

In my view, the relevant provisions of the Companies Act, those found at section 95(1), are indeed key provisions in this case, but not for the reasons indicated by the judge. To her, the subsection was of importance in the context of Atcorp's central argument that DFC had knowledge of both the existence and content of the Atcorp debenture primarily because, as counsel for Atcorp contended, particulars of the charge created on the properties by that debenture, and a copy of the debenture itself, had, in supposed due compliance with it, been caused by Atcorp to be delivered to the Registrar at the Companies Registry.

[49] In the context just identified, section 95(1) was at the heart of submissions from both sides in the court below. Quite properly, it also received attention in the judgment of Hafiz J. Curiously, however, nowhere in any of her references to it is there to be found a complete reproduction of its terms as material in the instant matter. A case in point is found at para 138, where just enough of the

portion of the subsection preceding the proviso is quoted to make known the consequences of non-delivery to, or non-receipt by, the Registrar of prescribed particulars of a mortgage or charge of the kinds there described, the portion dealing with the time for delivery or receipt being altogether omitted. (See also the reference to section 95(1) at para 147.)

[50] Omitting its composite proviso, which is of no present materiality, section 95(1) reads:

> '95.–(1) Every mortgage or charge created by a company registered in Belize and being either-
>
> (a) a mortgage or charge for the purpose of securing any issue of debentures; or
>
> (b) a mortgage or charge on uncalled share capital of the company; or
>
> (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or
>
> (d) a mortgage or charge on any land, wherever situate, or any interest therein; or

(e) a mortgage or charge on any book debt of the company; or

(f) a floating charge on the undertaking or property of the company,

shall, so far any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company, unless 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, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a mortgage or charge becomes void under this section the money secured thereby shall immediately become payable …' [Emphasis added.]

[51] Quite contrary to the impression conveyed by Hafiz J in her judgment, this subsection does not grant unlimited time for the delivery of particulars of a mortgage or charge to the Registrar. The dire and necessary consequence of voidness ordained by this subsection (with the qualification specified) befalls a mortgage or charge unless the relevant particulars (together with the pertinent instrument, if any), are delivered in the required manner 'within twenty-one days after the date of its [ie the mortgage's or charge's] creation'.

[52] As has already been noted above, the judge below raised compliance with section 95(1) as a basis for the rejection of DFC's contention that non-registration in accordance with the provisions of the LPA and the GRA left Atcorp without a charge in its favour. The subsection plainly did not escape the attention of counsel or the judge below. In my view, therefore, there can be no valid complaint of introduction of new matter if, on appeal, cognizance is taken of these statutory provisions in their entirety.

[53] What, then, is the effect, if any, of the application of this subsection to the facts of the instant case? The case is, in my view, (for reasons hereinafter to be given) one involving the creation, initially, of an equitable charge. In the court below, counsel for Atcorp neither pleaded nor argued that, vis-à-vis the properties, the Atcorp debenture had created more than that. Counsel for DFC, for his part, took, as noted above, the fundamental position that no charge at all had been created by that debenture. But he was prepared to contemplate the possibility that such debenture had brought into being, at most, an equitable charge, a fact noted by the judge at para 82 of her judgment.

[54] The judge was plainly not in any doubt as to the point of time at which this equitable charge would have been created. (Nor, for the reason to which I shall come in due course, am I.) At paras 103-104 of her judgment, she said:

> 'What then was created? The properties were identified in the Schedule but were not yet owned by [NBLL]. They had no estate or interest in the land either at law or in equity at the time … My view … is that the properties attached as soon as it [undoubtedly an erroneous reference in the singular number to the titles] came into existence, that is as soon as [NBLL] were (*sic*) given the Titles to the properties ... [T]he charge on the properties is an equitable charge.' [Emphasis added.]

At para 108, the judge returned to the question of the time of creation of the charge, adding to what she had already said:

> '[Atcorp] had a Mortgage Debenture which is a contract under seal and was in fact recorded in the Deeds Book. So, what was created was (*sic*) contractual rights and when [the properties] were acquired they immediately attached, that is, the estoppel was "fed". [Atcorp] then had an equitable interest in [the properties] because of the charge on future freehold properties.' [Emphasis added.]

[55] The immediately preceding quotation reflects acceptance of the argument of counsel for Atcorp before the judge below, to which the latter adverted at para 86 of her judgment and for which no authority seems to have been cited.

[56] There was much allusion by counsel on both sides in the court below to the well-known local case of *The Belize Bank Limited & anor v Atlantic Bank Limited & anor* (judgment delivered 10 February 1997), which was concerned with a failure by Atlantic Bank to file particulars of a charge in its favour within the period prescribed in section 93(1) of the Companies Act then in force, a section identical in its terms to section 95(1). Dealing with that case in the context of the issue of whether DFC had constructive knowledge of the charge created by the Atcorp debenture, the judge said at para 154:

> '**The Belize Bank v Atlantic Bank** case supra can … be distinguished from the case at hand … There must be registration as provided by the Companies Act if not the charge will be void. In the case at hand there was registration by [Atcorp] at the Companies Registry.' [Emphasis added.]

[57] The insuperable difficulty I have with the determination that there was such registration is that it was made in apparent disregard of the stark statutory requirement for registration within 21 days after the creation of the relevant charge. In my respectful opinion, that requirement could only have been fulfilled by the presentation, within 21 days after the creation of the equitable charge in question, of particulars of that new charge. The particulars that were indisputably presented to the Registrar with the filing that occurred on 30 May 2000 can only

have served to spare from the fate of voidness such charges, if any, as would have been created within the period of 21 days immediately preceding that date, ie 30 May 2000. Thus, if, for example, the Atcorp debenture was effectual in creating a charge over the properties situate on Gibnut Street and the Western Highway and already referred to above (para [34]), the filing of particulars on 30 May would, arguably, have ensured its continued validity in the context of section 95(1). Being of the view that the judge below was right in her conclusion that an equitable charge was created when NBLL became vested with title to the properties, I must go on to seek guidance from the provisions of section 27(2) of the GRA, which, as here material, are to the following effect:

> 'The Registrar shall record on the new duplicate [of the TCT] the day and hour … of the change from one registered proprietor to another, and that date shall be the day on which the memorandum of transfer was presented to the Registrar.' [Emphasis added.]

The date in question being, as already noted above (para [17]), 5 February 2002, the further particulars ought, in my view, to have been delivered to the Registrar within 21 days after that date.

[58] In my judgment, there can be no question of delivering particulars of a charge prior to the creation of such charge. After all, it has to be an object of section 95 effectively to protect creditors of companies formed under the Companies Act. And effective protection can hardly be said to be afforded if a company is to be regarded as exempt from giving particulars as to the all-important time of the creation of a charge in favour of any given secured creditor. That would, I think, be the effect of a legal determination that particulars of a charge can properly be delivered under section 95 even before the creation of that charge. Unlike the judge below, I am reluctant to treat particulars presented to the Registrar as 'prescribed particulars' within the meaning of section 95, without the benefit of some reliable indication that they are indeed 'prescribed particulars'. I am unable to ignore the relevant provisions of section 3(1) of the Interpretation Act, according to which

> 'In this and in any other Act, unless the contrary intention appears-
>
> …
>
> "prescribed" when used in or with reference to any Act, means prescribed by that Act or by subsidiary legislation made thereunder …'

There is no indication in this case that there has ever been such a prescription. But even if it were permissible to assume that there has, it seems to me that it

would be essentially wrong further to assume that a detail as fundamental as the date of creation of the relevant charge would not be amongst the prescribed particulars. And how does one give, in advance, the date, of which one cannot be sure, of an expected future occurrence?

[59] I have already indicated above that I share the view of the judge below that the Atcorp debenture succeeded in creating an equitable charge. The point came up for decision in this Court in *First Caribbean International Bank (Barbados) Limited v The Belize Bank Limited et al*, Civil Appeal No 30 of 2008 (judgment delivered on 19 March 2010, that is to say, some two days following the hearing of the instant appeal), in which I said at para [38]:

> 'The judge was, in my view, right in holding (at para 139 of her judgment) that the First Caribbean debenture created an equitable mortgage on the 625 acre parcel. [Counsel's] surprising submission to the contrary before this Court is, with respect, wholly indefensible. As is stated in a passage on equitable assignment helpfully extracted by [opposing counsel] from Dr William J Gough's book Company Charges, 2nd ed, (1996), pp 69-71:
>
> > "[Ashburner's Principles of Equity, 2nd ed (1933), p. 74] expresses the pertinent doctrine as follows:

> ‘If A agrees for valuable consideration to confer a title to property whether legal or equitable on B, and B executes the consideration, a court of equity will treat B as possessed of the title agreed to be conferred upon him from the time when, under the terms of the contract, it ought to have been conferred upon him.’ ”

> This doctrine is the basis of the favourable equitable view with regard to assignment of future property … An equitable title was created from the time when according to the contractual intention of the parties assurance of the legal title ought to have been effected at law, viz, when the property subsequently came into the legal ownership of the assignor. In the case of an agreement to create a legal mortgage over future property of a specific kind, the equitable mortgage attaches upon the property as soon as it is acquired by the mortgagor.’ [Emphasis added.]

The last sentence of this quote encapsulates my reason, anticipated at para [54], above, for coinciding with the view of the judge below as to the point of time at which the equitable charge in question was created.

[60] In the final analysis, therefore, the position is that, initially at any rate, NBLL, a company registered in Belize, created, by the Atcorp debenture, a charge (albeit only equitable) on land, viz the properties, of which charge no particulars, let alone prescribed particulars, were delivered to, or received by, the Registrar for registration within twenty-one days after the date of its creation, that is to say, 5 February 2002. It follows, in my opinion, that, as against DFC, whose status as a creditor of NBLL is undisputed, such charge is, so far as any security on the properties was thereby created, void. The charge initially created became, in this way, void to the extent described, at the end of the period of 21 days following its creation. Though not still-born, it proved decidedly short-lived.

[61] By its pleadings, Atcorp accepted that the DFC mortgage created a charge by way of legal mortgage in favour of DFC. There was no suggestion at any stage in the instant proceedings that such charge lost its validity prior to the moment in time when the properties were sold pursuant to the order of the court below. In these circumstances, the declaration of the court below to the effect that the charge created by the Atcorp debenture ranked in priority to the charge by way of legal mortgage created by the DFC mortgage was indubitably wrong and must be set aside.

[62] In the event, however, that I am mistaken in regarding the argument just discussed as available to DFC, I go on to consider the appeal of DFC on an

alternative basis, ie on a view other than my preferred one. If the equitable charge be treated as not having been avoided by the operation of section 95(1), the next question arising from the submissions of counsel for DFC, and necessary to be considered in view of DFC's second, third, seventh and eighth grounds, is whether section 103 of the LPA ('section 103'), and related sections to be identified in due course, apply in the instant case.

[63] The scope of the definition of the term 'mortgage' is a good starting point. Section 2(1) of the LPA states:

> '2. - (1) In this Act, unless the context otherwise requires:-
>
> "mortgage" includes any charge on any property for securing money or money's worth …'

The charge created by the Atcorp debenture cannot, therefore, be other than a mortgage for the purposes of the LPA, a point which appears not to be taken by the judge anywhere in her judgment, even although counsel for DFC referred to this definition in his reply (as noted by her at para 167) and she herself revisited it at para 180.

[64] Section 103 is found under the sub-heading 'Encumbrances', which, for its part, falls under the heading 'Charges and Encumbrances', which covers the whole of Part IV of the LPA. As material for present purposes, section 103(1) provides:

> '103.-(1) The following rights, burdens and dealings other than legal charges, that is to say –
>
> (a) …
>
> (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) …
>
> (d) …
>
> (e) …
>
> shall be encumbrances registrable under Part IV … of the [GRA].' [Emphasis added.]

[65] I see no reason for attaching any particular significance to the fact that section 103(1)(b) speaks, in large part, in the plural, using, eg, the terms

'interests' and 'individuals'. After all, by section 5(2) of the Interpretation Act, 'words and expressions in the plural include the singular'.

[66] If the charge created on the properties by the Atcorp debenture is to be treated as if it survived the operation of section 95(1), was it a mortgage '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'? The judge below, without confronting at any point the basic question whether an equitable charge can possibly fall outside the LPA's broad definition of the term mortgage, concluded without evident hesitation that the answer to the question posed in the immediately preceding sentence was 'No'. (See the penultimate sentence of para 100 of her judgment.) In respectful disagreement with her, I am firmly of the view that this question can be answered only in the affirmative. The relevant charge was, as the judge herself held, equitable in nature. And there can be no doubt, to my mind, that, if unaffected by both section 95(1) of the Companies Act and section 105 of the LPA (the latter to be considered shortly), it would, by its very nature as a charge, subject land, ie the properties, to a particular interest in favour of an individual, in the sense, albeit colloquial (see The Concise Oxford Dictionary of Current English, 8th Ed), of a person, ie Atcorp. (It seems to be predicated in the definition of 'equitable interest' provided in section 2(1) of the LPA that an equitable charge is an equitable interest.)

[67] It would be utterly absurd, in my judgment, to construe the words in question as meaning that a charge arising in equity could be an encumbrance for the purposes of the LPA only if created in favour of a human being (one meaning of the word 'individual'), as opposed to a company.

