IN THE COURT OF APPEAL OF BELIZE AD 2009

CIVIL APPEAL NO 30 OF 2008

FIRST CARIBBEAN INTERNATIONAL BANK (BARBADOS) LIMITED Appellant

v

(1) **THE BELIZE BANK LIMITED**

(2) **DEVELOPMENT FINANCE CORPORATION**

(3) **SOCIAL SECURITY BOARD**

(4) **STANLEY ERMEAV** (as Receiver for Belize Gold Bananas Limited, Tropical Produce Company Limited and Toledo Fish Farming Company Limited)

(5) **BELIZE GOLD BANANAS LIMITED**

(6) **TROPICAL PRODUCE COMPANY LIMITED**

(7) **TOLEDO FISH FARMING COMPANY LIMITED**

(8) **TOLEDO CITRUS COMPANY LIMITED** Respondents

BEFORE

The Hon Mr Justice Manuel Sosa	Justice of Appeal
The Hon Mr Justice Boyd Carey	Justice of Appeal
The Hon Mr Justice Dennis Morrison	Justice of Appeal

M C E Young, SC for the appellant.
R Williams, SC for the first-named respondent.
F Lumor, SC for the second-named and third-named respondents.
Fourth-named, fifth-named, sixth-named, seventh-named and eighth-named respondents not represented.

2009: 19, 20 and 21 October
2010: 19 March

SOSA JA

I - *Introduction*

[1] The appellant in this appeal ('First Caribbean') is a commercial bank which in 2002 assumed some of the assets, rights, liabilities and obligations of the Belize branch of Barclays Bank plc ('Barclays'). Included among the assets so assumed were (a) a 'Debenture' dated 8 February 1990 and (b) a 'Deed of Mortgage' dated 24 September 1999, both executed by a company named Belize Gold Bananas Limited ('Belize Gold') to secure the repayment, with interest, of money borrowed from Barclays. (In this judgment this 'Debenture' and this 'Deed of Mortgage' shall be referred to as 'the First Caribbean debenture' and 'the First Caribbean mortgage', respectively.) The first-named respondent in the appeal ('Belize Bank') is also a commercial bank. To secure the repayment, with interest, of money borrowed from Belize Bank, a 'Mortgage Debenture' dated 30 January 2006 in its favour was executed by another company, named Banana Farm 9 &10 Limited ('Farm 9 & 10'). (In this judgment this 'Mortgage Debenture' shall be referred to as 'the Belize Bank debenture'.) The second-named and third-named respondents in the appeal are not commercial banks but engage in the lending of money for profit. To secure the repayment, with interest, of money borrowed from it, the former ('DFC') had a number of 'Deeds of Mortgage' executed in its favour by Belize Gold from time to time, beginning with one dated 29 May 1991 (to be referred to, for convenience, in this judgment as 'the DFC mortgage'). To secure the repayment, with interest, of money borrowed from it, the third-named respondent ('SSB') had a 'Deed of Mortgage' dated 28 February

2000 (to be referred to in this judgment as 'the SSB mortgage') executed in its favour by Belize Gold.

[2] The fourth-named, fifth-named, sixth-named, seventh-named and eighth-named respondents in the appeal took no part in it. With the exception of the fourth-named (Mr Stanley Ermeav, to be called 'Mr Ermeav' in this judgment)), none of them took part in the proceedings in the court below (in which they were all named as defendants) either.

[3] The litigation of which this appeal forms part arose following what proved to be a decisive turn for the worst in the financial affairs of Belize Gold and other members of a corporate group to which it belonged. The financial position of Belize Gold deteriorated to the point where, among other unfortunate events, (a) it defaulted on the loans whose repayment was secured by the DFC mortgage and the SSB mortgage, (b) DFC and SSB appointed Mr Ermeav receiver and manager of, *inter alia*, the charged property of Belize Gold (in July 2005) and (c) Mr Ermeav sold to Farm 9 & 10 certain charged property of Belize Gold, viz three parcels of unregistered land containing 200 acres, 77 acres 1 rood and 625 acres, respectively (in January 2006). First Caribbean and others thereafter brought a claim in the court below, filing a claim form dated 4 April 2006 which, so far as now relevant, sought, in the main, a declaration that, by virtue of the First Caribbean debenture, First Caribbean held a 'first charge' on properties and assets of Belize Gold ranking in priority to '[a]ll other charges and interests',

including charges in favour, and interests, of the Belize Bank. Following a hearing which took place on 30 April and 2 May 2008, Hafiz J, in a reserved judgment which extended to 173 paragraphs and was delivered on 17 September 2008, refused to make the declaration, or to grant any other relief, sought by First Caribbean, holding in effect that, insofar as they created charges over the same properties, the First Caribbean debenture did not rank in priority to the Belize Bank Debenture and had not ranked above the DFC mortgage or the SSB mortgage while the charges created by those two deeds of mortgage had subsisted. This appeal is from that judgment.

II - *The issues*

[4] Despite the wide-ranging argument before this Court and that below, the issues in this appeal are, in my respectful view, limited to the following:

i) Of what nature were the charges created by the First Caribbean debenture over the properties that were also the subject, formerly, of the DFC mortgage and the SSB mortgage and, latterly, of the Belize Bank debenture?

ii) What were the respective priorities of the charges over those properties?

