IN THE COURT OF APPEAL OF BELIZE AD 2008

CIVIL APPEALS NOS 5 AND 25 OF 2007

KUO, CHUN HUNG Appellant

v

ATTORNEY GENERAL Respondent

BEFORE

The Hon Mr Justice Elliott Mottley	President
The Hon Mr Justice Manuel Sosa	Justice of Appeal
The Hon Mr Justice Boyd Carey	Justice of Appeal

Civil Appeal No 5:

W P Elrington SC for the appellant.
A McSweaney McKoy and P Banner for the respondent.

Civil Appeal No 25:

R Williams SC and N Ebanks for the appellant.
A McSweaney McKoy and P Banner for the respondent.

Civil Appeal No 5:

2007: 11, 12, 20, and 21 June
2008: 20 June
2009: 27 March

Civil Appeal No 25:

2008: 18 and 20 June
2009: 27 March

MOTTLEY JA

1. I agree with the judgment of Sosa JA.

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MOTTLEY JA

SOSA JA

I - *Introduction*

2. On 21 June 2008, the oral argument in Civil Appeal No 5 of 2007 ('Appeal No 5') and Civil Appeal No 25 of 2007 ('Appeal No 25') having been heard, I agreed with the other members of the Court that Appeal No 25 should be allowed, in part, and Appeal No 5 dismissed. No reasons in writing were promised or meant to be given. However, in view of the subsequent applications of the appellant, Mr Kuo, for leave to appeal to Her Majesty in Council and of the provisions of section 17(1) of the Privy Council Appeals Act, a need for such reasons has arisen, and, accordingly, I now give mine.

II - *The factual background*

3. As the narrative which follows will reveal, the appellant and the Government could have been more careful in the conduct of business affairs the full magnitude of whose importance should, in retrospect, be painfully clear.

(a) The agreement between Abdul Hamze and the Appellant

4. On 25 May 1993 the appellant entered into a two-page agreement, under hand only, with one Abdul Hamze concerning the prospective acquisition by the

appellant of 1,000 acres of land and the prospective payment, and recovery, by him of the sum of US $I million. (It is common ground that the land was, at all material times, unregistered land.) This agreement was drawn up by Messrs Musa & Balderamos, a firm of attorneys-at-law, acting on behalf only of Mr Hamze, and the customary statement as to preparation appearing at the end of it is signed 'E Flowers'. In view of the agreement's own terms as well as those of the deed which Mr Hamze and the appellant were later to make, it is a little strange that they were made to refer to themselves in this agreement as 'the Vendor' and 'the Purchaser', respectively. As will appear, neither document indicates that the appellant was purchasing anything from Mr Hamze. Oddly, moreover, what purported to be the first and second clauses of the operative part of the agreement were in reality recitals. These recitals were, respectively, to the effect that Mr Hamze had previously agreed to purchase 7,689 acres of land from a company named Parrot Hill Corporation Limited ('Parrot Hill') and that he had previously agreed to transfer 1,000 of those 7,689 acres to the appellant. The agreement went on to provide for payment by the appellant of the sum of US $1 million to Mr Hamze at some unspecified time in the future and the transfer of 1,000 acres of land to the appellant upon the transfer of the 7,689 acres to Mr Hamze. The agreement further provided for the subdivision and development of 5,000 of the 7,689 acres 'jointly between [Mr Hamze] and [the appellant]'. In its final operative clause, the agreement provided for the sale of the 5,000 acres in question and, significantly (as ruling out any idea of a purchase of the 1,000 acres by the appellant), the repayment to him of the sum of US $I million.

Interestingly, in view of the terms of the deed that was later to be executed by Mr Hamze in favour of the appellant, the agreement nowhere stated either that such repayment was to be made from out of the proceeds of the sale in question (in other words, that repayment was contingent upon there being a sale) or that any such proceeds were otherwise to be shared between Mr Hamze and the appellant.