[68] In my view, as an encumbrance under the provisions of section 103(1), the charge on the properties in favour of Atcorp would have subsisted even without registration thereof. This seems to me to follow of necessity from the provisions of section 103(1), which in its final two lines declares, first, that a mortgage arising in equity (if I may confine myself to the only one of the different classes of 'rights, burdens and dealings' relevant for present purposes) shall be an encumbrance and, secondly, that it shall be registrable (and not the other way around).

[69] This particular order of things is again indicated in section 105 of the LPA, which I anticipated at para [66] above and which provides:

> 'Subject to the provisions of the [GRA], an encumbrance over and upon any land registered … under that Act shall become binding on the land from the moment of the registration … thereof.'

The importance of this provision, generally as well as for purposes of the instant case, is difficult to overemphasise. It is that, by statute, in this jurisdiction, a mortgage arising in equity (a phrase synonymous, as adumbrated above, with equitable charge) does not bind registered land unless itself first registered as an encumbrance. Whilst it becomes an encumbrance by virtue of the language of section 103(1), it will not bind the relevant registered land so long as it is itself left unregistered. In the light of the foregoing, to speak of such a charge as enjoying priority over what is acknowledged to be a valid charge by way of legal mortgage is, to my mind, to engage in idle chatter. It is indeed, in my respectful opinion, no less than a contradiction in terms to call that which does not bind land a charge on land. It follows from this that, in my view, the failure to register what the Atcorp debenture sought to create by way of a security on the properties left Atcorp without a 'charge' of any kind in the correct sense of that term. Considering the DFC appeal, on this alternative basis, therefore, the end-result must be the same: the declaration of the court below was erroneous and needs to be set aside.

[70] Before going on to consider the appeal of Atcorp, I would only add that, in my respectful opinion, and in the light of the provisions of section 103(3) and (4), the suggestion or claim that Atcorp was somehow prevented by NBLL from justly enjoying the benefits of registration of their security amounts to little more than a red-herring. In relation to a legal charge, which of course is what DFC had upon registration of the DFC mortgage, no charge falling under section 103(1)(b), will

ever stand in a position of priority, even if registered as an encumbrance before registration of the legal charge. Subsection (3) states:

> 'An encumbrance of the nature described in paragraph (*a*), (*c*) or (*e*) of subsection (1) shall have priority to a legal charge registered … subsequent to such encumbrance …'

Paragraph (b) encumbrances are conspicuously absent from the group of three thus identified in subsection (3). As if that were not clear enough, subsection (4) then adds:

> 'Subject to subsection (3), 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 recorded.'

Hence my respectful opinion that registration of the purported charge on the properties in favour of Atcorp, even if effected prior to 14 February 2002, would not have made the resulting registered encumbrance (which would then admittedly bind the land) one whit stronger, as regards priority, *vis-à-vis* the charge created by the DFC mortgage.

[71] This opinion is, to my mind, consistent with the provisions of section 84(1)(a) of the LPA, which reads:

> '84.-(1) Where the mortgagee has obtained an order for sale of any mortgaged property-
>
> (a) the order shall operate to authorise the Registrar to sell and transfer the land to, and vest the fee simple therein in, any purchaser thereof, subject to any legal mortgage having priority to the mortgage in right of which the sale is made and to any money thereby secured …' [Emphasis added.]

In my view, this subsection properly reflects the legal position that, in Belize, an equitable charge can enjoy no priority over a legal one (ie a valid and enforceable one): para [43], judgment in the *First Caribbean* case cited at para [59] above. I respectfully reject the suggestion of the judge below (implicit in para 236 of her judgment) that the absence of any mention in this subsection of an equitable charge having priority to the mortgage must be the result of an oversight on the part of the draftsman. I consider that the subsection employs the expression 'subject to any legal mortgage having priority' deliberately and in due recognition of the true meaning of section 103(3) and (4).

The Appeal of Atcorp

[72] There is no need to repeat the grounds of appeal of Atcorp, fully stated as they are at para [47] above.

[73] Simultaneous consideration of these grounds, which are interrelated, may conveniently start with a reproduction of section 149, which, as here material, reads as follows:

> '149.-(1) Except as provided in this section, every transfer of property made, whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.
>
> (2) …
>
> (3) This section shall not extend to any estate or interest in property transferred for valuable consideration and in good faith or upon consideration and in good faith to any person not having, at the time of the transfer, notice of the intent to defraud creditors.'

This section bears a close similarity to what was, up to 1972 at least, section 172 of the Law of Property Act 1925 [UK], which, for its part, was a re-enactment of

provisions of the Statute 13 Eliz c 5: see Cheshire's Modern Law of Real Property (11th Ed) (1972) at p 799. Section 172(1) of the English statute spoke, however, of a 'conveyance', rather than a 'transfer', of property and section 172(3) spoke not of 'upon consideration' but of 'upon good consideration' (which latter arises where a person conveys land to another supposedly out of natural love and affection: Cheshire, *ibid*). In the present appeal, however, nothing turns upon either of these differences.

[74] A transfer of property does not presuppose a transfer of a legal estate, section 2 of the LPA defining 'property' as including 'any thing in action and any interest in real and personal property'. Moreover, the word 'transfer', as used in section 149(1) signifies, by way of connotation, more than just the conveyance of the proprietorship *per se* in land. As relevantly defined in section 2(1) of the GRA, a statute which came into force in 1954, the word means '… the conveyance of the proprietorship in land or any interest in land from a proprietor to another person'. There is obvious consistency between this definition and section 149, which, in subsection (1), speaks of an 'estate' as well as an 'interest' transferred.

[75] It was the core submission of counsel for Atcorp in support of his first ground of appeal that a charge by way of legal mortgage is a transfer of property for the purposes of section 149(1). I would tend to agree, though not for the

reasons cited by him. (I am not attracted, in particular, to the argument that 'transfer' bears the very ample definition of the term 'conveyance' as used in section 172 of the LPA 1925 [UK], a definition which is, significantly, plainly reflected, in part, in that of 'conveyance' provided in another Act introduced in Belize in 1953, viz the Administration of Estates Act, but not in that of 'transfer' found in the GRA.) In the local case of *Kuo, Chun Hung v Attorney General*, comprising Civil Appeals Nos 5 and 25 of 2007, in a judgment with which the other members of the Court agreed, I said, at para 56:

> 'When a charge by way of legal mortgage is created under the LPA (BZE) (which adopts, in large part, the LPA (UK)), the chargee takes a legal interest in the land for, as Professor Cheshire put it in his Modern Law of Real Property (11th Ed) (1972) at p 631:
>
> > "If, for instance, a borrower agrees in writing that his land shall stand charged with the payment of £500, the lender, or chargee obtains a mere equitable interest which does not entitle him either to recover possession or to grant leases, and which before 1926 also exposed him to the risk of being postponed to a later lender who acquired a legal mortgage in the land. But, presumably in the pursuit of simplicity, the legislature in 1925 invented a new species of charge which operates to pass a <u>legal interest</u> to the chargee, though it does not convey to him a legal estate (*sic*) ['legal estate'

being a regretted mistranscription by me of the expression 'legal term of years']. [Emphasis added.]" '

I went on to say in the same paragraph:

'Whilst this passage does not appear in the 16th edition of the work cited (see p 727), there can be no doubt that its contents, *mutatis mutandis*, continue to be accurate and sound in this jurisdiction today.'

Both passages just quoted from my judgment in *Kuo, Chun Hung* were drawn by me to the attention of counsel for DFC in the course of oral argument on the hearing of the instant appeals; but, regrettably, he neither addressed them nor asked for further time in which to do so. Clearly, however, he did not accept my view as stated in the passages in question, his submission being that a charge by way of legal mortgage passes no legal estate or interest to the charge, a submission advanced in reliance on section 67(1) of the LPA. By that subsection, it is provided that:

'The <u>legal estate, right or interest</u> of the mortgagor in any property shall notwithstanding a mortgage thereon, continue to be vested in him, and the mortgagee shall take <u>no estate</u> in the property mortgaged, but shall have as his security a charge on the property and a right to an order for sale of

the property in order to recover the mortgage money together with all costs, charges and expenses of the application for that order.' [Emphasis added.]

[76] In my view, the purpose of section 67 is the modest one of providing for the mode of protecting a mortgage security, as is indicated in its side-note, material which may properly be taken into account in ascertaining the meaning of a statutory provision: section 64(1)(a), Interpretation Act. In other words, the purpose of the section is not the ambitious one of answering the question whether a legal interest passes from a mortgagor to a mortgagee on the creation of a charge by way of legal mortgage. Moreover, it is a matter of considerable interest that, whereas the subsection opens by saying that not only the legal estate but also the legal right or interest of a mortgagor continues to be vested in him, it goes on immediately to state that the mortgagee shall take no estate in the property mortgaged, but makes no further mention of a legal right and, more importantly, a legal interest. That, to my mind, is not exemplary drafting. It provokes, then leaves unanswered, the question whether the mortgagee takes a legal right or interest in the property.

[77] There are, however, other provisions of the LPA touching on this point. It is in them, to my mind, that the answer to the relevant question resides. Specifically, section 2, the definition section, provides at subsection (1):

> '"purchaser" means a purchaser in good faith for valuable consideration and includes a mortgagee or other person who for valuable consideration acquires an interest in property …'

and, a little earlier, as already adumbrated above:

> '"equitable interest" means … charges in or over land which are not legal … charges in or over land …'

The first of these definitions seems to me clearly to postulate that a mortgagee acquires an interest in property (as distinct from the 'rights' incident to his 'interest' listed in section 68 of the LPA). From whom, other than the mortgagor, can he possibly do so? The second definition, for its part, seems to me plainly to predicate that an equitable charge is an equitable interest. If that be correct, why should a legal charge not be more than an equitable interest, ie a legal interest? Unable to answer that question, I find myself in respectful concurrence with the opinion of Professor Cheshire expressed in the 1972 edition of his work (first published in 1925 in anticipation of the coming into force in England of the LPA 1925 [UK]), the relevant passage of which is cited in the quote from *Kuo, Chun Hung* at para [75], above.

[78] I find fortification for that concurring opinion in the terms of section 2 of the Registered Land Act ('the RLA') and in the long-established and well-known practice under section 13 thereof. By section 2, 'charge' means an interest in land securing the payment of money etc' and 'chargee' means the proprietor of a charge. The effect of these provisions of the RLA, then, is that a chargee under the form of Torrens System introduced thereunder is a proprietor of an interest in land. These provisions, in my view, provide ample support for the ingrained practice whereby a mortgagee under a registered or recorded mortgage on land situate in an area of Belize not previously subject to the RLA may, upon the declaration of such area as a compulsory registration area, apply under section 13 of that Act for first registration of the charged land: see especially subsection (1) requiring that the applicant have 'an interest in [the] land'. Harmonious co-existence between the two systems of land registration seems to me to demand that a mortgagee under the LPA and the GRA, who later becomes, by operation of law, a chargee under the RLA, should, throughout, be in one and the same legal position *vis-à-vis* the matter of interest *vel non*.

[79] In the light of the foregoing, I am inclined, as indicated above, to accept the submission of counsel for Atcorp that a charge by way of legal mortgage transfers an interest in property within the meaning of section 149(1) and that, accordingly, the DFC mortgage transferred such an interest from NBLL to DFC. I see no pressing need to put it more strongly than that in view of what remains to be said below as to the other grounds of appeal.

[80] A final answer to the question whether the DFC mortgage constituted a transfer of property seems to me to be unnecessary since it is my opinion that, even in the event that that answer be 'yes', if DFC at the time of the creation of the DFC mortgage had no notice of the intent to defraud a creditor, then it enjoys the protection afforded to transferees under subsection (3) of section 149 and the DFC mortgage is not voidable thereunder.

[81] On this point, the case of Atcorp appears markedly to have evolved during the passage from the court below to this Court. Thus, when counsel for DFC, in oral argument before us, and undoubtedly guided by a fresh recollection of the position of Atcorp before Hafiz J, characterised Atcorp's appeal to this Court as a contention that 'the learned judge erred by not finding fraud against DFC', counsel for Atcorp was quick to protest the attempt at a pre-emptive strike 'because that is not our position'. (This notwithstanding the terms of his second ground of appeal, viz 'the judge erred in law in finding that there was no evidence of fraud on the part of DFC'.)

[82] In point of fact, as was rightly acknowledged by Hafiz J in her judgment (paras 161-162 and 170-174), the thrust of the pertinent submissions of counsel for Atcorp in the court below was that DFC had been fraudulent in taking the DFC mortgage (eg, submission at p 381, Volume II, Record) and that that was an allegation not only specifically pleaded as required but also established by the

evidence. The reference here is to the contentions of counsel for Atcorp made below in response to that of counsel for DFC, when existing in writing only as well as when voiced in oral argument, to the effect that the DFC mortgage could only be voidable upon proof of fraud on the part of DFC itself. (These submissions were in fact to be incorporated by counsel into his arguments to this Court on the second day of the hearing, when he would revive his challenge to the finding of Hafiz J that there was no evidence of fraud on the part of DFC.)

[83] Hafiz J, although holding that intent by DFC to defraud was not specifically pleaded as required (para 190, judgment), went on to deal with the issue of fraud or no fraud, reaching the conclusion, as already indicated above (para [42]), that the DFC mortgage was created with an intent by NBLL, but not by DFC, to defraud Atcorp.