III - *The background facts*

[5] The charges which are the subject of the litigation now before this Court subsist or subsisted, as the case may be, over three parcels of land. Two of these parcels have been dealt with simultaneously at all material times in the past, indeed constitute one banana farm, known as Farm 9 (see clause 1 of the Belize Bank debenture), and may therefore conveniently be treated as a single parcel. Each was originally, as far as the evidence goes, the subject of a Crown Grant. One parcel, comprising 200 acres situate at the Swasey Branch of Monkey River, was the subject of Crown Grant No 27 of 1894. The other, comprising 77 acres 1 rood situate at Monkey River, was the subject of Crown Grant No 12 of 1903. These two parcels became the property of Belize Gold by a Conveyance dated 24 March 1987. (In this judgment these two parcels shall, for convenience, be referred to together as 'the 277 acre parcel'.) The third parcel shall, in the interest of simplicity, not be further referred to until later on in this judgment: see para **[14]** below.

[6] In 1990 Belize Gold executed the First Caribbean debenture for the purpose, as already stated above, of securing the repayment, with interest, of money borrowed from Barclays. It is of nothing more than academic interest, and therefore to be mentioned only in passing, that the debenture purported to charge by way of legal mortgage a fourth parcel of land belonging to Belize Gold and at no time purportedly charged in favour of Belize Gold, DFC or SSB. That parcel is described in the schedule to the First Caribbean debenture as containing 694.36 acres of land situate south of Harvest Caye Work, Toledo

District and as being the subject of Minister's Fiat (Grant) No 6 of 1990 dated 22 January 1990. Whether or not this parcel is in fact charged by way of first legal mortgage has never been in issue in the present proceedings for the reason that none of the respondents has ever claimed to have a charge over such parcel. So in fact there has been no need for First Caribbean to even assert that a charge in its favour ever subsisted over it.

[7] That fourth parcel of land at one time owned by Belize Gold is the only one identified by way of a description in the First Caribbean debenture, the relevant description being one which refers to the parcel's particular area (ie extent) and location within Belize and is contained in the debenture's sole schedule. It is not disputed that clause 5 of this debenture, which opens as follows:

> '5. The Company as BENEFICIAL OWNER hereby charges with the payment of all moneys and liabilities hereby agreed to be paid or intended to be hereby secured (including any expenses and charges arising out of or in connection with the acts or matters referred to in clause 11 hereof) and so that the charge hereby created shall be a continuing security:'

refers only to this fourth parcel in the category of property which is immediately thereafter set out in these terms:

> ‘First. – The deeds and documents mentioned in the Schedule hereto and all and singular the premises comprised therein together with all buildings now or hereafter erected thereon and all fixtures (including trade fixtures) fixed plant machinery and equipment from time to time thereon. ‘

But clause 5, casting out its net farther, so to speak, sets out the following three additional categories of property;

> ‘Secondly. – All other (if any) the freehold property of the Company both present and future and the fixed plant machinery and fixtures (including trade fixtures) from time to time thereon but not including and specifically excluding all the leasehold property of the Company.
>
> Thirdly. – The goodwill and the uncalled capital of the Company both present and future.
>
> Fourthly. – The undertaking and all other property and assets of [Belize Gold] whatsoever and wheresoever both present and future.’

before closing in the terms following:

'The charge hereby created shall be as regards the premises firstly secondly and thirdly described be *(sic)* a fixed first charge (subject to any prior charges existing at the date hereof) and as regards all those parts of the premises first and secondly described now vested in the Company shall constitute a charge by way of legal mortgage thereon and as to the premises fourthly described shall be a floating charge but so that the Company shall not without the consent in writing of the Bank create any mortgage debenture or charge upon and so that no lien shall in any case or in any manner arise on or affect any part of the premises fourthly described ranking either in priority to or pari passu with the charge hereby created. PROVIDED ALWAYS that the Bank may at any time by notice in writing to the Company convert the said floating charge into a specific charge as regards any assets specified in the notice and the said floating charge shall without notice be converted into a specific charge as regards all the premises so charged upon the appointment of a receiver or receivers under the provisions of clause 11 hereof.'

[8] This debenture goes on to provide, at clause 6:

'6. The Company will deposit with the Bank and the Bank during the continuance of this security shall be entitled to hold and retain all deeds and documents of title relating to the Company's freehold property (and the insurance policies thereon) for the time being.'

It then reads, at clause 7:

> '7. The Company will at any time if and when required by the Bank so to do execute to the Bank or as the Bank shall direct such further legal or other mortgages or charges as the Bank shall require of and on all the Company's estate and interest in any premises comprised in the said deposited deeds and writings or which may hereafter be acquired by or belong to the Company (including any vendor's lien) to secure all money and liabilities hereby agreed to be paid or intended to be hereby secured such mortgages or charges to be prepared by or on behalf of the Bank at the cost of the Company in all respects and to contain an immediate power of sale without notice a clause excluding sections 72, 75 and 82 of the Law of Property Act (Chapter 154) or sections 75, 77 and 78 of the Registered Land Act (Chapter 157) (as the case may be) and all other clauses for the benefit of the Bank as the Bank may reasonably require.'