5. Sometime after the signing of this agreement, the appellant paid a total sum of BZE $2 million, the equivalent of US $I million, to Mr Hamze, which sum, according to the former, was to be used to pay the purchase prices of three parcels of land as well as the 'initial costs of survey and subdividing the land'. Mr Hamze, according to the appellant, had previously informed him that he would need US $I million to pay for the 7,689 acres that were to be purchased. The date or dates of the relevant payment or payments to Mr Hamze were not provided to the Court below or this Court by the appellant.

(b) The Deeds of Conveyance between Parrot Hill and Mr Hamze

6. There is, however, evidence that three Deeds of Conveyance were later executed by Parrot Hill in favour of Mr Hamze, dated 25 August 1993 and recorded at the Land Titles Unit in Belmopan ('the Land Titles Unit'). These three deeds, it must be noted, were all recorded in the Deeds Book (Volume 24 of 1993), at folios 649-660, 661-670 and 671-682, respectively.

(c) The self-styled Deed of Mortgage between Mr Hamze and the Appellant

7. According to the appellant, in or about February 1994, he retained Messrs Barrow & Williams, a firm of attorneys-at-law, to act for him in Belize and he sought from Mr Rodwell Williams SC of that firm an opinion on the agreement dated 25 May 1993 already referred to above. He received that opinion and, subsequently, both he and Mr Hamze consulted Mr Williams and instructed him, in the words of the appellant, 'to prepare the necessary document to reflect the business arrangement which existed between Mr Hamze and I'.

8. The evidence of the appellant is that Mr Williams thereafter produced, and he (the appellant) and Mr Hamze executed, a deed calling itself a Deed of Mortgage which was dated 1 March 1994 and recorded at the Land Titles Unit. (The deed was, in fact, executed only by Mr Hamze.)

9. It is obvious that, in certain respects, this deed was drawn with appropriate care. The eye of a conveyancing lawyer having experience with mortgages in this jurisdiction will readily notice that, whilst basic guidance was derived by the draftsperson from one or more precedents commonly used here by certain lending institutions, this was, in general, not a case of blind copying from a form. Excisions, for example, were, where considered essential, neatly executed with, so to speak, the surgeon's scalpel. Thus, it is noted that the first testatum (clause 1), speaking of 'the principal sum', and the charge clause (clause 2) and clause 5(4), both speaking of 'the principal [money or moneys] and other

moneys', all deftly omit the reference to interest invariably included with, or in, those, or similar, phrases in the forms of mortgage in common use amongst banks and other lenders in Belize. It can hardly be doubted that such omissions faithfully reflect instructions received by the attorney concerned from the appellant and, if there be truth in the latter's relevant assertion, from Mr Hamze himself: see para 7, *supra*.

10. I would direct attention, before turning to the language of specific clauses of the Deed of Mortgage, to another of its odd features. According to the evidence of the appellant, the property to be purchased from Parrot Hill was to be charged in his favour and, furthermore, as already indicated above (para 6), such property was in fact conveyed to Mr Hamze by three discrete deeds of conveyance. Yet, for some reason not made known to this Court or to that below, the property conveyed by the deed said to have been recorded at folios 649-660 of Volume 24 of 1993 of the Deeds Book was, plainly, not included in the property charged by the Deed of Mortgage. There is simply no reference in the mortgage deed's relevant recital, numbered (i), to that Deed of Conveyance (hereinafter to be referred to, for convenience, as 'the omitted conveyance'). And that recital makes it clear that the properties described in the two-part schedule to the Deed of Mortgage are, respectively, the subjects of the two recited Deeds of Conveyance (recorded, respectively, at folios 661-670 and 671-682 and hereinafter to be referred to, again for convenience, as 'the second and third conveyances'). To complicate matters even more, whilst the three approximate

acreages provided in the schedule to the Deed of Mortgage (that is to say, 3,323 acres, 4,366 acres and 40.96 acres) add up to a total of approximately 7,729.96 acres, the rest of the Deed of Mortgage presents the mortgaged property as comprising a total of 7,689 acres only: see clause 3(1), (2), (3) and (4).

11. It is convenient at this point in the narrative to pause and highlight the language of certain parts of the mortgage deed.