[84] On the first day of the hearing before this Court, counsel for Atcorp, performing no small shift, argued that, contrary to what counsel for DFC had contended below, the DFC mortgage was voidable even if fraud on the part of DFC were not proved. It sufficed, he urged, if all that was proved was that DFC had notice of an intent on the part of NBLL to defraud, and he initially evinced no intention whatever to suggest to this Court, in the alternative, that DFC had actually been fraudulent. He was thus seeking to distinguish between (a) having notice of an intent to defraud and (b) being fraudulent. (If accepted, this

argument would, of course, have had the highly desirable side-effect, for Atcorp, of doing away with the plainly daunting hurdle posed for it, ie Atcorp, by the need to show that fraud by DFC had been pleaded.) But, in my respectful opinion, the argument is classically fallacious. I, for my part, find it more than a little difficult to follow any reasoning along lines that if A, having prior notice that B, for the purpose of defrauding C, wishes to grant A a legal mortgage by way of security for a loan, however genuine, (or, for that matter, to sell land to A for a substantial price, even one based on true market value), goes ahead and takes that mortgage (or the transfer/conveyance of that land), he, ie A, is not a party to B's fraud. The flaw in such reasoning, as I see it, is the predication that notice of intent to defraud can properly be viewed as separate and apart from the taking by A of the mortgage (or transfer/conveyance), when, in reality, they can only be indissolubly bound together as one. I confess to being quite unable to conceive of the extraordinary circumstances in which notice of the intent to defraud would not justly stamp as fraudulent the taking of the mortgage or conveyance. I therefore reject any suggestion that the judge strayed from the point in holding that DFC was not fraudulent. It is my view that, on the contrary, the judge was entirely on point and reached a valid conclusion, viz that fraud needed to be proved if the DFC mortgage was to be held voidable and, further, that it had neither been specifically pleaded nor (assuming, *arguendo*, that it had) proved.

[85] To take the pleading point first, it is to be seen from the judgment of the court below (para 169) that counsel for DFC relied on the statement, correct in

my respectful view, of the pertinent rules of pleading set out in the Supreme Court Practice 1999, Volume 1, at p 320, para 18/8/16 and p 330, para 18/12/18, respectively. The composite quote is as follows:

> 'Any charge of fraud or misrepresentation must be pleaded with the utmost particularity.
>
> Fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts (*Davy v Garrett* (1878) 7 Ch D 473 at 489; *Behn v Bloom* (1911) 132 LTJ 87; *Claudius Ash Sons & Co Ltd v Invicta Manufacturing Co Ltd* (1912) 29 RPC 465,HL).'

It is noted that, in *Davy's* case, Thesiger LJ pointed to one reason for the rule against the leaving of fraud to be inferred from the facts, saying, at p 489:

> 'In the present case facts are alleged from which fraud might be inferred, but they are consistent with innocence. They were innocent acts in themselves, and it is not to be presumed that they were done with fraudulent intention.'

[86] The judge was right, to my mind, to reject counsel for Atcorp's submission that fraud had been pleaded in paras 8, 10 and 11 of the Statement of Claim. Para 8 was a pleading of the covenant in the Atcorp debenture not (without Atcorp's consent or approval) to, *inter alia*, create any mortgage upon the properties and other things purportedly charged by the Atcorp debenture. In para 10 it was pleaded that NBLL created the DFC mortgage without the consent or approval of Atcorp and with intent to defraud Atcorp of the benefit of the charge created on the properties by the Atcorp debenture. Para 11 pleaded that DFC had actual and/or constructive notice of the Atcorp debenture. The submission was that DFC took the DFC mortgage whilst having notice of the Atcorp debenture, of which the covenant in question formed part, and was therefore acting fraudulently in so doing. I cannot agree that that was a pleading of fraud. As I have already stated above, what the Atcorp debenture created on the properties was an equitable charge, a finding of the judge which is not disputed by Atcorp. (It is, of course, my view that this charge had a much shortened life.) That was a charge created not upon the recording of the Atcorp debenture but upon the transfer of title to NBLL on 5 February 2002, another undisputed finding, by necessary implication, of the judge. By section 95 (1) of the Companies Act, particulars of that charge were, indisputably, registrable within 21 days of the date of the charge's creation. It is beyond question that no such particulars were ever filed, whether within that period or after its expiration. There was, furthermore, no evidence from the person who was General Manager of DFC at the time when the DFC mortgage was executed. Nor was there

evidence from anyone else to shed light on what the General Manager (or any other officer or agent of DFC) knew concerning the Atcorp debenture at that time and, specifically, on whether DFC took the DFC mortgage with full knowledge of the existence of the Atcorp debenture and after obtaining legal advice. As noted above, the witness statement of the Chairman of the DFC Board, despite its vague allusion to the conduct of a search which revealed, on some unspecified date, the existence of the Atcorp debenture, was never explored through cross-examination. Being of the opinion that the operation of section 95 resulted, after the lapse of 21 days from the creation of the equitable charge, in the invalidity of such charge to the extent already indicated above, I find it impossible to take a quantum leap to the conclusion that there is here a plea of fraud by Atcorp, when, as Lord Cozens-Hardy MR said in *In Re Monolithic Building Company, Tacon v The Company* [1915] 1 Ch 643 at 663, '… it is not fraud to take advantage of legal rights, the existence of which may be taken to be known to both parties'. The rights one has in mind here are those indubitably accruing to creditors in circumstances where particulars of a charge in favour of another creditor have not been delivered to the Registrar within the period of 21 days next following after the creation of such charge. The words of Thesiger LJ quoted in the immediately preceding paragraph cannot, it seems to me, be more apposite.

[87] Counsel for Atcorp's response to the submission of counsel for DFC that fraud had not been specifically pleaded was, in my view, also deficient. That

response was, essentially, that fraud can be inferred from a person's conduct (para 171, judgment of the court below). With respect, this was an attempt to counter with a point as to evidence in general a submission as to the sufficiency of pleadings dealing with a specific type of allegation, viz fraud, and hence an unacceptable attempt so to do. The submission, unanswerable in my view (as adumbrated by my allusion to 'the plainly daunting hurdle' at para [84], above), was thus left unanswered.

[88] Counsel for Atcorp below further sought to refute the argument of counsel for DFC that Atcorp had failed to plead particulars of the supposedly fraudulent intentions of DFC. In this valiant effort, he quoted the following passage from the judgment of Russell LJ in *Lloyds Bank Ltd v Marcan and others* [1973] 1 WLR 1387 at 1390-1391:

> 'If he disposes of an asset which would be available to his creditors with the intention of prejudicing them by putting it, or its worth, beyond their reach, he is in the ordinary case acting in a fashion not honest in the context of the relationship of debtor and creditor. And in cases of voluntary disposition that intention may be inferred. Here we have this situation. A part of the bundle of rights in the bank's secured debt was a right to possession … To take that action at that juncture in my judgment, was, in the context of the relationship of debtor and creditor, less than

honest: it was sharp practice, and not the less so because he was advised that he had power to grant the lease. It was, in my judgment, a transaction made with intent to defraud the bank within section 172, and would have been within the Statute 12 Eliz.'

But, while this would appear to have a bearing on the position of NBLL, it is difficult to see how, on the state of the evidence, it could be of any relevance in considering the position of DFC. The real question, which was not being addressed by this invocation of legal principle, was this: What about the conduct of DFC shows that it had to have had notice of NBLL's intention to defraud Atcorp?

[89] Hafiz J rightly chose to grapple with this question, adopting the common sense position that, despite her conclusion that there had been no transfer of property under the DFC mortgage, 'the issue of fraud still has to be considered …' She found, correctly in my view, that in creating the DFC mortgage '[NBLL] did so to cheat [Atcorp] out of its security … and this was done in bad faith and dishonestly by [NBLL] and so was fraud on its part'. (At the same time, as should be clear by now, I refuse to go along with the judge in her ready acceptance of the suggestion of Atcorp's counsel that the security Atcorp wanted was not the security it in fact received.) As regards DFC, however, the judge held that fraud needed to be, but was not, pleaded. I am of the same mind. To seek to

distinguish between notice of intent to defraud and fraud is, as I have already hinted above, to split hairs. In the ordinary case taken to the court below under section 149, the claimant would, I consider, be well-advised specifically to plead fraud against both transferor and transferee. The judge, perhaps to be on the safe side, nonetheless went on to ask herself whether there was proof of fraud by DFC, the state of the pleadings notwithstanding.

[90] This brings me, then, to the second of the two points raised in the closing sentence of para [84] above. Rightly, to my mind, the judge below felt unable to found a finding of fraud on the flimsy foundation of a finding that DFC had only constructive (not actual) notice of the contents of the Atcorp debenture filed at the Companies Registry. Fraud, as already noted above, must not only be distinctly alleged but also distinctly proved. It is not a matter to be inferred from the facts.

[91] Indefatigably, counsel for Atcorp in the court below had urged upon the judge, in this regard, the following words of Lord Esher MR in *The English & Scottish Mercantile Investment Company, Limited v Brunton* (1892) 2 QB 700 at 707:

> ‘The doctrine of constructive notice is wholly equitable; it is not known to the common law. There is an inference of fact known to common law which comes somewhat near to it. When a man has statements made to him, or has knowledge of facts, which do not expressly tell of something which is against him, and he abstains from making further inquiry because he knows what the result would be - or as the phrase is, “he willfully shut his eyes” - then judges are in the habit of telling juries that they may infer that he did not know what was against him. It is an inference of fact drawn because you cannot look into a man’s mind, ***but you can infer from his conduct whether he is speaking truly or not when he says that he did not know of particular facts.*** There is no question of constructive notice or constructive knowledge involved in that inference; it is actual knowledge which is inferred.’ [Emphasis not added.]

The judge was evidently not impressed with this statement. Neither, in the context of this appeal, am I. There is nothing in the passage to suggest that the learned Master of the Rolls was speaking of anything other than a permissible approach to the question of a witness’s truthfulness in the generality of cases, with no reference to the special case of fraud that is singled out in the quote from The Supreme Court Practice set out above.

[92] The Record discloses in painstaking detail the unrelentingly uphill struggle of counsel for Atcorp in arguing the case for the grant of what I have been calling the first declaration (beginning at para [5], above). Primarily, his difficulty was a lack of evidence of fraud on the part of DFC. The evidence of Mrs Bedran, which I have made some effort to analyse in view of the judge's rather uncritical approach to it, fell woefully short of what was required. But her unquestioning attitude to this evidence notwithstanding, the conclusion of the judge that 'there is no evidence to prove that DFC knew that [NBLL] had the intentions to cheat [Atcorp] and assisted [NBLL] in defrauding [Atcorp]' is not one with which I can find fault. I can only agree, also, with her further conclusion that, 'I don't find any evidence against the DFC which shows dishonest intentions.'

[93] Long after the conclusion of the hearing of this appeal, the Privy Council delivered its judgment in *Villeneuve & anor v Galliard & anor* [2011] UKPC 6, an appeal from the Court of Appeal of the Commonwealth of the Bahamas. I would strongly commend to judges in the court below the following passage (dealing with the way in which trial judges should perform their duty of checking the impressions which they form of witnesses) taken from para 67 of the judgment, delivered by Lord Walker on 23 February 2011:

> 'That duty was described by Robert Goff LJ in *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1988] 1 Lloyd's Rep 1, 57:

> "Furthermore it is implicit in the statement of Lord Macmillan in *Powell v Streatham Manor Nursing Home* [1935] AC 243 at p 256 that the probabilities and possibilities of the case may be such as to impel an appellate Court to depart from the opinion of the trial Judge formed upon his assessment of witnesses whom he has seen and heard in the witness box. Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities …'

[94] Lord Walker, in another passage, reminds appellate judges of an important principle which I have kept firmly in mind in dealing with the appeal of Atcorp. To quote what he said at para 75:

> '[I]t is a very strong thing for an appellate court to find fraud proved when the lower court has rejected the claim …'

Disposition

[95] I would, in the circumstances, allow the appeal of DFC and set aside the declaration granted by the judge below; dismiss the appeal of Atcorp and affirm the refusal by the judge below of what I have referred to in this judgment as the first declaration; set aside the order of the judge below as to costs insofar as it purported to affect DFC; and order that the costs of DFC in both appeals and in the court below (to be taxed, if not agreed) be paid by Atcorp.

Postscript: The Delay in the Preparation of this Judgment

[96] By way of introduction to this postscript, I refer to the well-known admonition and advice of Lawton LJ in *Rolled Steel Ltd v British Steel Corporation* [1986] Ch 246, a case involving a delay in the court of first instance of 18 months in the delivery of judgment:

> 'Delays of this length should not occur unless there are compelling reasons why they should; and, if there are such reasons, it would be prudent of a judge to refer to them briefly.'

Regrettably, brevity is unaffordable in the present circumstances.

[97] From 1999, when I joined it, to the end of 2009, this Court has (as a Court consisting of three judges) had only three sittings per year, usually in the months of March, June and October. From 1999 to August 2009, the Court was made up of four judges, of which I was the only one resident in Belize. During that period, we would meet in Belize City for our sittings of no more than three weeks' duration and, upon separating again at the end of each sitting, have very little to do with one another until the next sitting. Our judgments would generally be written, and our preparation for the next sitting done, during those periods of separation (misleadingly called 'recesses'). But none of us was expected by the government of Belize to work only on the business of this Court during these so-called recesses. (In my case, which is of greatest relevance in the present context since I am the author of this judgment (the last substantive one to be prepared), my contract with the government has always expressly permitted me to engage in other forms of gainful occupation.) I will unapologetically describe the period commencing in June 1999 and ending sometime just before the end of 2009 as the halcyon days of my term of office in this Court as far as the volume and organization of the work-load is concerned.