And clause 13(11), in the same general vein, states:

> '13. The Company hereby covenants with the Bank that during the continuance of this security the Company will:
>
> …
>
> (11) Deposit with the Bank (which it may retain during the continuance if *(sic)* this security) all documents of title relating to all

freehold property which the Company now or at any time hereafter owns and if the Bank so requires promptly to execute at the Company's own cost a legal mortgage or charge in form to be determined by the Bank of any freehold or leasehold property which is acquired by the Company.'

[9] There is no evidence before this Court to indicate that, at the time of the execution of the First Caribbean debenture, Barclays knew, whether through disclosure by Belize Gold or otherwise, that Belize Gold owned the 277 acre parcel.

[10] The next event concerning the 277 acre parcel to occur was the execution by Belize Gold of the DFC mortgage dated 29 May 1991. First Caribbean has not contended before this Court or below that this deed created anything other than a charge by way of legal mortgage over the 277 acre parcel.

[11] There is no evidence that during the period of more than nine years that then elapsed Barclays took any step in relation to the 277 acre parcel. In the meantime, Belize Gold was busy purporting to create further charges by way of legal mortgage in favour of DFC. The relevant 'Deeds of Mortgage', three in number, were dated 30 December 1991, 7 July 1993 and 9 October 1996, respectively. There was, in addition, a 'Deed of Substitution of Mortgage' dated

13 July 1993, the intended effect of which is not entirely clear, no copy of it having been placed before this Court.

[12] The next step to be taken with respect to Barclays in relation to the 277 acre parcel was the execution by Belize Gold of the First Caribbean mortgage (dated 24 September 1999, as already stated above).

[13] Among the recitals to this deed were the following three, numbered (1), (3) and (4), respectively:

> '(1) The Company has created and issued to the Bank [the First Caribbean debenture] whereby the Company charged in favour of the Bank (inter alia) all its freehold property both present and future including specifically the freehold property comprising 694.36 acres of land situate at *(sic)* Harvest Caye Work in the Toledo District which is the subject of the Minister's Fiat (Grant) No 6 of 1990 dated the 22nd day of January 1990 as well as the undertaking of the Company and all its property and assets whatsoever and wheresoever both present and future including its goodwill and uncalled capital for the time being as a security for the repayment to the Bank in manner therein mentioned of all moneys at any time due or owing to the Bank or for which the Company might be or become liable to the Bank on any current or other account or otherwise

from the Company to the Bank or on any account for which the Company is guarantor or surety.

…

(3) The Company is (under and by virtue of a Conveyance ...) seised of [the 277 acre parcel] for an estate in fee simple which property is also now charged in favour of [DFC] by virtue of the following documents:

(a) …

(b) …

(c) …

(d) … and

(e) …

(4) For the purpose of perfecting the charge created by the [First Caribbean debenture] upon [the 277 acre parcel] the Bank in pursuance of the power in that behalf contained in [the First Caribbean debenture] has called upon the Company to execute such specific charge by way of legal mortgage thereon as is hereinafter contained which the Company has agreed to do.'

[14] Sometime in early 2000, by Minister's Fiat (Grant) No 3 of 2000 (no copy of which is before the Court), Belize Gold became the owner of the 625 acre parcel, the third parcel mentioned at para **[5]** above.

[15] In that same year, Belize Gold, to secure the repayment, with interest, of a loan made to a third party, executed the SSB mortgage (dated 28 February 2000, as already stated above). First Caribbean has not contended before this Court or below that this deed created anything other than a charge by way of legal mortgage over the 625 acre parcel.

[16] Thereafter for the purpose of securing the repayment, with interest, of money borrowed from DFC, Belize Gold executed the following:

(a) a 'Deed of Mortgage and Further Charge' dated 20 March 2001, further charging the 277 acre parcel;

(b) a 'Deed of Mortgage and Further Charge' dated 18 December 2003, further charging both the 277 acre parcel and the 625 acre parcel; and

(c) a 'Variation and Further Charge' dated 20 May 2004, further charging the 625 acre parcel.

[17] By two separate 'Conveyances' dated 23 January 2006, Mr Ermeav, as receiver, conveyed title to the 277 acre parcel and the 625 acre parcel to Farm 9 & 10.

[18] A matter of mere days later, Farm 9 & 10, in order to secure the repayment, with interest, of money borrowed from Belize Bank, executed the Belize Bank debenture (dated 30 January 2006, as already stated above).