12. Looking first at the recitals, I would note the presence of an 'introductory recital', which, as pointed out by the learned author of *Gibson's Conveyancing*, (20th Ed) at p 195, is used to 'indicate the purpose of the deed in which [it is] contained'. The recital in question, numbered (ii), reads:

> '(ii) [Mr Hamze] has requested and the [appellant] has advanced previous hereto to [Mr Hamze] the sum of one Million Dollars ($1,000,000.00) Currency of the United States of America and [Mr Hamze] has agreed to create a charge by way of legal mortgage as security for repayment of the said sum of money lent and advanced.' [Emphasis added.]

13. I move on to the opening clause of the testatum, already referred to above (para 9) in another context, which, for its part, states:

'1. [Mr Hamze] hereby covenants with the [appellant] to repay the principal sum of One Million Dollars ($1,000,000.00) Currency of the United States of America exclusively from the proceeds of sale of all or any portion of a certain 5,000 acre parcel being a portion of the lands described in the SCHEDULE hereto upon the sale thereof by [Mr Hamze] and the [appellant].' [Emphasis added.]

These words, as is only obvious, constitute the mortgage deed's covenant for payment (albeit an unusual one by virtue of the provision for repayment to be contingent upon a land sale).

14. Most important, for present purposes, is clause 2, the deed's charge clause, which is in the terms following:

'2. [Mr Hamze] AS BENEFICIAL OWNER hereby charges by way of First Legal Mortgage ALL THAT property described in Parts I and II of the Schedule hereto with all buildings and erections thereon with the payment to the [appellant] of the principal money and other moneys hereby covenanted to be paid by [Mr Hamze] subject to the provisions of the Law of Property Act.' [Emphasis added.]

The underlined expression is anything but original. It occurs in the statutory form of mortgage (Form 26 in the First Schedule to the General Registry Rules, which were first promulgated in 1954).

15. I will now refer, only in passing for the moment, to two other clauses of the mortgage deed which, as will be demonstrated in due course, are of no importance in the context of the present appeals. The first, clause 3, has as its opening words: '[Mr Hamze] hereby covenants with the [appellant] as follows' and proceeds to set out six different things to be done by Mr Hamze. In its attempt to mix oil with water, as it were, this clause represents a microcosm of the entire deed. (At one stage in the Court below, Mr Elrington SC understandably called it 'a convoluted document which incorporates, purportedly, a mortgage as well as an agreement': see p 104, Record for Appeal No 5.) Most, if not all, of its content has, in my view, no proper place in a pure deed of mortgage. Assuredly, the clause addresses real concerns of the parties, the appellant in particular, but, in my respectful view, most of the listed things belonged not in the mortgage deed but in a separate agreement. To present them as mortgagor's covenants was, in truth, to dress them in borrowed garments. Clause 3(5), whilst of relevance to the mortgage, could conveniently have been put into a separate agreement concentrating on what was to be done with the pertinent land once it had been charged.

16. The next clause, numbered 4, opens, significantly in my view, with the words: '[Mr Hamze] and the [appellant] hereby agree and declare as follows' [emphasis added] and, again, relates primarily to matters not integral to the charge. At sub-clause (5) the parties agree and declare that they will use their best efforts to bring about the development and sale of the 5,000 acres alluded to earlier in the mortgage deed and reference is made, in the wrong context in my view, to the sharing of the expenses and the proceeds of sale equally.

(d) The court order for the discharge of the mortgage

17. I would now turn away from the clauses of the mortgage deed and resume the narrative. Evidence adduced below by the respondent (in an affidavit of Gian Gandhi, Solicitor General over a period of several years ending in 1999) indicates that disputes arose between Mr Hamze and the appellant sometime after the execution of the Deed of Mortgage and that, on 31 January 1996, Mr Hamze issued proceedings in the Court below against the appellant alleging breach of contract. There is no dispute as to this or as to the further evidence of Gian Gandhi that on 21 October 1999, Meerabux J, a Supreme Court Justice who was to be removed from office for unrelated reasons by September 2001 (*George Meerabux v The Attorney General of Belize* [2005] UKPC 12), ordered, *ex parte* and on the strength of no more than an undertaking by Mr Hamze to pay the appellant the sum of US $1 million, that the mortgage be discharged.