[98] The demands of the work, and affairs in general, of the Court on my time (if I may be permitted, for obvious reasons, to speak for myself) have, alas, escalated bewilderingly since the latter part of 2009, particularly on the civil side. Whereas, to take a random sample from the year 2005, our final list of civil appeals for the first session comprised seven appeals, that for the last session of

2009 consisted of 15 appeals. (And, most notably on the civil side, there has been a marked increase in the volume of reading-matter placed before us for the average appeal, very often rather late in the day.) There have also been unprecedented events, some of a recurring nature, which have been causing major distraction and consuming excessive portions of recess time, during which, as indicated above, we have traditionally done the bulk of our judgment writing. Salient amongst these was the case of an appellant who sought to be heard by the Judicial Committee between the March and June sittings of 2010 on the basis that, by traversing the hearing of the relevant matter, we had refused to hear it. In short, the members of the Court are being asked by litigants to continue performing as in the halcyon days of yore despite the radically different scenario which keeps inexorably unfolding around judges and all else since, as I see it, the closing months of 2009.

[99] Not in the least surprisingly, in these circumstances, three members of the Court (me included again) found ourselves having to convene in January 2010 for a wholly unprecedented 'special sitting', which, predictably, would soon come to be cited as a precedent to be followed, despite the tradition of holding no more than three sitting sittings per year. The members concerned were called upon to prepare themselves for the hearing of two complex civil appeals, only one of which was, in the event, heard.

[100] The disruption of the established order during the recess month of January 2010 was followed in due course by the March 2010 sitting of the Court. By the time that memorable sitting had ended, the Court had, unusually, found it necessary to reserve its decision in as many as seven civil appeals. Going back again, for the sake of comparison, to the random sample from the year 2005 referred to earlier, only one judgment was reserved in that sitting (the first of 2005).

[101] After the rigours of the March 2010 session, our efforts to concentrate on the unfamiliar mountain of unfinished work with which it had left us were interrupted (in the case of three members, including me again) by the need to hold our second special sitting for the year, in the recess month of May. The appeal heard was, like that heard in the special sitting held in January 2010, a complex civil one.

[102] When the Court ended its regular June 2010 sitting, the signs of overwork were very much in evidence. In terms of the seven matters in which decision had been reserved at the end of the March sitting, the decision was handed down in one but the pertinent reasons for decision were reserved for the October sitting. In four others, however, including the two the subject of this judgment, decision was further reserved until the October sitting. In another, in which reasons for decision had been promised to be given in June, those reasons were further

reserved until October. And, to add (reluctantly, of course) to the existing backlog, decision was reserved in three of the appeals heard during the June sitting.

[103] At the end of our October 2010 sitting, the Court was able finally to deliver reasons in one appeal in which it had given its decision without reasons in June. In another, in which the decision had been given in March, reasons reserved then and further reserved in June, were again reserved. The decisions in the two appeals the subject of this judgment were, of course, again reserved. As to these two appeals, it needs further to be noted that one member of the Court, most commendably in the difficult circumstances, was able to produce, sometime after the June sitting, a draft judgment which reached my hands in mid-July 2010. Following a careful study of it, I realised that I could not agree with it and would therefore have to write a judgment of my own. Doing the best I can, I have now completed this admittedly long-delayed judgment. I, of course, very much regret the delay in producing it.

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SOSA JA

MORRISON JA

Introduction

[104] On 17 March 2010, by the consent of the parties, these appeals were consolidated and heard together. The appellants in both appeals contend that the judgment of Hafiz J given on 26 November 2009 in Action No. 81 of 2006 was wrong in some, although not in all, respects.

[105] The appellant in Civil Appeal No. 3 of 2010 is Development Finance Corporation ("DFC"), a statutory corporation duly formed and existing under the Development Finance Corporation Act, and the respondents are Atlantic Corporation Limited ("Atlantic"), a company duly incorporated under the laws of Belize, and Novelo's Bus Lines Limited ("Novelo"), a company duly incorporated under the laws of Belize, engaged in the provision of bus services throughout Belize.

[106] The appellant in Civil Appeal No. 7 of 2010 is Atlantic and the respondents are DFC and Novelo. Novelo took no part in either the trial of this matter before Hafiz J or in the consolidated appeal.

[107] Novelo incurred substantial indebtedness to both Atlantic and DFC and defaulted on both loans. The question for decision in this appeal is which of the

two creditors should have prior claim to the assets of Novelo in the circumstances of the case. This situation is not, of course, an unusual one, but the particular circumstances of each case are almost invariably unique.

[108] The main issue, broadly speaking, is whether a charge on certain properties created by a Mortgage Debenture dated 23 May 2000 (and duly recorded in Deeds Book Volume 33 of 2000 at folios 91 to 130) between Novelo and Atlantic ("the Mortgage Debenture") should take priority over a charge by way of legal mortgage created over the said properties by a Deed of Supplemental Mortgage dated 18 February 2002 (and duly recorded in Land Charges Register Volume 28 Folio 36 No. 7) between Novelo and DFC ("the Supplemental Mortgage"). This issue, which I shall refer to as "Issue (i)", calls for a consideration of the nature of the interest given to Atlantic by the Mortgage Debenture, as well as the effect of the registration by Atlantic of particulars of the Mortgage Debenture in the Companies Registry, pursuant to section 95(1) of the Companies Act. Subsidiary issues have to do with whether the Supplemental Mortgage is void as being a transfer of property made with intent to defraud Atlantic Bank ("Issue (ii)") and, lastly, whether and to what extent the reliefs claimed by Atlantic are affected by the fact that on 3 March 2005 the Supreme Court made an order for sale of the properties mortgaged by Novelo to DFC (on the application of DFC) ("Issue (iii)").

[109] Central to the determination of these issues is the relationship and the interplay between the Law of Property Act ("the LPA"), the General Registry Act ("the GRA") and the Companies Act ("the CA").

The factual background

[110] There is virtually no contest between the parties as to the relevant factual background to the litigation and it can therefore be shortly stated (with grateful thanks to Hafiz J, upon whose summary of the facts what follows is largely based).

[111] By letter dated 24 February 2000, Atlantic offered to provide a loan of $6,600,000.00 to Novelo, for the purpose of assisting Novelo to complete the purchase of the assets of Batty Brothers Bus Services Company Limited. This loan, together with interest, was to be repaid over five years by way of 60 equal monthly instalments of $106,482.00 and one balloon payment of $2,368,625.00. The loan was to be secured in part by a mortgage debenture on the assets being purchased, stamped for the sum of $2,000,000.00, to include the Batty Bus Terminal Complex in Belize City (comprising three parcels of land) as well as the Bus Depot Property in Lindo's Alley, Belize City (comprising three parcels of land). On 25 February 2000, Atlantic's letter of offer was duly signed and dated by Antonio D. Novelo and David Novelo, for and on behalf of Novelo, accepting the terms and conditions of the offer.

[112] Upon acceptance of the offer by Novelo, the proceeds of the loan were disbursed by Atlantic and Novelo executed and delivered to Atlantic the Mortgage Debenture dated 23 May 2000, which was in due course stamped and recorded (pursuant to the GRA) in Deeds Book Volume 33 of 2000 at folios 91 to 130. Under the terms of the Mortgage Debenture, Novelo gave to Atlantic, as a continuing security for the payment of all moneys thereby secured, a first fixed charge over all of its "freehold and leasehold property…both present and future…", including, but not limited to the assets specified in the schedule. Among the assets listed in the schedule were the Batty Bus Terminal Complex and the Bus Depot Property. As at the date of execution of the Mortgage Debenture, these properties were still held on five transfer certificates of title registered in the name of Batty Bus Services Company Ltd, but were the subject of an agreement to sell, which had been entered into by that company and Antonio and David Novelo on 31 December 1999. By the terms of the Mortgage Debenture, Novelo covenanted not to create or attempt to create or permit to subsist any mortgage, debenture, charge or pledge upon the goodwill, undertaking, property, assets, revenues and rights charged by the Mortgage Debenture or any part thereof, without the prior written consent of Atlantic.

[113] Sometime in early 2001, Novelo approached DFC for a loan of $30,000,000.00, to upgrade and expand its passenger bus operation and, on 2 March 2001, DFC approved and offered a loan in that amount to Novelo. On 31 March 2001, Novelo accordingly entered into a loan agreement with DFC and, on

11 April 2001, Novelo executed and delivered to DFC a Mortgage Debenture as part of its security for the loan of $30,000,000.00.

[114] In May of 2001, Novelo defaulted on its loan payment to Atlantic. In response to Atlantic's inquiries, Novelo indicated that it was anticipating early disbursement of a loan from DFC and would update the loan with Atlantic upon receipt of those monies. This information was confirmed by an officer of Atlantic in a discussion with an officer of DFC, who also confirmed that another disbursement of $1,500.000.00 was due to Novelo.

[115] On 14 February 2002, Novelo completed the acquisition of the Batty Bus Terminal Complex in Belize City as well as of the Bus Depot Property in Lindo's Alley, Belize City when it secured in its name Transfer Certificates of Title, all dated 14 February 2002 and recorded in Land Titles Register, Volume 40 at Folios 97, 98, 99, 100 and 101. On 18 February 2002, Novelo, by way of Deed of Supplemental Mortgage dated 18 February 2002, recorded in the Land Charges Register in Volume 28 at Folio 36, charged the five properties ("the mortgaged properties") by way of first legal mortgage to DFC with the repayment of the sum of $30,000,000.00 made available by DFC to Novelo under the Loan Agreement dated 31 March 2001. The Supplemental Mortgage was entered into by Novelo without the prior knowledge, consent or approval of Atlantic.

[116] On 23 December 2004, DFC applied to the Supreme Court, under the provisions of section 68(1)(a) of the LPA, for an order for the sale of the mortgaged properties and in due course obtained an order accordingly on 3 March 2005. On 29 January 2006, the sale by auction of the mortgaged properties was advertised in the Amandala newspaper and on 10 February 2006, Atlantic's attorneys-at-law wrote a letter to DFC challenging its right to sell the properties, on the ground that the Mortgage Debenture had priority over the Supplemental Mortgage. That letter gave notice of Atlantic's intention to institute legal action for a declaration to that effect and ended with a request for "a written undertaking from DFC not to in any way deal with the proceeds of sale of the subject properties until the said action is concluded".

[117] On 13 February 2006, DFC's attorneys-at-law replied to Atlantic's attorneys-at-law to advise that DFC would "on [sic] accordance with your request, hold the proceeds of sale of the [mortgaged properties], in trust, until such time as your intended action is concluded". The mortgaged properties were in due course sold at public auction pursuant to the order of the court and transferred to the purchaser.

The claim

[118] In its statement of claim dated 15 February 2006, Atlantic referred to the terms of the Mortgage Debenture, in particular to the fact that Novelo had

thereby charged all its assets, present and future, to secure its debt to Atlantic, and alleged that Novelo had acted without its consent or approval in entering into the Supplemental Mortgage to DFC. Atlantic alleged further that DFC, at the time of the said mortgage, "had actual and/or constructive notice of the existence of the Mortgage Debenture in favour of [Atlantic]."

[119] Atlantic accordingly sought two declarations, in the following terms:

> "(i) The charge by way of legal mortgage created on the properties listed in the schedule below ("the Properties") by way of Deed of Supplemental Mortgage dated the 18th February, 2002 and recorded in the Land Charges Register in Volume 28 at Folio 36 given by the Second Defendant to the First Defendant to secure the repayment of the principal sum of BZ $30,000.000.00 is void and of no effect being a transfer of property made with the intent to defraud creditors within the meaning of section 149 (1) of the Law of Property Act; and/or
>
> (ii) The charge created on the Properties by Debenture dated 23rd May, 2000 and recorded in deeds Book Volume 33 at folios 91-130 given by the Second Defendant Company, Novelo's Bus Line Limited, as continuing security to secure the repayment of all monies obligations and liabilities owing or incurred to the Claimant

by the Second Defendant which continues to be held by the Claimant ranks in priority to the charge by way of legal mortgage created on the properties by Deed of Supplemental Mortgage dated the 18th February, 2002 and recorded in the Land Charges Register in Volume 28 at folio 36 given by the Second Defendant to the First Defendant to secure the repayment of the principal sum of BZ $30,000,000.00 which continues to be held by the First Defendant as a charge on the properties."

[120] In its defence filed on 15 March 2006, DFC asserted that the Mortgage Debenture could not operate to give Atlantic priority over the Supplemental Mortgage, as it was not (and could not have been) registered as a mortgage under the provisions of the LPA and the GRA. As a result, the Mortgage Debenture "did not or could not have constituted notice, actual or constructive, to [DFC]". Further, DFC stated that the charge by way of legal mortgage (created by the Supplemental Mortgage) was not a "transfer" of land and that the proviso to section 149 of the LPA did not apply to it. Finally, DFC stated that in 2004 and 2005 Atlantic had encouraged it to incur expenditure and alter its position irrevocably, "on the faith of the supposition" that the Supplemental Mortgage was valid and would rank pari passu with the Mortgage Debenture and that in those circumstances it was "inequitable and unconscionable for [Atlantic] to deny the validity and rank" of the Supplemental Mortgage.