IV - *Nature of relevant charges created by the First Caribbean debenture*

(a) The 277 acre parcel

[19] As regards the 277 acre parcel, Hafiz J held that the charge created over it by the First Caribbean debenture was legal in nature, inferentially, a charge by way of legal mortgage. Before this Court, Mr Young, SC, for First Caribbean, has argued that, to that extent, the judgment of Hafiz J is sound. Mr Williams SC, for the Belize Bank, and Mr Lumor SC, for DFC and SSB, respectively, have begged to differ, the latter counsel expressly associating himself with the submissions of the former and orally addressing this Court with relative brevity. (For the sake of convenience, the submissions of Mr Williams, although so adopted by Mr Lumor, shall, in general, be referred to below simply as the submissions of the former.) Of course, while contending that Hafiz J was in error in this respect, Mr Williams submits that her overall decision in the claim was and is (but, importantly, for reasons other than those given by her) entirely tenable. Hafiz J reasoned that,

adopting the approaches of the Privy Council and the House of Lords in the cases of *Agnew v Commissioners of Inland Revenue* [2001] 2 AC 710 and *Re Spectrum Plus Ltd, National Westminster Bank plc v Spectrum Plus Ltd et al* [2006] 2 LRC 243, respectively, the only proper conclusion was that the parties to the First Caribbean debenture had created what she variously called a 'fixed legal mortgage' and a 'fixed charge': see paras 127 and 131, respectively, of her judgment. (Although the judge did not so state in as many words, I, for my part,, filling in the blanks, so to speak, in the light of the clear provisions of section 3(3) of the Law of Property Act, Chapter 190 ('the LPA'), consider that, taking her reasoning to its logical conclusion, the end result would be a finding by her that the charge in question was one by way of legal mortgage.) Mr Young, before this Court, essentially followed suit by in turn adopting the reasoning of the judge below in this regard. (Where Mr Young and the judge below differ is on the matter of notice of First Caribbean's supposed legal charge, which, as I have adumbrated above and will demonstrate as I proceed, is not an issue on this appeal.)

[20] I respectfully share the principal reservation developed by Mr Williams in his submissions before this Court (though, conspicuously, not in the court below). The decisions in *Agnew* and *Spectrum*, if I may say so with respect, deal with the proper approach to the question whether the parties to a particular security document have created a fixed charge or a floating charge. I do not presume to question these decisions. This, however, is not a case in which such a question

arises nor one in which the adoption, with necessary adaptation, of the approach taken in those important appeals, is paramount in dealing with the true issue under consideration here. In the instant case, as Mr Williams contends, the real question (for purposes of this, the first of the two issues) is whether the parties, given their intention, as found by the judge below, to create a fixed first charge over the 277 acre parcel, succeeded in their endeavours having regard to the state of the law in Belize, as contained in the LPA, the General Registry Act, Chapter 327 ('the GRA') and the General Registry Rules ('the GRR'). His submission was that such a question stood to be answered only with a resounding 'No' since the different pieces of legislation in question, taken together, identified an unambiguous requirement for particularity in the description of property to be charged by way of legal mortgage (as opposed to mere identification of such property), which requirement had not been satisfied on the facts of the instant case. (I pause to note that, generally speaking, I understand particular description to be but one method of making an identification. Thus, in the Gospel according to St Mark, Jesus Christ on sending two of His disciples into Jerusalem to prepare for what is to be the Last Supper, identifies for them the man whom they are to follow; but He does so without describing the man himself.)

[21] The statutory provisions relied upon in this regard by Mr Williams must now be set out.

[22] Section 64 of the LPA, insofar as material for present purposes, reads:

> '64.-(1) A legal charge on an estate in fee simple … shall only be created –
>
> (a) …
>
> (b) in the case of unregistered land by a deed expressed to be by way of legal mortgage … and recorded under and in accordance with Part VI of the [GRA].
>
> (2) A deed creating a charge by way of legal mortgage shall –
>
> (a) in the case of registered land be in such form as may be prescribed under the [GRA]; and
>
> (b) in the case of unregistered land shall [an unnecessary repetition of the word 'shall'] be in a similar form with such modification as in many *(sic)* case may be necessary.'

[23] Section 47 of the GRA, dealing, admittedly, expressly with registered land, provides as follows:

> '47.- (1) So soon as the Registrar has registered a deed creating a legal charge on or over registered land the land described in the deed shall stand charged with the payment of the principal sum and other sums

secured under the deed and be subject to the provisions contained in the deed and in the [LPA].'

And I cannot help noticing that, at subsection (2), this same section further provides (albeit still expressly in regard to registered land):

'The Registrar shall be deemed to have registered a legal charge at the time when the instrument creating it is delivered to him in such a condition as to enable him to register it in accordance with this Part.'

[24] The provisions of section 91(1) of the GRA, as relevant for present purposes, are as follows:

'91.- (1)The Registrar may from time to time make rules for the purpose of –

(a) …

(b) prescribing the manner and form in which any information required by law to be furnished to the Registrar shall be furnished, verified, recorded or noted in the Registry.

(c) …

(d) …

(e) prescribing, subject to this Act, the manner whereby … deeds creating legal charges … required to be registered or recorded … are prepared …

(f) prescribing all of forms necessary for carrying the [LPA] and this Act into effect …'

The first precursor of this Act must have conferred the necessary rule-making authority on the Chief Justice, rather than on the Registrar, for the original General Registry Rules (No 30 of 1954) purported to have been made by the then Chief Justice under section 91 of the relevant Ordinance.