18. No evidence was adduced by the respondent of any subsequent cancellation, prior to 12 November 2001 (a date whose importance will appear below), of the relevant mortgage in accordance with the law of Belize, which, as stated in section 64(4) of the Law of Property Act ('the LPA (BZE)'), is as follows:

> '(4) Every … discharge of a legal charge on land … shall be effected by deed.'

With these provisions are to be read those of Rule 37 of the General Registry Rules which are to the following effect:

> '37. … a deed cancelling [a] mortgage shall be in Form 29 …'

(Form 29 is headed 'Deed of Cancellation of Mortgage'.)

(e) The agreement for sale between Mr Hamze and the government

19. I come now to an agreement dated 17 December 1999 and purportedly 'prepared' by the then Acting Solicitor General, who is, for some reason, not identified therein by name. By this agreement, which (like the earlier agreement between Mr Hamze and the appellant) reveals a penchant on the part of the draftsperson for confusing recitals with operative clauses, Mr Hamze agreed to sell to the government 'several parcels of land… comprising … 7,693 acres together with some … 6 … miles or (*sic*) roadway situate on the Western Highway and being a part of the Mahogany Works known as Orange Walk and

Monkey Bay and Beaver Dam': see 'clause' 1. For its part, the government agreed to pay Mr Hamze a purchase price of BZE $9,500,000.00 for the land, which was, of course, the very land (undeveloped by all accounts) for which he had, according to the appellant's affidavit (p 43, Record for Appeal No 5), paid a total purchase price of only US $400,000.00 (the equivalent of BZE $800,000.00) in 1993. The agreement recited (in its operative part) that the parcels in question were held by Mr Hamze under the three conveyances executed by Parrot Hill in his favour and already adverted to above. As has also been noted above (para 10), one of these three conveyances, namely, the omitted conveyance, is nowhere mentioned in the Deed of Mortgage. It therefore seems probable that, having purchased the relevant parcels of land with the money provided by the appellant, Mr Hamze, for reasons unknown, charged only some of them in favour of the appellant but went on to agree to sell all of them to the government. (Mr Williams was nevertheless content to submit, in arguing Appeal No 25, that the total acreage charged and the total acreage sold were one and the same, that is to say, 7,693 acres: see p 22 of the transcript for the afternoon of 18 June 2008.) Yet cause for confusion remains as to the true acreages involved for, whilst the agreement between Mr Hamze and the appellant of 25 May 1993 speaks of 7,689 acres, it is also the case that (a) the subsequent Deed of Mortgage (as already noted at para 10, *supra*) speaks in its schedule of approximately 7,729.96 acres (of which only some 40.96 acres is identified as roadway) and (b) the agreement for sale between Mr Hamze and the government, whilst involving land not included in the mortgage deed, is said to concern 7,693 acres (that is to

say, less land than was mortgaged) plus six miles of roadway. Not surprisingly (sad to say), the government, whilst claiming in the Court below as well as in this Court to have been a bona fide purchaser for value without notice, could refer to no evidence showing that it ever took the simple precaution of investigating the title of Mr Hamze to the property in question. Surprisingly, on the other hand, the government shied away from any express assertion that it had in fact investigated such title, a necessary assertion if its claim to being a bona fide purchaser for value without notice could be regarded as even complete. And, equally surprisingly, the appellant himself has been silent throughout on the question of what an investigation would have in fact revealed as regards the execution and recording of a deed of cancellation of mortgage once the order for discharge had been obtained in 1999.