The evidence

[121] Four witnesses were called at the trial before Hafiz J, three by Atlantic and one by DFC. As none of the grounds of either appeal challenges any of the judge's findings of fact, it is not necessary to rehearse the evidence given by these witnesses in any detail. It suffices to say that the judge accepted the evidence of the Deputy Registrar General, Mr Edmund Pennil, who at the time of trial had been employed in various capacities in the General Registry for over 50 years, as to the practice in the Companies Registry with regard to the registration of particulars of mortgages or charges presented to the Registry. The judge also accepted the evidence of Ms Judith Alpuche, a research clerk employed to Barrow & Co., attorneys-at-law for Atlantic, as to the state of the file relating to Novelo's Bus Line Limited at the Companies Registry on 17 July 2009, which was the date on which she conducted a search at the registry.

[122] Specifically, the judge accepted Mr Pennil's evidence that it was the invariable practice in the Companies Registry, whenever particulars of a mortgage or charge are presented for registration, to retain and keep on the file of the particular company a copy of the relevant security documentation, in this case, the Mortgage Debenture, presented with the particulars for registration. She also accepted Ms Alpuche's evidence that, on the date of her search of Novelo's file at the Companies Registry, the entire Mortgage Debenture dated 23 May 2000 was on the file, attached to completed form of particulars of mortgage

or charge. This evidence will be of some importance in relation to the issue of notice, to which I shall come in due course.

[123] Ms Sandra Bedran also gave evidence on behalf of Atlantic. She was the duly appointed attorney of Atlantic, under a registered power of attorney dated 1 October 2001. Ms Bedram was able to tell the court in some detail of the process by which Novelo came to enter into a borrowing arrangement with Atlantic and of the events leading up to the execution of the Mortgage Debenture. Ms Bedram was the person who had made contact with DFC after Novelo's first default in loan payments in May 2001. On that occasion, she had spoken to Mr Roberto Bautista, who was at the time the General Manager of DFC, and he was the person who had confirmed to her the information given by Novelo that there was another disbursement of $1,500,000.00 due to Novelo. Ms Bedram's evidence was that at this time DFC "had already agreed to lend the sum of $30 million to [Novelo] and [DFC] knew of the loan that [Novelo] owed to [Atlantic] and that the loan had been made to purchase the assets of Batty Brothers Bus Lines".

[124] On 8 February 2002, Novelo, which was again in default of its loan payments to Atlantic, requested that Atlantic nevertheless honour a cheque for $1,500,000.00 drawn on its account in favour of DFC. Novelo advised Atlantic that it needed to make a payment to DFC, from whom it said it was "borrowing $30 million to be able to pay off everyone and that included paying me of". As a

result of this request, and in order to safeguard Atlantic's position, Ms Bedram on that same day again spoke with Mr Bautista on the telephone and he confirmed to her that DFC did have a disbursement to make to Novelo, but could not do so while it was in arrears with its payments. Mr Bautista assured Ms Bedram that if she allowed Novelo to draw on its account with Atlantic to make the payment of arrears, DFC would see to it that the disbursement of $5,000,000.00 which was due to be made on 11 February 2002 would be sent to Novelo through Atlantic. On the faith of this arrangement, Ms Bedram testified, she gave permission for Novelo's cheque for $1,500,000.00 to be honoured. However, DFC's disbursement of $5,000,000.00 to Novelo was in the end not made through Atlantic and DFC did not otherwise pay any money for Novelo to or through Atlantic.

[125] Ms Bedran was also able to give the court some insight, based on her more than 20 years of experience in the banking industry, into what she described as the "standard practice" in Belize in relation to the making of any "sizeable loan" ("say of $1 million and more") to a company, including the due diligence enquiries that would routinely be made in such circumstances. She described it as "unthinkable for a lender to proceed with a sizeable loan without having its attorneys-at- law or its in-house Registry or legal or titles clerk conduct a search of the companies registry and the Land Titles registry to verify the state of the title to any land which the borrower says it can offer as security for such a

loan". She also considered it to be unthinkable "for a lender to finance the purchase of land for that land to be mortgaged to another lending institution".

[126] Mr Bautista did not give evidence and Ms Bedram's evidence was not contradicted by any evidence on behalf of DFC, whose only witness was Mr Arsenio Burgos, the chairman of the board of directors. He confined himself in his witness statement to an account of the process by which DFC agreed to make a loan to Novelo, the preparation and execution of the security documentation, Novelo's default, the joint appointment by DFC and Atlantic of a Receiver/Manager of Novelo and DFC's subsequent application to the court for an order for sale of the mortgaged properties.

Hafiz J's judgment

[127] The learned judge asked herself six questions, which may be summarised as follows:

(i) Whether the Mortgage Debenture executed by Novelo on 23 May 2000 created an equitable charge over the mortgaged properties;

(ii) whether DFC had actual or constructive notice of the Mortgage Debenture on or before 18 February 2002, the date of the Supplemental Mortgage;

(iii) whether the Supplemental Mortgage dated 18 February 2002 in favour of DFC is void, pursuant to section 149 of the LPA, as a transfer by Novelo of property with intent to defraud Atlantic;

(iv) whether the said mortgage was created by Novelo and DFC with intent to defraud Atlantic;

(v) whether the equitable charge created by the Mortgage Debenture ranks in priority to the charge by way of legal mortgage in favour of DFC created by the Supplemental Mortgage; and

(vi) whether Atlantic is entitled to any relief, the Supreme Court having by order dated 3 March 2005 already ordered the sale of the mortgaged properties.

[128] In a full and careful judgment, Hafiz J answered questions (i) and (ii) in favour of Atlantic (there was a "fixed equitable charge" on the mortgaged

properties and DFC had constructive notice of the contents of the Mortgage Debenture "because of the standard practice in Belize where the Instrument is kept together with the Particulars filed at the Companies Registry"). Question (iii), the judge answered in the negative ("the legal mortgage dated 18th February 2002 in favour of DFC is not void pursuant to [section 149 of the LPA] because it was not a transfer of property by Novelo as envisaged by that section"). However, on question (iv), she found that Novelo had given the charge by way of legal mortgage to DFC with intent to defraud Atlantic, though she also found that there was no evidence of fraud on the part of DFC. With regard to the all important question (v), the judge concluded that the equitable charge created by the Mortgage Debenture dated 23 May 2000 ranked in priority to the 18 February 2002 charge by way of legal mortgage in favour of DFC. And finally, on question (vi), the judge concluded that the order for sale of the mortgaged properties did not disentitle Atlantic from relief in the action, though it did have the result that it could only look to the proceeds of sale of the properties, not to the properties themselves. In the result, the judge granted the second of the two declarations sought by Atlantic, that is to say, that the charge created by the Mortgage Debenture "ranks in priority to the charge by way of legal mortgage created…by Deed of Supplemental Mortgage dated the 18th February, 2002…".

The appeals

[129] As already indicated, neither DFC nor Atlantic was entirely happy with the way in which Hafiz J resolved these issues and as a result they both filed appeals.

[130] In Civil Appeal No. 3 of 2010, DFC filed a total of 11 grounds of appeal, giving rise, to adopt Mr Lumor SC's very helpful summary, to four issues, as follows:

(1) Whether the learned trial judge properly interpreted or construed the provisions of the LPA and the GRA when she excluded the Mortgage Debenture executed in favour of Atlantic from the purview of both statutes.

(2) Whether the "fixed equitable charge" is an "encumbrance" or "equitable mortgage" governed by the provisions of sections 103(1) and 118 respectively of the LPA.

(3) Whether the "fixed equitable charge" was made, constituted or created and registered in accordance with sections 48, 50, 51, 52 and 52 of the GRA and sections 103(1) and (2), 105 and 106 of the LPA.

(4) Whether the learned trial judge has any statutory authority to exclude the "fixed equitable charge" from the scope of section 84(1)(b) of the LPA.

[131] In Civil Appeal No. 7 of 2010, Atlantic filed a more modest three grounds of appeal as follows:

> "(1) The learned trial judge erred in law in finding that [Novelo] did not transfer any property to DFC under the mortgages and that it followed that a charge by way of legal mortgage is not a transfer of property as envisaged by the provisions of section 149 of LPA.
>
> (2) The learned trial judge erred in law in finding that there was no evidence of fraud on the part of DFC.
>
> (3) The learned trial judge erred in law in failing to find that the charge by way of legal mortgage created on the properties by the deed of supplemental mortgage dated 18th February, 2002 given by the Second Defendant to the First Defendant to secure the repayment of the principal sum of BZ $30,000.00 [sic] is void and of no effect being a transfer of

property made with the intent to defraud creditors within the meaning of section 149(1) of the Law of Property Act."

[132] At the outset of his submissions, Mr Lumor was careful to remind us of the cardinal features of the Torrens System of land registration, as described by the Privy Council in **British American Cattle Co v Caribe Farm Industries Ltd (1998) 53 WIR 101, 102** and by this court in **Santiago Castillo Ltd v Quinto (2007) 71 WIR 156, 173**. These cases were referred to in support of Mr Lumor's general point that, by virtue of the provisions of the LPA and the GRA, Part IV of the latter Act "contains the separate regime for constitution and registration of charges over registered land."

[133] It is against this background that Mr Lumor then took us to his specific submissions on the first, second and third issues set out in para. [130] above. Thus he submitted that the combined effect of the LPA and the GRA was such that for Atlantic's Mortgage Debenture to achieve priority over DFC's Supplemental Mortgage, it had to be executed and registered pursuant to those statutes as a legal charge, an encumbrance or an equitable mortgage. But in fact, it would not have been possible for the Mortgage Debenture to have been so registered at the date of its creation, for the simple reason that Novelo was not then the registered proprietor of the mortgaged properties, which was a statutory precondition to the registration of any of those three interests.

[134] As to the judge's finding that DFC had constructive notice of the Mortgage Debenture, Mr Lumor submitted that there was no room for the operation of that doctrine in the context of the LPA and the GPA, which created a complete code for dealings with the registered proprietor of land under those Acts. As a result, registration of particulars of the Mortgage Debenture at the Companies Registry, pursuant to the provision of section 95 of the Companies Act, did not make that document a registered security nor could it constitute notice, for the purposes of the LPA and the GRA.

[135] In the result, Mr Lumor submitted that the Mortgage Debenture conferred contractual rights only on Atlantic, in accordance with the provisions of section 18(3) of the GRA.

[136] Finally, on his fourth issue, Mr Lumor submitted that the effect of the sale of the mortgaged properties pursuant to the order made on 3 March 2005 was that DFC's charge by way of legal mortgage was thereby extinguished and the question of priorities was then transferred to the proceeds of the sale of the properties. Thereafter, the mortgagee becomes in law "the holder of a judgment for money", pursuant to Order XLII, rule 4 of the old Belize Supreme Court Rules, as provided for by section 86(1) of the LPA. In these circumstances, the provisions of Order XLII and section 88(1) of the LPA apply, with the result that the proceeds of sale of the mortgaged properties are held by DFC subject "only

to any prior bona fide mortgage, charge or incumbrance". Atlantic does not fall into any of these categories.

[137] Mr Marshalleck SC for Atlantic did not take issue with Mr Lumor's submission that the Mortgage Debenture was not and could not have been registered as an encumbrance within the meaning of section 103(2), Novelo not having been at the material time the registered proprietor of the mortgaged properties. For the same reason, Mr Marshalleck also argued that the Mortgage Debenture could not have been registered pursuant to Part IV of the GRA as a legal charge, notwithstanding that the lands in question were registered land. Indeed, Mr Marshalleck submitted, a close analysis of the GRA and LPA makes it clear that none of their provisions speak to the creation of equitable charges and equitable interests in registered land by persons other than a registered proprietor. (Although he did point out that section 118 of the LPA, which deals with the manner of creation of equitable mortgages, is permissive and does not exclude the creation of equitable mortgages by other means by other persons interested in the land in question.) Those provisions cannot therefore be relied upon to determine the priority of the "very peculiar interest" created by the Mortgage Debenture. In such circumstances, "priority must be determined in accordance with the common law", which is the approach that Hafiz J had (correctly) taken.

[138] With regard to the effect of the order for sale of the mortgaged properties, Mr Marshalleck submitted that section 88 of the LPA did not speak to the position of the fixed equitable charge created by the Mortgage Debenture prior to the Supplemental Mortgage in satisfaction of which the sale was ordered, However, he submitted, by agreement between the parties, the proceeds of sale were held by DFC pending the court's determination of the question of priority, so that Mr Lumor's fourth issue did not arise in these circumstances.

[139] As regards Atlantic's appeal (Civil Appeal No. 7 of 2010), Mr Marshalleck submitted that the trial judge erred in failing to find fraud on the part of DFC. It was submitted further that she had also erred in restricting the meaning of the word "transfer" in section 149 of the LPA and that there was no reason why "transfer" should not be interpreted to include every assurance or disposition of land, nor was there any reason for excluding a mortgage of land from that definition. On this basis, it was submitted that section 149 applied to render DFC's mortgage voidable at the instance of Atlantic. Further, that DFC, having had constructive notice of the Mortgage Debenture and of Novelo's intention to defraud Atlantic, could not avail itself of the provisions of section 149(3). Mr Marshalleck also referred us to the old cases of **Cadogan v Kermith (1776) 2 Cowp. 483** and **Le Neve v Le Neve (1747) AMB. 436**.