[25] A few of the rules contained in the GRR were plainly meant to apply not only to registration under the Torrens system but also to the recording of deeds under what is now Part VI of the GRA: see, eg, Rules 3 and 46(2). However, most of them were, equally plainly, intended to apply only to registration, eg, those (including Rule 35) set out under the sub-heading 'Registration of Legal Charges and Incumbrances'. Rule 35 states:

'35. A deed creating a charge by way of legal mortgage shall be in Form 26 which shall be varied to meet the case of any other legal charge.'

[26] Form 26, appended to the GRR, contains, as its first recital, the following:

'WHEREAS the mortgagor is the registered proprietor of the land, estate, interest, power or right all as fully set forth, bounded and described in the certificate of title dated the day of 20 , registered in the "Land Titles Register" Volume Folio No , and also set out in the Schedule hereto'

Form 26 ends with the designation 'SCHEDULE' followed by a blank space intended to be filled by the relevant parcel description. That this is the intention is clearly indicated by a corresponding marginal note reading 'Full description of land mortgaged according to a certificate of title'. Given, then, that a full parcel description taken from the relevant certificate of title is required to be included in the form of deed of mortgage to be used in the case of registered land, one goes back to the provisions of section 64(2) of the LPA itself which require that 'in the case of unregistered land [the deed] shall be in a similar form with such modification as in any case may be necessary. (This requirement of the LPA is indeed echoed in rule 47(2) of the GRR which reads: 'Where no form is provided in respect of any act or proceeding to be done or taken under the Act or these Rules, a form framed on the analogy of a corresponding form in these Rules shall be used.') The instant case having been one where the property now under consideration, ie the 277 acre parcel, was property already owned by Belize Gold, the omission by Belize Gold of a full parcel description can hardly be regarded as a necessary modification of the form in question. In that case, and all similar cases, it is correct, in my view, to say that there is an applicable

statutory requirement for a full parcel description to be provided in the relevant instrument creating a charge, be it deed of mortgage, debenture or any other form of security document.

[27] Mr Young, seeking in his submissions to forestall Mr Williams, referred to the position at common law, citing the learning contained in Halsbury's Laws of England, 4th ed, vol 32, p 146, para 303, which is as follows:

> '**Validity of a charge on a mortgagor's whole estate.** A charge created by a mortgage and extending to the whole of the mortgagor's real and personal property, whether present or future, may possibly be unenforceable as such, either on the ground that it is too vague to be enforced or on the ground that it is contrary to public policy that a person should be allowed to deprive himself of the whole of his livelihood. Such a charge is, however, enforceable if it can be construed as confined to property existing at the date of the granting of the charge and ascertainable at the date when it is sought to enforce it. Moreover, if the charge extends to future property but the particular types of property included in the general charge are separately specified, the charge may be treated as divisible and enforced against after-acquired property which falls within a particular class so specified and is ascertainable at the date when it is sought to enforce the charge.'

[28] But I do not consider that learning helpful in a case where statute (in the form here of section 64(2)(b) of the LPA) allows no modification of a prescribed form save for one which 'may be necessary'. The deed of conveyance under which Belize Gold was vested with title to the 277 acre parcel (no copy of which was placed before this Court) no doubt contained a description of that parcel. That seems to me to be the safest of assumptions and one which any experienced conveyancer in Belize would readily make. In any event, there is, to my mind, a good indication in recital (1) to the DFC mortgage that that assumption is correct and that the relevant parcel description is borrowed from the conveyance and reproduced in the first schedule to the DFC mortgage. (Regrettably, I cannot verify this as the copy of the DFC mortgage supplied to the Court is incomplete and does not include the First Schedule.) The parcel description contained in the conveyance in question was, in the circumstances, required to be included in the First Caribbean debenture. It could not have been 'necessary', by any stretch of the imagination, for Belize Gold effectively to modify the statutory form by omitting such parcel description from the relevant deed. It may be tempting, but cannot be of any use, in the present context, to speculate on the reason/s for the omission of such a parcel description, which Belize Gold must have been in possession of, or at least in a position to obtain, at the time of the preparation of the First Caribbean debenture.

[29] Mr Young further referred this Court to the work Bennion on Statutory Interpretation: A Code, 5th ed, p 812, sect 269, in which Mr F A R Bennion deals with the principle that law should not be subject to casual change thus:

> '(1) It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not change either common law or statute law by a sidewind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is.'

[30] In my respectful view, however, the relevant statutory provisions which are at play in the instant case do not offend in any way against the principle invoked by Mr Young. His entire argument, is in my opinion, constructed on an illusory foundation. The very common law position which supposedly stands in counterpoint to the statutory requirement said by Mr Williams to exist is expressly done away with elsewhere in the LPA, a point made neither by Mr Williams nor Mr Lumor. The common law position relied on in this regard by Mr Young is that which is set out in Halsbury's Laws of England, 3rd ed (preferred for present purposes by Mr Young as being more relevant to Belize than the 4th), vol 11, p 424, para 685 as follows:

> 'Sect. 7 THE PROPERTY CONVEYED

SUBSECT. (1) *The Parcels (Rule of falsa demonstratio)*

685. **Description of property.** The property comprised in a deed - or the parcels – is described by terms having either a general or specific meaning, and usually by two or more of such terms. Where possible, full effect will be given to all the terms of description. Thus, a grant of all the grantor's freehold land in the county of Hampshire contains a general and also a specific term, and effect is given to both by treating the specific term as restricting the general term. Consequently, of all the grantor's freehold land, only that situate in the county of Hampshire will pass. In such a case both the descriptions are required in order to define the particular property which is being dealt with. It is always a question of fact for the jury whether a particular parcel of land is or is not contained in the description of the land conveyed.'