(f) The Deed of Conveyance between Mr Hamze and the government

20. A Deed of Conveyance purporting to be the work of the then Solicitor General himself and signed 'E Kaseke' was subsequently executed in favour of the government, dated 12 November 2001 (the date whose importance was foreshadowed at para 18, *supra*) and recorded at the Land Titles Unit. The document both perpetuates and compounds the existing confusion. First, it recites the omitted conveyance. Secondly, it describes in its fourth schedule a piece of land containing 16.28 acres without reciting Mr Hamze's document of title (presumed) in respect thereof. Thirdly, it purports to describe, in its third schedule, the 976.2 acres conveyed by the omitted conveyance to Mr Hamze

but, at the same time, fails to make clear whether any, and, if so, how many of those acres were in fact conveyed by Mr Hamze to the government. What I am here referring to is the fact that the omitted conveyance purports to convey to Mr Hamze a parcel containing 1,040.94 acres save and except an access road and another piece of land comprising, respectively, 40.94 and 23.8 acres (that is to say, it purports to convey 976.2 acres) whereas the conveyance from Mr Hamze to the government purports to convey (together, of course, with the other acreages the subjects of the second and third conveyances) 1,040 acres save and except not only the 40.94 acres and 23.8 acres but also '1,040 acres more or less' save and except three pieces of land, all of unknown acreages. Putting this slightly differently to emphasise the woeful inadequacy of the parcel description, what was purportedly conveyed, in terms of the land Mr Hamze had acquired under the omitted conveyance, was 976.2 acres save and except approximately 1,040 acres save and except the three pieces of land of unknown acreage. In the face of the resulting uncertainty as to the total acreage purchased, I, for my part, found it quite idle for the government, through counsel, to speak during the hearing of endeavouring to arrive at the price per acre in fact paid by it for the land in question.

(g) The setting-aside of the order for the discharge of the mortgage

21. According to the affidavit evidence of the government, on 25 November 2005, that is to say, some four years after the execution by Mr Hamze of the Deed of Conveyance in favour of the government, the Court below set aside,

rightly as it seems to me, the *ex parte* order for the discharge of the mortgage which had been made by Meerabux J in 1999. As already indicated above, the government has not admitted to the court below, or this one, failure to ascertain by the accustomed title search whether the process merely initiated by the obtaining of this *ex parte* order had ever been completed by the recording of the requisite deed of cancellation of mortgage.

III - *The proceedings in the court below leading up to Appeal No 5*

22. It was against this background that the government, through the respondent, applied to the court below in November 2006 for an order that the mortgage be discharged upon payment by the government into court of the sum of US $1 million, a sum which, on the affidavit evidence, had previously been offered to the appellant but refused. As has been admitted by counsel for the respondent before this Court, the basis of the application to the court below was the nebulous one of 'public interest' and 'interests of justice' rather than the specific provisions of section 60 of the LPA (BZE), which is similar to section 50 of the Law of Property Act 1925 (UK) ('the LPA (UK)'). It was, curiously enough, Mr Elrington who suggested to the court below, effectually, that section 60 should be treated as the basis of the application. But Mr Elrington sought in the court below to downplay the importance of the fact that the deed executed by Mr Hamze and the appellant called itself a Deed of Mortgage (p 134, Record for Appeal No 5), and he suggested, in the same breath, that it had not been open to Mr Hamze to charge the property in question since he was in truth a trustee

holding the title for himself and the appellant and had no power to charge the property (pp 151-152, Record for Appeal No 5). His main contention below was that there had arisen a trust for sale under which the appellant was a beneficiary (p 121, Record for Appeal No 5) and that, in consequence, there was an encumbrance, as distinct from a mortgage, in his favour which needed properly to be addressed by the court in dealing with the application of the respondent under section 60. Implicit in this argument, it seems to me, was the recognition, albeit grudging, that the charge (if any) secured no more than US $1 million. On the other hand, the trust for sale, argued Mr Elrington, gave rise to an 'equitable' encumbrance (p 108, Record for Appeal No 5) involving the interest of the appellant which, as I understand it, was worth a half of BZE $9,500,000.00, the purchase price agreed to be paid by the government to Mr Hamze for the parcels of land in question (p 116, Record for Appeal No 5). Therefore, according to Mr Elrington, the sum to be paid into court under section 60 was BZE $4,750,000.00. The court below rejected this contention of the appellant. It considered that what Mr Hamze had created in favour of the appellant by the relevant deed was, some unusual provisions notwithstanding, a charge by way of legal mortgage, nothing more and nothing less (see especially paras 10, 11, 15, 18 and 20 of the judgment) . Because of the way in which the appellant's case was argued, there was no issue below as to the amount of money secured by the charge (in the event that the court found there was a charge).