[140] In a brief reply, Mr Lumor submitted that, for section 149 to apply, actual fraud on the part of DFC would need to be established, referring us on this point

to **Assets v Mere Roihi [1905] AC 176** and **Ecedro Thomas and others v Augustine Stoutt and others** (Eastern Caribbean Court of Appeal, Civil Appeal No. 1 of 1993, judgment delivered on 12 May 1996). In any event, Mr Lumor pointed out, there as no pleading of fraud against DFC in this case.

[141] Finally, with regard to the "agreement" between the parties referred to by Mr Marshalleck, Mr Lumor maintained that DFC's position was, and had always been, that the question of priorities was to be dealt with on the basis of section 88 of the LPA. All DFC had agreed to do was to keep the proceeds of sale intact until the conclusion of the litigation.

The statutory framework

[142] Both parties have prayed in aid several of the provisions of the LPA and the GRA and it may accordingly be helpful to advert briefly to some of the relevant provisions at this stage. It may be noted at the outset that both statutes came into effect within 10 weeks of each other in 1954 (the LPA on 1 March 1954 and the GRA on 15 May 1954). They are in several respects complementary and form the basis of the introduction in Belize of the Torrens system of land registration, a point which is of central significance to Mr Lumor's submissions in this appeal, and to which I shall have to return in due course.

The LPA

[143] My starting point is the LPA and some relevant definitions, which are to be found in section 2(1). 'Equitable interest' means "estates, interests and charges in or over land which are not legal estates, interests and charges over land, and 'equitable title' means a title to an equitable interest". 'Legal estates' means "the estates, interests and encumbrances in or over land which under section 3 are authorized to subsist, to be conveyed or to be created at law." 'Legal mortgage' means "a charge by way of legal mortgage" and 'mortgage', 'mortgage money', 'mortgagor' and 'mortgagee' fall to be interpreted accordingly.

[144] Section 2(2) provides that "where an equitable interest in or power over property arises by statute or operation of law, references to the creation of an interest or power include references to any interest or power so arising", and section 2(3) provides that "All words and expressions defined in the [GRA], shall have the same meaning in this Act as they have in that Act."

[145] Section 3 is of some importance and is accordingly set out below in its entirety:

> "3.-(1) After the commencement of this Act, the only estates in land which are capable of subsisting or of being created or transferred at law are –
>
> (a) an estate in fee simple absolute in possession; and

(b) a term of years absolute.

(2) After the commencement of this Act, the only interests in or over land which are capable of subsisting or of being created or transferred at law are –

(a) an easement, right or privilege in or over land for an interest equivalent to an estate in fee simple absolute in possession or to a term of years absolute;

(b) rights of entry exercisable over or in respect of a legal term of years absolute, or annexed for any purpose to a legal rentcharge.

(3) After the commencement of this Act, the only charges in or over land which are capable of subsisting or of being created or assigned at law are –

(a) a charge by way of legal mortgage;

(b) a rentcharge in possession issuing out of or charged on land being either perpetual or for a term of years absolute;

(c) a charge on crops;

(d) land tax and any other similar charge on land which is not created by an instrument.

(4) All other estates, interests and encumbrances in or over land shall take effect as equitable interests.

(5) Legal estates have the same incidents as legal estates subsisting at the commencement of this Act."

[146] Section 10 provides for the creation and disposition of equitable interests in land, as follows:

> "10-(1) Interests in land validly created or arising after the commencement of this Act which are not capable of subsisting as legal estates, shall take effect as equitable interests.
>
> (2) Except as otherwise expressly provided by statute, interests in land which under the Statute of Uses or otherwise could before the commencement of this Act been created as legal interests shall be capable of being created as equitable interests:
>
> Provided that, after the commencement of this Act (and except as hereinafter expressly enacted), an equitable interest in land shall only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created before such commencement."

[147] Section 41 provides that after the commencement of the LPA (except in the case of national land), the creation or transfer in law of an estate in fee simple absolute in possession, a term of years absolute (for a period of 10 years or more) and any easement, right or privilege in or over any land equivalent to an estate in fee simple absolute, shall only be effected as follows:

> "(i) in case of registered land by the issue of a certificate of title under and in accordance with Part III of the [GRA]; and
>
> (ii) in the case of unregistered land by the recording of the title deed thereto under and in accordance with Part VI of the [GRA]."

[148] Section 41(3) provides that a registered title to land under Part III of the GRA shall, subject to all estates, interests, charges and encumbrances noted on the certificate of title to the land, "be an absolute and indefeasible title." As a

result, as section 41(4) provides, such a certificate of title is generally unchallengeable, save in cases of fraud "committed in respect of the issue of the certificate of title, or the noting of such estates, interests, charges or encumbrances" (section 41(4)(a)). There is a further exception in cases in which the person in continuous and undisturbed possession of the land for 30 years establishes to the satisfaction of the Supreme Court his entitlement to the land or in cases in which the registered proprietor's right to recover the land has been barred by the operation of the Limitation Act (sections 41(4)(b) and section 42(1)).

[149] Section 64(1)(a) provides that a legal charge over land shall only, in the case of registered land, be created "by a deed expressed to be by way of legal mortgage…and registered under and in accordance with Part III, IV or V of the [GRA]" and section 64(2) provides that such a deed shall be "in such form as may be prescribed under the [GRA]."

[150] Section 67(1) makes it clear that the legal estate in any property remains, notwithstanding a mortgage thereon, vested in the mortgagor and that "the mortgagee shall take no estate in the property mortgaged, but shall have as his security a charge on the property and a right to an order for sale of the property in order to recover the mortgage moneys together with all costs, charges and expenses of the application for that order."

[151] Section 69(1) gives to the mortgagee of registered land a power of sale without an order of the court in cases of default by the mortgagor, while, with regard to the question of priorities as between legal mortgages, section 74 provides that such mortgages rank according to their respective dates of registration as a land charge, pursuant to Part IV or recording pursuant to Part VI of the GRA.

[152] Section 86(1) makes provision for the procedure relating to the sale of mortgaged properties, providing that the sale shall be effected by the Registrar "under Order XLII of the Supreme Court Rules, the mortgagee being deemed 'the holder of a judgment for money' within the meaning of rule 4 thereof". The order of priority of payment of claims out of the proceeds of sale of the mortgaged property is provided for by section 88, as follows:

> "88-(1) The proceeds of a sale of mortgaged freehold, leasehold or other property under this Part shall be applied in payment of the following claims arising in respect of the land in the following order-
>
> (a) the taxed costs, charges and expenses of and incidental to obtaining the order for sale and for effecting the sale;
>
> (b) any Government debt due in respect of the freehold, leasehold or other property;
>
> (c) all taxes and rates due to the Government or to the Belize City Council or to any town council;
>
> (d) all interest and other sums in the nature of interest payable on the principal money secured by the mortgage;

(e) the principal money, or any balance thereof remaining unpaid and directed to be recovered by the order for sale.

(2) If, after payment in full of the principal money or any balance thereof, any surplus proceeds of sale remain in the hands of the Registrar he shall, if there is any legal mortgage subject to which the freehold, leasehold or other property was sold, pay to the person entitled to such legal mortgage the whole or so much of such surplus proceeds as is sufficient to discharge any money thereby secured.

(3) If, after payment in full of the principal money or any balance thereof, any surplus proceeds of the sale remain in the hands of the Registrar and there is no legal mortgage subject to which the freehold, leasehold or other property was sold, the Registrar shall pay such surplus proceeds to the person entitled to the mortgaged property at the date of the sale, or other person authorised to give receipts for the purpose of the sale."

[153] Section 103 provides for the registration or recording of encumbrances on registered land, as defined by section 103(1), under Part IV or Part VI of the GRA, while section 120 provides for the recording or registration of equitable mortgages of registered land in accordance with Part IV of the GRA. I have not found it necessary to set out the relevant provisions in detail, given the fact that it is common ground between the parties that the Mortgage Debenture was not and could not have been registered as either an encumbrance or an equitable mortgage within the meaning of the LPA because Novelo were not the registered proprietors of the mortgaged lands at the time it was entered into.

[154] The final section of the LPA that calls for specific mention is section 149, which provides (under the rubric 'Voidable Dispositions') as follows:

> "149-(1) Except as provided in this section, every transfer of property made, whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.
>
> (2) This section shall not affect the operation of a disentailing assurance, or the law of bankruptcy for the time being in force.
>
> (3)This section shall not extend to any estate or interest in property transferred for valuable consideration and in good faith or upon consideration and in good faith to any person not having, at the time of the transfer, notice of the intent to defraud creditors."

The GRA

[155] The GRA was clearly intended by the legislature to complement the LPA, providing in section 2(2), that "All words and expressions defined in the [LPA] shall have the same meaning in this Act as they have in that Act" (see also the corresponding provision in the LPA, at para. [144] above).

[156] Section 2(1) defines 'dealing' as "a dealing with land in any manner which requires application to the Registrar to have the matter completed and made available by registration under this Act." A 'transfer' is defined as "a conveyance of the proprietorship in land or any interest in land from a proprietor to another person."

[157] Part III provides for the registration of title to land in a Land Titles Register "consisting of certificates of title issued and bound together in

accordance with this Act" (section 12(1)). Section 18(1) provides that when a First Certificate of title is issued under the GRA, "all dealings with the land described therein shall be governed by the [LPA] and all such dealings shall take effect from the date and act of registration, and not from the date of execution or delivery of any instrument or document or otherwise, except as may be provided by this Act".

[158] Section 18(3) provides for the consequence of non-compliance with the Act as follows:

> "Dealings with registered land which are not in accordance with the provisions of this Act shall operate as contracts only and shall not confer any legal estate or interest in or over the land, but may create contractual rights or equitable interests in or over the land."

(See also section 25(2) which makes a similar provision.)

[159] Part IV provides for the registration of legal charges and incumbrances and the establishment of a Land Charges Register. (The discerning reader will have immediately noticed the difference in the spelling of 'incumbrance' in the GRA from that of 'encumbrance' in the LPA. (For a comment on this curiosity, see the postscript to the judgment of Sosa JA in **First Caribbean International Bank (Barbados) Limited v The Belize Bank Limited and others**, Civil Appeal

No. 30 of 2008, judgment delivered 19 March 2010, para. [47]). It is again not necessary to dwell in any detail on the provisions of this part, as it is also common ground between the parties that the Mortgage Debenture could not have been registered as a legal charge by virtue of the fact that a pre-requisite to such registration is the presentation to the Registrar by the person creating the charge of his certificate of title to the land (see section 48), which Novelo was not in a position to do on 23 May 2000.

[160] Part VI provides for the recording of deeds and it is again not necessary to dwell on this part, save to say that the Mortgage Debenture was duly recorded as a deed in Deeds Book Volume 33 of 2000 at folios 90 to 130 (Vol. 1 p. 61).

[161] The combined effect of these provisions was authoritatively summarised by Lord Browne-Wilkinson in **British American Cattle Co v Caribe Farm Industries Ltd (1998) 53 WIR 101, 102-103**, and was also referred to by this court in its judgment in **Santiago Castillo Ltd v Quinto and another (2007) 71 WIR 158, 173**. In the subsequent decision on appeal to the Privy Council from this court in **Santiago Castillo** (Privy Council Appeal No. 27 of 2008, judgment delivered 28 April 2009), the Board confirmed that "under the Torrens system registration confers title on the registered proprietor" and that "…a purchaser from the registered proprietor does not normally need to look further than the register for reassurance that the vendor has good title" (per Lord Phillips at para. 4).

The CA

[162] Section 95(1) of this Act provides for the delivery to the Registrar of Companies for registration particulars of every mortgage or charge created by a company registered in Belize, being either –

> "(a) a mortgage or charge for the purpose of securing any issue of debenture; or
>
> (b) a mortgage or charge on uncalled share capital of the company; or
>
> (c) a mortgage or charge created or evidenced by an instrument which, if executed by an individual, would require registration as a bill of sale; or
>
> (d) a mortgage or charge on any land, wherever situate, or any interest therein; or
>
> (e) a mortgage or charge on any book debt of the company; or
>
> (f) a floating charge on the undertaking or property of the company."

[163] The consequence of non-registration of particulars as required by section 95(1) is that such mortgages or charges "shall, so far as any security on the company's property or undertaking is thereby conferred, be void against the liquidator and any creditor of the company".

Discussion and analysis

Issue (i) – does the Mortgage Debenture prevail over the Supplemental Mortgage?

[164] It is against this extended background that I come now to the main question that arises on this appeal, that is, whether Hafiz J was correct in her conclusion that DFC's legal charge by way of mortgage created by the Supplemental Mortgage given on 18 February 2002 was subject to Atlantic's Mortgage Debenture dated 23 May 2000.

[165] In order to determine this issue, it is first of all necessary to address the question of classification of the Mortgage Debenture. As previously indicated, Mr Marshalleck did not dissent from Mr Lumor's submission that the Mortgage Debenture was and could not have been registered pursuant to the LPA as a legal charge by way of mortgage, an incumbrance or an equitable mortgage, since under that Act the registration of each of these interests could only be achieved by the registered proprietor of the mortgaged properties, which Novelo was not at the time when it took the Mortgage Debenture on 23 May 2000. I entirely agree with Mr Lumor's submissions in this regard (which, incidentally, also mirror Hafiz J's conclusion on this aspect of the matter) and I accordingly consider that Mr Marshalleck's concession was properly made. This follows from the nature of the registration system since, as the editors of Fisher & Lightwood's Law of Mortgage put it, "…In the case of registered land, a legal charge cannot

be registered until the charger has acquired a legal estate and been registered as the proprietor…" (11th edn, para. 3.20). Thus section 48 of the GRA requires the production by the registered proprietor of his certificate of title to the land affected for the purpose of registration of a legal charge by way of mortgage, while section 52 applies the provisions of section 48, *mutatis mutandis*, to incumbrances.