He contended on the basis of this passage that, at common law, a full parcel description was not required to be contained in a conveyance; and, for added support, he quoted as follows from the same edition and volume of Halsbury's Laws, p 405, para 658:

'Extrinsic evidence is, however, admissible both to ascertain where necessary the meaning of the words used and to identify the person or

objects to which they are to be applied, for example, to connect the language of a deed with the property conveyed …'

That only strengthened, counsel submitted, his point that, at common law, there was no requirement for a conveyance to contain the full parcel description which, if Mr Williams' argument was to be accepted, was now being statutorily required in the context of a deed creating a charge by way of legal mortgage over unregistered land. Such a change, if brought about by the statutory provisions cited by Mr Williams, would be change wrought by a sidewind, in the imagery employed by Mr Bennion.

[31] With great respect, however, this argument flies in the face of a clear and yet-to-be-repealed provision of the LPA, which, though not adverted to by Mr Williams or Mr Lumor, is by no means little-known (though certainly much-ignored by conveyancers). It is found in section 40 of the LPA, which, as material for present purposes, states:

'(40).-(1)From and after the commencement of this Act and except in respect of national land, the legal title to all land or any interest in land shall be created either -

(a) by registration of the certificate of title under and in accordance with the [GRA]; or

(b) by recording the title deed thereto under and in accordance with Part VI of the [GRA].

(2)Such a deed shall be made according to the form in the Schedule …'

The LPA goes on to provide in section 41(1) that the transfer, in law, of, *inter alia*, an estate in fee simple in possession in land other than national land shall, from the commencement of the Act, be effected, in the case of unregistered land, by the recording of, again, 'the title deed thereto'. In my view, the provision in section 40(2) that the deed, referred to by identical language in section 40(1)(b), 'shall be made according to the form in the Schedule', though not repeated in section 41(1), must be regarded as also applying to the phrase 'the title deed thereto' appearing in section 41(1).

[32] What, then, does the form in the schedule to the LPA relevantly require? One must examine the form itself, which, being relatively short, can conveniently be here set out in its peerlessly quaint entirety. It reads:

'Form of Conveyance

BELIZE

This indenture, made the day of , one thousand nine hundred and , between A.B. of

hereinafter called the grantor of the one part, and C.D., of hereinafter called the grantee, of the other part. Witnesseth that in consideration of the sum of

paid to him by the grantee, the receipt whereof is hereby acknowledged, the grantor doth grant and convey to the grantee, his heirs and assigns for ever, all, etc. [describing the premises to be conveyed]. And the grantor for himself, his heirs, executors, administrators, and assigns covenants with the grantee, that he has the right to convey to him the said premises, notwithstanding any act of him the grantor; that the grantee shall have quiet possession of the said premises free from all incumbrances; and that he the grantor will execute such further assurances of the said premises as may be requisite. In witness whereof the parties hereto have hereunto set their hands and seals the day and year above written.

Witness, A.(L.S.)B.

C.(L.S.)D'

[33] The relevant requirement set out in square brackets in this form is obviously one calling for a description of the premises being conveyed. Can there be any doubt as to the only reasonable interpretation of the language in which this requirement is couched? Surely, that language can only be construed as setting out a requirement for a full description, corresponding to that found in the marginal note to Form 26 (prescribed, as already indicated above, in the case

of a charge of registered land). It can hardly be other than absurd to argue that, simply because a word such as 'fully' does not precede the word 'describing' in the square brackets, a less-than-full description is what the learned Chief Justice of the day should be regarded as having had in mind when he made the original GRR in 1954.

[34] Therefore, I am of the opinion that the several statutory provisions already referred to have the combined effect of giving rise to a requirement for a full parcel description to be included in any instrument purporting to create a charge by way of legal mortgage over unregistered land. Manifestly, on the facts of the present case, the First Caribbean debenture contained no such description of the 277 acre parcel. What was the effect, if any, of this?

[35] I accept the submission of Mr Williams that the effect of non-compliance with this statutory requirement was that the First Caribbean debenture created no legal charge on the 277 acre parcel, a position contrary to that arrived at by the judge below. Mr Young, as I understood him, did not dispute that, if indeed there was non-compliance with a statutory requirement as submitted by Mr Williams, there could be no legal mortgage over the parcel in question. His point, as I understood it, was that there was nothing in either the LPA or the GRA to indicate what consequences would properly flow from such a non-compliance. In my view, however, the absence of relevant provisions in those statutes is of no practical significance since the legal position is, and has for a long time now

been, clear. It is that which is stated by the learned editors of Fisher & Lightwood's Law of Mortgage, 10th ed (1988) in the following passage, at p 14, to which the Court was referred by Mr Williams):

> '**Equitable mortgages by legal owners.** Equitable mortgages of the property of legal owners are created by some instrument or act which is insufficient to confer a legal estate or title, but which, being founded on valuable consideration, shows the intention of the parties to confer a present security, or in other words, evidences a contract to do so … Another quite common instance of an equitable mortgage is where a formal legal mortgage has been attempted, but proves ineffective for some reason, such as some defect in execution or formality … It will be seen from the above examples that an equitable mortgage of land, not being by way of deposit of title deeds, requires to be evidenced in writing or supported by a sufficient act of part performance.'