23. The sole formal order of the court below contained in the record settled by the parties in relation to Appeal No 5 (and the sole order confirmed by Mr Williams, at p 120 of the transcript for 20 June 2008, to have been under appeal in that Appeal) is dated 2 May 2007 and to be found at pages 180-181. (I note, in passing, that, whilst a purported second order did dramatically surface during the hearing before this Court in June 2008, neither side sought its belated inclusion in the record.) The sole formal order required, rather than authorised, the Attorney General to pay 'into Court, to the account of the [appellant] the sum of US $I,000,000.00 …' and went on, erroneously in my view, to provide for the mortgage to 'stand discharged' upon the payment of such sum. (Mr Williams informed this Court, and Mrs McSweaney McKoy, who appeared on the application before the court below as Ms McSweaney, confirmed, that the appellant had subsequently received a sum of BZE $2.2 million that had been paid into court pursuant to order.) Contradictorily, the order then concluded by authorising the Registrar to execute a deed of discharge. (Mrs McSweaney McKoy informed this Court that this, too, was done.) I use the adverb 'contradictorily' in the penultimate sentence because if, by the preceding part of the order, the mortgage was to stand discharged on payment, there should, logically, have been no need for a deed of discharge. In fact, however, as noted above (para 18), it is required by section 64(4) of the LPA (BZE) that a mortgage be cancelled by deed. It is the law, moreover, that a court has no power in circumstances such as these to declare land freed from a mortgage until

payment into court has been effected: see *Re Uplands* [1948] WN 165, in which section 50 of the LPA (UK) was at issue.

IV - *Appeal No 5: Argument*

24. Initially, Mr Elrington seemed poised to argue this appeal on the basis that, as he had unsuccessfully contended below, there was in truth no valid Deed of Mortgage and the deed in fact executed by Mr Hamze and the appellant disclosed that Mr Hamze was a trustee who lacked power to charge the property. He began with an effort to persuade the Court that the conveyance in favour of the government could be impugned on the ground that Mr Hamze was a trustee who could not give a valid receipt and that, accordingly, the court below had no jurisdiction to deal with the application. This effort was, however, short-lived and at the end of his address proper in this appeal, I understood Mr Elrington to be (a) conceding that the deed executed by Mr Hamze and dated 1 March 1994, was, as its title implied, a Deed of Mortgage and (b) contending that, by clause 2 thereof, properly construed, the relevant property was charged to secure the payment by Mr Hamze to the appellant of, first, the sum of US $1 million and, secondly, by virtue of clause 4(5), the sum of BZE $9,500,000.00: see pp 22-23, transcript for afternoon of 11 June 2007. (Mr Elrington told this Court that the argument put before the judge below had been that the same sum of BZE $9,500,000.00 should be paid into court, *ibid*, but he was, I think, confused: see para 22, *supra*.)

25. The fundamental position of the respondent before this Court was no different from his fundamental position before the court below, that is to say, that the government was, at all material times a bona fide purchaser for value without notice. Mrs McSweaney McKoy argued on the basis that the government 'did not know' of what she erroneously called the 'equitable interest' of the appellant in the land but, eventually, she conceded, as she was bound to do, that the affidavit evidence adduced by the respondent did not address the point whether there had ever been an investigation of title by, or on behalf of, the government. (The judge below took the position, during argument, that the government had conducted a title search: p 120, Record for Appeal No 5.) When asked by a member of the Court what it was that she meant by the words 'did not know', she simply said that the mortgage had been discharged at the time of the purchase by the government, without explaining whether the government had in fact believed the mortgage to have been discharged and, if it had, what had been the basis for such belief (p 29 of the transcript for 11 June 2007). Obviously, such a belief could have been based on anything, ranging from the mere oral assurance of someone, say Mr Hamze himself or an agent of his, to the results of a proper investigation of title.