[166] In my view, the position is similar in respect of those equitable mortgages which are capable of registration under the LPA, the protection given by registration pursuant to section 120(1)(a) presupposing that the equitable mortgagor is the holder of a registered title to the property in question. If the equitable mortgagee does not register the equitable mortgage, the charge will nevertheless bind the mortgaged property, but will not have preference over a subsequent registered equitable mortgage (section 120(2)). However, it should be noted that, as Mr Marshalleck correctly pointed out, the language of section 118 of the LPA is permissive (an equitable mortgage "may be created by the deposit of the proprietor's duplicate certificate of title or the proprietor's title deeds…"). It therefore seems to me that, as Hafiz J also appears to have thought, an equitable mortgage can still be created otherwise than in the manner contemplated by section 118 (as, for instance, where only an equitable interest is transferred by way of mortgage, "whether because the mortgagor has merely an equitable interest, or because he uses a form insufficient for the transfer of a legal interest…": see Snell's Principles of Equity, 31st edn, para. 34-02). This is

also consonant with the views expressed by Sosa JA (in a judgment with which the other members of the court concurred) in the **First Caribbean** case (at paras. [35] – [36]).

[167] Mr Lumor's further submission was that, since the Mortgage Debenture could not be registered on the title as a legal interest, and since it was the core principle of the Torrens system that title to interests in land derived from registration and that the register should be a faithful reflection of the state of the proprietor's title, that instrument could accordingly not prevail over DFC's registered legal charge by way of mortgage.

[168] But notwithstanding the unquestionable fact that the general objective of both the LPA and the GRA, in common with all Torrens systems of land registration, is to make the statutory registers the sole repositories of legal rights and interests over and in registered land, it is nevertheless clear from the provisions of the LPA itself that equitable rights and interests also remain capable of subsisting over and in such land. To this end, section 2(1) of the LPA provides a definition of 'equitable interests' ("estates, interests and charges in or over land which are not legal estate, interests and charges…")., while section 3, after listing in subsection (3), "the only charges" capable of subsisting or being created or transferred at law, specifically provides in subsection (4) that "All other estates, interests and encumbrances in or over land shall take effect as equitable interests." In similar vein, but of more general effect, is section 10(1), which

provides that interests in land "validly created or arising after the commencement of this Act which are not capable of subsisting as legal estates, shall take effect as equitable interests."

[169] Yet other indicia are to be found in the GRA. So, for example, section 18(3), upon which Mr Lumor relies for his submission that the Mortgage Debenture was effective to confer contractual rights only on Atlantic, expressly provides that dealings with registered land otherwise than in accordance with the provisions of the GRA "may create contractual rights **or equitable interests** in or over the land" (emphasis supplied). To similar effect, in the context of a purported transfer of registered land, is section 25(2) of the GRA which provides that such a transfer done otherwise than by certificate of title under that Act "shall not vest in the intended transferee the legal title to such land, estate or interest therein, but shall operate to create in the intended transferee an equitable title only to the land, estate or interest."

[170] The statutorily prescribed result of a dealing with registered land, which is ineffective to create a legal interest in land for want of compliance with the provisions of the LPA and the GRA, is therefore not dissimilar to what would have been the result in equity. So, for instance, where, without any transfer of, or agreement to transfer, ownership or possession, property is appropriated to the discharge of a debt or some other burden, an equitable charge is thereby created (see Cheshire's Modern Law of Real Property, 11th edn, pages 635-636). Hence

the following definition of an equitable charge (in Commonwealth Caribbean Land Law, by Sampson Owuso, 2007, at page 181):

> "An equitable charge is an agreement, declaration or direction, whereby a real or personal property is made, without a grant of general or special property therein, or delivery of possession thereof, liable or specially appropriated, otherwise than by way of mortgage, to the discharge of a debt, or some other obligation."

[171] In the instant case, Novelo charged to Atlantic by the terms of the Mortgage Debenture "the freehold and leasehold property of the Company both present and future and all buildings and fixtures…including but not limited to the assets specified in the Schedule hereto…". It is common ground that as at 23 May 2000, the date of the Mortgage Debenture, Novelo was not the registered proprietor of the mortgaged properties, which were subsequently mortgaged to DFC. The evidence, which Hafiz J accepted, was that when Novelo in due course obtained certificates of title in its name to the mortgaged properties, it did not go to Atlantic to perfect the security, as agreed, but instead gave a charge by way of legal mortgage to DFC.

[172] In the well known older case of **Holroyd and others v Marshall and others [1861 – 73] All ER Rep 414**, it was held by the House of Lords that if a vendor or mortgagor agrees to sell or mortgage property of which he is not possessed at the time, and he receives the consideration for the contract and

afterwards becomes possessed of property answering the description in the contract, a court of equity will compel him to perform the contract which in equity would transfer the beneficial interest in the property to the purchaser or mortgagor immediately on its being acquired. This is how Lord Westbury L.C. stated the position in his judgment in that case (at page 418):

> "But it is alleged that this is not the effect of the contract, because it relates to machinery not existing at the time, but to be acquired and fixed, and placed in the mill at a future time. It is quite true that a deed which professes to convey property which is not in existence at the time is a conveyance void at law, simply because there is nothing to convey. So in equity, a contract which engages to transfer property which is not in existence, cannot operate as an immediate alienation, merely because there is nothing to transfer. But if a vendor or mortgagor agree to sell or mortgage property, real or personal, of which he is not possessed, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a court would in equity transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a court of equity would decree the specific performance. If it is so, then immediately on the acquisition of the property described, the vendor or mortgagor would hold it in trust for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained.
>
> Applying these familiar principles to the present case, it follows that immediately on the new machinery and effects being fixed or placed in the mill, they became subject to the operation of the contract, and passed in equity to the mortgagees, to whom Taylor was bound to make a legal conveyance, and for whom he, in the meantime, was a trustee of the property in question. There is another criterion to prove that the mortgagees acquired an estate or interest in the added machinery as soon as it was brought on the

> mill. If, afterwards, the mortgagor had attempted to remove any part of the machinery, except for the purpose of substitution, the mortgagees would have been entitled to an injunction to restrain such removal, and that because of their estate in the specific property."

[173] As a result of all of the foregoing, Hafiz J concluded that the Mortgage Debenture created an equitable charge in favour of Atlantic. This is how the learned judge put it (at paras. 103 – 105 of her judgment):

> "As seen from the above discussion, the charge was not a **legal charge**, nor an **encumbrance** nor an **equitable mortgage** under the provisions of the **LPA** and the **GRA**. What then was created? The properties were identified in the Schedule but were not yet owned by the Novelos. They had no estate or interest in the land either at law or in equity at the time. These were lands which were to be purchased by the Novelos with money advanced from Atlantic Bank and after the purchase and Titles received by the Novelos, the security was to be perfected into a charge by way of legal mortgage. The Novelos in breach of the agreement with Atlantic Bank and in breach of the covenants in the Mortgage Debenture did not perfect the security. The Novelos were bound by **Clause 5:01** of the Mortgage Debenture to give perfect security but failed to do so. They instead went to DFC and created a charge by way of legal mortgage on the said properties. My view, as shown under the heading of 'future property' is that the property attached as soon as it came into existence, that is, as soon as the Novelos were given the Titles to the properties. What is the effect in a situation such as this one? Certainly, it would be very harsh to say that Atlantic Bank had no charge or had nothing. They had a contract under seal which was registered in the Deeds Book and also the Instrument was registered in the Companies Registry.
>
> In my considered view, since the security was not perfected when the Novelos received the Titles to the properties, the charge on the properties is an equitable charge. By way of definition an equitable charge is 'A security for a debt taking effect only in equity'. See **Osborn's Concise Law Dictionary, Tenth Edition**.

> As for creation of an equitable charge, See – **Snell's Equity, Thirty-First Edition at Chapter 34 at paragraph 34-03** which states that, "An equitable charge is created when the property is appropriated for the discharge of a debt or other obligation. It is sufficient if the parties have made plain their intention that the property should constitute a security. The Novelos had agreed that the properties would be used as security for the debt".

[174] I find myself in complete and respectful agreement with the learned judge. This was plainly a case, as the judge found and the parties are now agreed, in which the Mortgage Debenture could not, for the reasons already discussed, take effect as either a legal charge, an encumbrance or an equitable mortgage. But it is clear that it was intended by Novelo that the properties listed in the schedule were to provide security for its debt to Atlantic. To the extent that those properties were 'future property', the principle of **Holroyd and others v Marshall and others** makes it clear that the moment the properties came into existence, that is, were acquired by Novelo, they became subject in equity to the operation of the Mortgage Debenture (see also a passage from Dr William Gough's book on Company Charges, 2nd edn, (1966), pages 69-71, which is quoted by Sosa JA in his judgment in the **First Caribbean** case, at para. [38]). Thereafter, the security not having been perfected by Novelo, as it had bound itself by contract to do, the properties remained subject to an equitable charge in favour of Atlantic.

[175] I also think that the judge was correct in thinking that the charge thus created was a fixed, rather than a floating, charge. In a passage to which Hafiz J

also referred, Fisher & Lightwood observe (at para. 8.7) that while "a debenture almost invariably creates a floating charge…it may also or alternatively create a legal charge or a fixed equitable charge". In the instant case, the charging clause of the Mortgage Debenture (clause 3.01) explicitly created a charge on "the freehold and leasehold property of [Novelo] both present and future" and by clause 3.02 this charge was stated to be a fixed charge. Clause 3.02 goes on to state that, as regards those parts of the freehold property now vested in the company, the charge thus created "shall constitute a charge by way of legal mortgage thereon", thus it seems to me, by necessary implication, making it clear that, in respect of property not then vested in Novelo, the charge created was to be a fixed equitable charge.

[176] The further question that now arises in relation to this issue is the crucial one, that is, whether the fixed equitable charge in favour of Atlantic should prevail, as the judge found that it did, over DFC's legal charge by way of mortgage. The answer to this question turns entirely on the applicability of the equitable doctrine of purchaser for value without notice. This is how Owuso (op. cit., at page 219) states the position:

> "Where a grant takes effect merely in equity, the grantee will only get an equitable interest; the legal interest will then become outstanding in the grantor. Where a subsequent purchaser succeeds in getting a transfer of the legal estate from the original or common grantor he, the subsequent purchaser, becomes vested with the legal interest which will override the equitable interest if, in acquiring the legal estate, the subsequent purchaser did not have notice of the prior existing equitable interest at the time of his purchase, and he gave valuable consideration for the estate. If the

> subsequent purchaser can establish that he was a bona fide purchaser of the legal estate for valuable consideration without notice of the equitable interest which was earlier in time the order of priority based on the doctrine of order of creation will be disturbed: the legal owner will be accorded precedence over the owner of the equitable interest which was earlier in the temporal order of creation".

[177] The question is therefore whether DFC took its legal charge by way of mortgage created by the Supplemental Mortgage bona fide and without notice of Atlantic's pre-existing equitable charge. There being no allegation that DFC had actual notice of Atlantic's interest, the matter then turns on whether DFC, as at the date of the Supplemental Mortgage, can be said to have had constructive notice of Atlantic's interest. According to Fisher & Lightwood (at para. 24.31), a prospective mortgagee will have constructive notice of a prior incumbrance in the following two circumstances:

> "(a) when, on advancing his money, he omits to make inquiries which, having regard to the state of the title known to him, are usual inquiries for a purchaser to make and which would have led him to a knowledge of the prior incumbrance; and
>
> (b) when he has reason to suspect a prior incumbrance and willfully or fraudulently avoids receiving actual notice of it."

[178] So constructive notice may arise from a failure to investigate or to make such enquiries as a prudent mortgagee would have made in similar circumstances. In the instant case, Atlantic contends, and the judge agreed, that DFC had constructive notice of, at the very least, the existence of the Mortgage Debenture by virtue of the registration of the particulars filed with the Registrar of Companies pursuant to section 95(1) of the CA (see para. [162] above). Section 95(2) of the CA mandates the

Registrar of Companies to keep "a register in the prescribed form of all mortgages and charges created by the company…" and to enter in the register, "with respect to every such mortgage or charge, the date of creation, the amount secured by it, short particulars of the property mortgaged or charged, and the names of the mortgagees or persons entitled to the charge". Section 95(9) provides that the register kept pursuant to the CA "shall be open to inspection by any person on payment of the prescribed fee, not exceeding twenty-five cents for each inspection". The actual form of particulars which was registered by Novelo pursuant to this section referred to the Mortgage Debenture dated 23 May 2000, to the amount secured by it ("$2,000,000.00 and further advances) and (under the heading "Short particulars of the properties mortgaged or charged"), to "all the freehold and leasehold property of the company both present and future". Atlantic's name and address were also stated on the form.