[36] It is noted that the same principle is discussed in Megarry & Wade, The Law of Real Property, 5th ed (1984), under the sub-heading of 'Informal mortgage' at p 927, where the learned authors write:

> 'As in the case of an imperfect lease, an imperfect legal mortgage may take effect as an agreement for a mortgage, and so as an equitable mortgage, if it contains the necessary particulars. But the money must

have been advanced, for normally equity will not specifically enforce an unperformed agreement to lend money.'

And in Halsbury's Laws, 4th ed (2005 issue), vol 32, p 230, para 440, under the rubric 'Imperfect mortgage treated as equitable mortgage', it is noted that:

'An instrument which fails to comply with the formalities of a legal charge is treated as, and must comply with the formalities required for the creation of, an equitable mortgage, rather than as an equitable charge.'

In the instant case there is no dispute that the security created over the 277 acre parcel in 1990 was evidenced in writing in the form of the First Caribbean debenture, which contained all necessary particulars for the creation of an equitable mortgage. Nor is the advancement of money disputed. It is for these reasons that I conclude that the First Caribbean debenture created an equitable mortgage, rather than a charge by way of legal mortgage, over the 277 acre parcel.

[37] Before leaving this sub-topic, I must briefly mention the Trinidad and Tobago case of *Baksh General Wholesalers Limited v Republic Bank Limited* [2004] UKPC 46, not because of what the Board there decided, but because of a general observation made by their Lordships in setting out the pertinent factual background. That was a case in which the appellant company had granted to a

predecessor of the respondent bank a debenture which, in the words of the Board, 'was in a familiar form, creating fixed first charges on the Company's freehold and leasehold property and its goodwill and a first floating charge on its other assets …': see para 3 of the judgment. As Belize Gold, in the instant case, did in favour of Barclays in 1999, the appellant company in *Baksh* later granted to the respondent bank a mortgage by way of collateral security over property already owned by it at the time of the giving of the debenture. Having noted that fact, the Board observed: 'Since the existing debenture contained a fixed first charge on all the Company's land, this mortgage did no more than simplify conveyancing on any eventual sale by the Company (*sic*) (since unlike the debenture it contained a specific description of the premises).': para 4. I am not in any position to question the correctness of this proposition, as a general proposition made in the context of a foreign jurisdiction. Quite obviously, it was a proposition accepted by both sides in that case. In the instant case, however, the effect of the First Caribbean debenture must be determined only in the light of the law of Belize, whose relevant statutory provisions may have no counterparts in the law of Trinidad and Tobago.

(b) The 625 acre parcel

[38] Before this Court, Mr Young obviously considered it important to devote some time to dealing with the fact that the judge below treated him as having conceded before her that the First Caribbean debenture could have created no more than an equitable mortgage on the 625 acre parcel, title to which, as

already stated above, was acquired by Belize Gold only after the grant of the First Caribbean debenture. He protested that he should not have been so treated since he had asked the court below to reach its own conclusion on the point, an explanation which, with respect, I find difficult to follow. If one thing is clear and not to be gainsaid, however, it is that Mr Young made no submission to the judge below to the effect that the security created over this parcel could have been anything more than an equitable mortgage. This last sentence is not intended, however, to suggest that such a submission could possibly have had any merit. 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. Mr Young'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 Mr Williams 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.]

[39] I respectfully concur in the conclusion of the judge below that the First Caribbean debenture did not create a floating charge over the 625 acre parcel. There is no doubt in my mind that, giving full recognition to the two-stage process described by the Board in *Agnew*, there is only one proper conclusion: that the parties to that debenture thereby created a fixed first charge (albeit not legal in nature), as the judge held at para 140 of her judgment.

IV - *The respective priorities*

[40] On this issue, I must again agree with the concise submissions of Mr Williams, which I find disarming in their simplicity.

[41] The issue must, in my opinion, be resolved by the application of the governing provisions of the LPA, which may well be peculiar to Belize and are in relatively short compass.

[42] Section 103, as relevant for purposes of this aspect of the appeal, is in the following terms:

> '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 …
>
> (c) …
>
> (d) …
>
> (e) …
>
> shall be encumbrances … which may be recorded under Part VI of the [GRA].
>
> (2) …
>
> (3) An encumbrance of the nature described in paragraph (a), (c) or (e) of subsection (1) shall have priority to a legal charge registered or recorded subsequent to such encumbrance, and every such legal charge shall be held and be exigible subject to the rights, dealings, privileges, restrictions and interests created by any such encumbrance.
>
> (4) …

(5) Subject to subsection (3) a legal charge shall, in the case of unregistered land, have priority over every encumbrance upon the same land whenever that encumbrance was recorded.'