26. At the invitation of this Court, Mrs McSweaney McKoy made submissions on the question of what sums of money besides the US $1 million Mr Hamze had covenanted to pay under clause 2 of the mortgage deed. These submissions, it should be noted, were neither made nor required to be made on the day on

which the invitation was extended but on the next day, an arrangement intended to facilitate such prior attorney/client consultation as might be considered necessary. Their purport was that Mr Hamze had covenanted to pay a half of the proceeds of sale of the 5,000 acres referred to in clause 4 of the Deed of Mortgage and, as well, different unascertained sums of money under clause 3 which needed to be deducted from the proceeds of sale in question. Mrs McSweaney McKoy, indeed, went so far as to state that, 'in a sense' she was conceding that the order of the court below could not stand.

27. Following these submissions and this concession of sorts by Mrs McSweaney McKoy, Mr Elrington, having been invited further to assist this Court on the matter of the intermediate order to be made, renewed his effort to show that the trust which, in his submission, had been created was a decisive factor in this appeal. He contended, in this regard, that the appellant's cause was assisted by the provisions concerning encumbrances which are contained in section 103 of the LPA (BZE), a section which he had not prayed in aid in the court below, where his position was that the alleged encumbrance was equitable rather than legal in nature: see para 22, *supra*. And he quoted section 60(1) of the same Act, the section under which the court below clearly acted in granting the application of the respondent, the provisions of which relate not only to legal charges (which are not referred to as encumbrances in section 103) but also to encumbrances. At this point, Mr Elrington indicated that it was a half only of the proceeds of sale of the 5,000 acres referred to in clause 4(5) (p 67 of the

transcript for the afternoon of 11 June 2007) but, by implication, the whole of the proceeds of sale of the 1,000 acres referred to in clause 4(1) that the appellant was entitled to under section 60(1).

28. The Court, having listened to both counsel, proceeded to order that the matter be returned to the court below on a basis which I understood to be twofold. First, Mr Elrington had raised a matter not raised below (see para 22, *supra*), namely, that the appellant, on the proper construction of clause 2 of the Deed of Mortgage, was entitled to be paid more than the US $1 million in view of the provisions of clause 4(5) and, secondly, Ms McSweaney had conceded, albeit with a vague qualification, that the order of the court below could not stand and that perhaps the justice of the case would require a 'bit more in terms of sums due to the appellant'. Part III of the Court of Appeal Act concerns civil appeals and contains, amongst other sections, section 19, according to subsection (1) of which:

> 'On the hearing of an appeal under this Part, the Court shall have power to -
>
> (c) direct the Supreme Court or the judge thereof from whose order the appeal is brought to enquire into and certify its finding on any question which the Court thinks fit to be determined before final judgment in the appeal.'

Exercising this power, the Court made an order which, according to the transcript for 21 June 2007 (p 9), was as follows: 'that the matter should be return (*sic*) to the Chief Justice for him to ascertain and assess the "other moneys hereby covenanted to be paid under the mortgage (*sic*)" and once that enquiry is conducted he should certify his findings to this Court.' (The words 'under the mortgage' did not belong between the quotation marks.) Having a little earlier informed counsel that it was setting aside the order of the judge below, the Court, on deciding to exercise its power under section 19(1), made it very clear to the parties that it was neither allowing the appeal nor setting aside the order in the meantime. The Court made it equally clear that, whilst its final determination of this appeal would be deferred until the court below certified its findings as directed, there was to be no hearing by this Court of fresh argument.

29. A draft of the order was subsequently agreed upon between counsel on both sides and approved by the then Registrar of this Court. The order thus arrived at is to the effect that 'the matter be referred to the … [judge below] for his assessment of all other moneys covenanted to be paid by Abdul Hamze to the appellant under Section (*sic*) 2 of the Deed of Mortgage dated 1st day of March, 1994.' It will be noted that, as 'perfected', the order is incomplete and qualifies what was said by this Court by the use of the phrase 'to the appellant'. This order was not seen by any member of this Court until after Appeal No 25 had been brought.