[179] In the well known older case of **Wilson v Kelland [1910] 2 Ch 306, 312**, Eve J stated that particulars of a charge or mortgage in the register of charges constitute "constructive notice of a charge affecting the property but not of any special provisions contained in that charge restricting the company from dealing with their property in the usual manner when the subsisting charge is a floating security". Although the learned judge's observations on this point were strictly speaking obiter, they have nevertheless achieved authoritative status, and the case is referred to in Mayson, French & Ryan on Company Law (25th edn, para. 11.7.5), for instance, as authority for the proposition that "Registration in the register of charges constitutes notice to the whole world that a charge of a particular type exists but does not constitute notice of the terms and

conditions of the charge". However, in addition to the statutory particulars, Atlantic places heavy reliance on the evidence, which the judge accepted, that in practice in Belize the Registrar also retains (and did in this instance) as part of the record a copy of the instrument itself, in this case, the Mortgage Debenture, thus giving rise, as the judge also found, to a distinction between Belizean and English practice in this regard, since, in England, the security documents "are not retained but are returned after being examined against the registered particulars" (Legal Problems of Credit and Security, by Professor Roy Goode, para. 2-24, footnote 15). In the light of the evidence of this distinguishing feature in Belizean practice, Hafiz J, took the view that DFC had constructive notice not only of the Mortgage Debenture, but also of its contents, "because of the standard practice in Belize where the Instrument is kept together with the particulars filed at the Companies Registry" (see para. 152 of her judgment).

[180] It seems to me that this is a conclusion which the learned judge was fully entitled to reach on the evidence. But it also seems to me that, in any event, given the judge's earlier finding that the Mortgage Debenture created a fixed equitable charge, the distinguishing feature provided by the evidence of Belizean practice diminishes in importance somewhat, for the reason that, as Professor Goode also observes (op. cit., loc. cit.), the rule that registration is not notice of the terms of the security agreement "has little impact on the rights of a fixed chargee". This is because, in the case of a fixed charge, "the debtor has neither actual nor ostensible authority to dispose of the charged asset free from the charge…[hence]…notice of the existence of the charge suffices to preserve the chargee's priority over a subsequent legal mortgage". On this

analysis, the fact that DFC had, by virtue of the registered particulars of the charge, constructive notice of the fact of its existence in favour of Atlantic on all of Novelo's leasehold and freehold property, "both present and future", would, in my view, suffice to preserve the priority of the Mortgage Debenture over the supplemental Mortgage.

[181] In Gower's Modern Company Law (6th edn, at page 376), registration of charges is said to fulfil "a range of purposes", chief among which is that "It provides a picture of the state of the incumbrances on a company's property, something which is obviously of interest to those contemplating entering into a secured lending transaction with the company". It appears to me that in the instant case DFC failed to investigate the full picture relating to the state of Novelo's title, notwithstanding the fact that that the shape of that picture had been clearly foreshadowed in the telephone discussions between Ms Bedram and Mr Bautista, in May 2001 and in February 2002. Those discussions, which should have put DFC on enquiry in any event, could easily have been confirmed by a simple search at the Companies Registry.

[182] I think that it is fair to say that Mr Lumor, in his spirited submissions before us, did not seek to question the established principles of constructive notice in any way. But what he did maintain strongly was that they did not apply in the instant case, because the Torrens system established by the LPA and the GRA, by providing a "separate regime for dealing and registering charges over registered land" (per Lord Browne-Wilkinson in **British American Cattle Co. v Caribe Farm Industries Ltd and another (1998) 53 WIR 101, 103**), had abolished the doctrine of notice in respect of

registered land. That this may well be so in cases governed entirely by the "separate regime" regarding dealings with registered land is largely confirmed by Lord Wilberforce's observation in **Fraser v Walker [1967] 1 All ER 649, 653**, that "In all systems of registration of land it is usually necessary to modify and indeed largely to negative the normal rules as to notice, constructive notice, or inquiry as to matters possibly affecting the title of the owner of the land". However, as I have already attempted to demonstrate (see paras. [167] to [172] above), the framers of both the LPA and the GRA were careful to carve out a significant residual area of operation for the rules of equity as regards interests in land and, in respect of those areas, in my view, the "equitable doctrine of purchaser for value without notice" (as it is characterised by Lord Hoffmann in **Re Bank of Credit and Commerce International SA (No 8) [1997] 4 All ER 568, 576**), continues to underscore the fundamental distinction between legal estates and equitable interests.

[183] For all of the above reasons, most of which coincide with those given by Hafiz J in the court below, I have therefore come to the conclusion that the judge was correct in her determination that the Mortgage Debenture created a fixed equitable charge in favour of Atlantic and that this charge, albeit equitable, nevertheless took priority over DFC's duly registered subsequent legal charge by way of mortgage, on the basis that DFC had constructive notice of the Mortgage Debenture.

Issue (ii) – does section 149 of the LPA apply?

[184] This issue has to do with whether the Supplemental Mortgage is caught by the provisions of section 149 of the LPA and is therefore void as being a transfer of property made with intent to defraud Atlantic Bank. Section 149(1) provides that "every transfer of property made, whether before or after the commencement of this Act, with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced" (for the full text of the section, see para. [154] above).

[185] The question that immediately arises is whether there was in this case a "transfer of property" within the meaning of the section. As the judge pointed out, the word 'transfer' is not defined in the LPA. However, section 2(3) of that Act does provide that all words and expressions defined in the GRA shall have the same meaning in the LPA as in the GRA. Section 2(1) of the GRA defines a 'transfer' as "the conveyance of the proprietorship in land or any interest in land from a proprietor to another person" and section 48(1) of the LPA provides that "every transfer shall be effectual to pass to the transferee the estate, right, title and interest of the transferor in, or to the property transferred...". It therefore appears on the face of it that the word 'transfer' connotes the act by which a proprietor achieves the alienation of his property to another.

[186] While, as is well known, the traditional method of creating a mortgage was under the old law was by way of an absolute conveyance of the mortgaged property from the mortgagor to the mortgagee, with a proviso for re-conveyance to the mortgagor upon

payment of the principal debt and interest, the modern method of creating a mortgage is by way of a deed executed by the mortgagor charging the property with the debt in favour of the mortgagee (see Snell's Principles of Equity, 26th edn, pages 416-418). Hence the definition of a legal mortgage in section 2(1) of the LPA as "a charge by way of legal mortgage". That there is no actual conveyance under the modern law of the mortgaged property to the mortgagee is confirmed by section 67 of the LPA, which provides as follows:

> "67-(1) The legal estate, right or interest of the mortgagor in any property shall, notwithstanding a mortgage thereon, continue to be vested in him, and the mortgagee shall take no estate in the property mortgaged, but shall have as his security a charge on the property and a right to an order for sale of the property.
>
> (2) The mortgagee shall not be entitled, except by special agreement in writing between himself and the mortgagor, to have possession of the mortgaged property or the custody of the documents of title relating to the mortgaged property, but shall have the right upon breach of some covenant contained in the mortgage deed or some other provision of this Part to apply to the court for an order for sale under this Part."

[187] On the face of these provisions, it appears to me to be clear, as the judge also concluded, that a mortgage under the LPA is not a transfer within the meaning of section 2(1) of the GRA, in the sense that it does not connote a conveyance or alienation of the mortgagor's proprietary interest in the property in question. Faced with a clear difficulty in this regard, Mr Marshalleck was driven to argue that "although the mortgage did not transfer any estate or proprietorship interest in the mortgaged property to the mortgagee, it nonetheless did create and confer on the mortgagee a security interest in the land carrying a number of defined legal rights, including a right to sell the

mortgaged property to recover the mortgage money". While this may well be an accurate way of stating the effect of a mortgage under the LPA, I do not think that it can by any means lead to the conclusion that, by giving a mortgage, the mortgagor has thereby transferred "proprietorship in land or any interest in land" to the mortgagee.

[188] Before leaving this aspect of the matter, I would observe that section 149(1) of the LPA is far more narrowly drafted than is the equivalent section 172 of the English Law of Property Act, which renders voidable, at the instance of any person prejudiced, "every conveyance of property, made…with intent to defraud creditors…". 'Conveyance' in that statute is defined 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 (section 205(1)(ii); see also Halsbury's Laws of England, volume 18, para. 361). Against the background of such a widely drafted legislative precedent, it seems to me that there can be no doubt that the framers of section 149(1) of the LPA intended a more restricted meaning to attach to the word 'transfer' used in that section.

[189] I therefore agree with Hafiz J's conclusion that "a charge by way of legal mortgage is not a transfer of property as envisaged by the provisions of section 149 of the LPA" (para. 182). It follows from this that Atlantic's challenge to the Supplemental Mortgage pursuant to section 149 cannot succeed and there is therefore no basis for treating the legal mortgage created thereby as void. This conclusion makes it unnecessary for me to go on to consider whether Novelo and/or DFC acted fraudulently

in procuring the execution of the Supplemental Mortgage. It is sufficient to say, I think, that had it been necessary to do so, it would have been difficult to avoid Hafiz J's conclusion that "the Novelos by their conduct gave the charge by way of legal mortgage to DFC to defraud Atlantic Bank" (para. 186). As regards the part played by DFC, while the evidence of Ms Bedran in particular suggests that DFC was at least negligent in not following up on the clear indication which it had been given about Novelo's indebtedness to Atlantic, I also agree with the judge that there was no evidence in the case to suggest that DFC had actual notice of the contents of the Mortgage Debenture and so acted with dishonest intentions.

Issue (iii) – the effect of the order for sale made on 3 March 2005

[190] This issue raises the question whether and, if so, to what extent, the reliefs claimed by Atlantic are affected by the fact that on 3 March 2005 the Supreme Court, at the instance of DFC, made an order for sale of the mortgaged properties. Mr Lumor submitted that the effect of the sale of the mortgaged properties pursuant to that order was that DFC's charge by way of legal mortgage was thereby extinguished and the question of priorities transferred to the proceeds of the sale of the properties.

[191] Section 84()(b) of the LPA provides that, where a mortgagee has obtained an order for sale of any mortgaged property, "the charge by way of legal mortgage in satisfaction of which the sale is made and every mortgage charge subsequent thereto shall, upon the transfer of the land to any purchaser, be extinguished".

[192] Section 86(1) of the LPA provides that a sale of mortgaged property under an order for sale shall be effected by the Registrar "…under Order XLII of the Supreme Court Rules, the mortgagee being deemed 'the holder of a judgment for money' within the meaning of rule 4 thereof". Order XLII, rule 4 provides as follows:

> "A judgment for the payment of money shall bind the lands, tenements, and hereditaments of the judgment debtor within Belize to the extent of his beneficial interest therein, both at law and in equity, and the same shall be deemed to be attached by virtue of such decree in satisfaction thereof from the date of the judgment subject to Crown debts and to any prior *bona fide* mortgage, charge or incumbrance thereon".

[193] Section 88(1) of the LPA provides for the priority of payments of claims out of the proceeds of sale of mortgaged property, in the following order: (a) charges, costs and expenses of obtaining the order for sale and effecting the sale, (b) any government debt due in respect of the property, (c) all taxes and rates due, (d) interest on principal money secured by the mortgage, (e) the principal money or any unpaid balance thereof. Any surplus then remaining must be paid to the person entitled to any legal mortgage subject to which the property was sold (section 88(2)) and any further surplus remaining thereafter shall be paid to the person entitled to the mortgaged property at the date of the sale (section 88(3)).

[194] The basis on which Hafiz J resolved this issue is not entirely clear. However, she appears to have taken the view that, although neither section 84 nor section 88 of the LPA provides for the case of a prior equitable charge of which there was notice to the legal chargee, Atlantic as the person entitled to the benefit of the equitable charge

had an enforceable right against Novelo and that that right "extends to the holder of the charge by way of legal mortgage who sells and receives the proceeds of sale" (para 239). Accordingly, she concluded that the order for sale made on 3 March 2005 did not bar Atlantic from the declaratory relief which it sought from the court.

[195] It seems to me that it must be the case that, as Mr Lumor submitted, the mortgaged properties having been sold pursuant to the order of the court and the parties having very sensibly agreed that the proceeds of sale should be held in escrow pending the determination of this action, the question of priorities has now been transferred to the proceeds of sale. It seems to me further that, in these circumstances, the only way to give effect to the direction in Order XLII, rule 4 that a judgment for the payment of money, a holder of which the mortgagee is deemed by section 86(1) to be, binds the lands of the judgment debtor (mortgagor), "subject to Crown debts and to any prior *bona fide* mortgage, charge or incumbrance thereon", is to treat the proceeds of sale of the mortgaged properties as also being bound, "subject to Crown debts and to any prior *bona fide* mortgage, charge or incumbrance thereon".

[196] Mr Lumor appears to accept this, but contends that Atlantic has no prior *bona fide* mortgage, charge or incumbrance on the mortgaged properties. However, given that the LPA clearly contemplates, as I have attempted to demonstrate in this judgment, that interests existing in equity might continue to be created and to exist alongside legal interests, I do not see a basis, in the absence of express words, for not reading the reference in Order XLII, rule 4 to a prior bona fide charge in such a manner as to

include a charge arising in equity only. On this basis I would therefore conclude on this issue that the proceeds of sale now being held by DFC in escrow (pursuant to the very sensible agreement arrived at between the parties before this action was filed), are subject in the first place to Atlantic's fixed equitable charge and thereafter to be dealt with in accordance with section 88 of the LPA.

Conclusion

[197] In the result, I would dismiss DFC's appeal in Civil Appeal No. 3 of 2010, with costs to the respondent to be agreed or taxed. I would also dismiss Atlantic's appeal in Civil Appeal No. 7 of 2010, also with costs to the respondent to be agreed or taxed. Finally, I would accordingly affirm in all respects the judgment of Hafiz J given on 26 November 2009.

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MORRISON JA