[43] If, as I have had no difficulty in concluding, an equitable mortgage properly falls under section 103(1)(b), there can be no doubt that by virtue of subsection (5) a valid and enforceable legal charge will always enjoy priority over an equitable mortgage in Belize, even in a case where the equitable mortgage has been recorded before the legal charge. Mr Williams relied on these provisions and was understandably not overly concerned about the fact that, on the evidence, it is not even possible to find that Belize Gold ever complied with the statutory requirements for the recording of an equitable mortgage as an encumbrance. He was content, presumably in the interest of simplicity, to assume, *arguendo*, that Belize Gold had so complied.

[44] Mr Young did not, in my estimation, argue this point with his characteristic vigour. The reason, self-evidently, was that the law was decidedly not on his side. Without disagreeing that equitable mortgages clearly have to fall under section 103(1)(b), he invited this Court to interpret paragraph (c) of the same subsection as also including equitable mortgages. That paragraph reads:

'dealing with the land which, in the event of sale, would limit the free use and disposal thereof by the purchaser, such as leases for three years and

upwards, restrictive covenants, easements, rights and privileges in, over or out of the land, rights in or over the land arising out of any trust or settlement, whether created by will or deed …'

This invitation is one that I, for my part, must respectfully decline. Paragraph (b), reluctantly to state the obvious, precedes paragraph (c). The former, on the most cursory of glances, includes equitable mortgages: the latter does not (certainly not on the most cursory of glances). It would be more than absurd, in my opinion, to interpret paragraph (c), in those circumstances, as also having been intended by the draftsperson to include equitable mortgages. There is no doubt, on the one hand, that the draftsperson meant to include, and included, equitable mortgages in paragraph (b). For what practical purpose would he/she want, on the other hand, to include them in paragraph (c) as well? If the answer given is that he/she evidently wanted equitable mortgages to enjoy priority over legal charges recorded subsequently in point of time, that immediately raises the further question: Why then were 'mortgages … arising in equity' left in paragraph (b)? And since he/she obviously considered it to be in the interest of clarity to use the words 'mortgages … arising in equity' in paragraph (b), why did he/she, if Mr Young's interpretation is correct, not employ those same words in paragraph (c)?

[45] Accepting as I do, the submissions of Mr Williams in this regard, I am driven to the conclusion that, on the facts of this case as already set out above,

the equitable mortgages created over the 277 acre parcel and the 625 acre parcel, respectively, in favour of First Caribbean by the First Caribbean debenture did not (even if one generously assumes that they were duly recorded as encumbrances) rank in priority to the charges by way of legal mortgage created in favour of DFC and SSB by the DFC mortgage and the SSB mortgage, respectively. For the same reasons that they did not enjoy such priority, they do not enjoy priority over the Belize Bank debenture insofar as that deed creates charges by way of legal mortgage over the 277 acre parcel and the 625 acre parcel. (First Caribbean has not, as I understand it, ever disputed that the Belize Bank debenture created such charges.) Therefore, the judge below was, in my respectful opinion, right in her overall decision refusing to make the declaration already referred to above (albeit not necessarily for the reasons she gave) and to award costs in the terms set out in the final two sentences of her judgment. As already noted above, Mr Williams chose not to support a great deal of the reasoning of the judge below (a luxury, as it were, open to him in view of the cogency of his argument that the First Caribbean debenture did not succeed in creating a legal charge over either relevant parcel) and as a result the attack launched against parts of the judge's reasoning by Mr Young went unanswered before this Court. There is, therefore, in my view, as I foreshadowed at para 19 above, no need, nay justification, for the Court to deal, on this occasion, with the issue of notice in all of its ramifications, as was done by the judge below. Were I nevertheless to express my views on the matter, they would, as mere *obiter*

dicta, perforce be of limited value to practitioners and the court below, having regard to the circumstances which I have described.

V - *Disposition of the appeal*

[46] I would dismiss the appeal with costs to the Belize Bank, DFC and SSB, such costs to be taxed, if not agreed.

VI – *Postscript*

[47] As a postscript, I would note that, in writing this judgment, I have found myself in the rather invidious position of having to speak of 'encumbrances' rather than 'incumbrances'. I have done so for the sake of consistency (a factor in view of my pertinent quotations from the LPA), rather than for reasons of personal preference. The curious fact is that the Law of Property Act, Chapter 154 of the Laws of Belize, Revised Edition 1980, spoke only of 'incumbrances', as does the GRA today. What led the last reviser to depart from the familiar spelling of the word in revising the Law of Property Act (but not in revising the General Registry Act) for purposes of the 2000 edition must, at least for now, remain a mystery.

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SOSA JA

CAREY JA

[48] I have had the privilege of reading in draft the reasons for judgment of Sosa JA. I am in entire agreement and have nothing useful to add.

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CAREY JA

MORRISON JA

[49] I entirely agree and have nothing to add.

_____
MORRISON JA