V - *The proceedings in the court below leading up to Appeal No 25*

30. On the return of this matter to the court below, the appellant was represented by Mr Williams, who, on the evidence, had been consulted and instructed by the appellant and Mr Hamze with respect to the drawing and preparation of the document which was later to materialise as a 'Deed of Mortgage': see para 7, *supra*. Before that court, he echoed the argument which Mr Elrington had earlier deployed before this Court; but he also emphasised that which Mr Elrington had largely left to be brought in by implication, namely, the provisions of clause 4(1) of the Deed of Mortgage. In his submission, the appellant was entitled to receive a sum of BZE $5,358,990.00 with interest pursuant, presumably, to section 166 of the Supreme Court of Judicature Act. For reasons which will appear below, it is unnecessary to enter into the details of Mr Williams's calculation (or, for that matter, those of Mrs McSweaney McKoy and the judge below, respectively).

31. In her written submissions to the court below, counsel for the respondent defined the basic position of the respondent as being that the mortgage in favour of the appellant had been discharged prior to the purchase by the government of the land in question. This was merely to reiterate, by indirect reference, her earlier overarching contention, before both the court below and this one, that the government was a purchaser for valuable consideration without notice.

32. But she went farther and sought to assist the court below with a figure representing the price per acre paid by the government for the land in question. As I have indicated in para 30, *supra*, it is wholly unnecessary at this stage to go into the details of the calculations, by whomsoever made. Those calculations do not arise in view of the reasons for which, in my opinion, Appeals Nos 5 and 25 had to be, respectively, dismissed and allowed in part. I would nevertheless advert to counsel's submission on the total acreage the subject of the legal charge in order merely to illustrate the generally loose approach of the government to specifics in this case. Paragraph 4 of the submissions reads as follows:

> 'The Schedule to the Mortgage lists the following properties as those charged thereunder: (a) a parcel of land comprising approximately 3323 acres (Part I); and (b) a parcel of land comprising approximately 4366 acres and a strip of land 120 feet wide (Part II). The Schedule therefore charges a total of 7689 acres of land.'

The concluding sentence of this paragraph is needlessly and inexcusably inaccurate and runs the risk of being interpreted as a sign of scant regard for the obligations of counsel towards the court. The second parcel description contained in the relevant part of the schedule to the Deed of Mortgage, that is to say, Part II, does indeed begin with an allusion to 'a strip of land 120 feet wide' but, far from leaving the matter there, it goes on expressly to describe that strip

as ‘comprising 40.96 acres’. I would prefer to think that this detail was carelessly overlooked by counsel than that it was deliberately withheld from the court below.

33. The same approach manifests itself in para 5 of the written submissions where it is stated, *inter alia*, that the third schedule to the conveyance in favour of the government describes a parcel containing 1,040.94 acres. As I have demonstrated at para 20, *supra*, the relevant parcel description fails to disclose how much, if any, of the acreage the subject of the omitted conveyance was purportedly conveyed to the government.

34. With respect to the effect of the words ‘other moneys hereby covenanted to be paid’ occurring in clause 2 of the Deed of Mortgage, Ms McSweaney referred vaguely to clauses 3 and 4 of that deed but it was not clear to me how exactly, in her submission, those clauses were relevant to the matter referred by this Court to that below.

35. The difficulty created for the judge below by the *de facto* wording of the order of this Court is, it seems to me, reflected in para 4 of his decision which, in what strikes me as the language of a man somewhat constrained, reads:

> ‘As I have had occasion to remark before, the Mortgage Deed in issue in this case, with respect leaves much to be desired in terms of precision and clarity. However, doing the best I can, I think, it is evident that by clause

> 3, the Mortgagor (Abdul Hamze), covenanted with the Mortgagee to do certain things. Some of these are quantifiable in monetary terms which could be said to be reasonably contemplated to be "other moneys".'

At para 13 the judge said:

> 'In my view under section (*sic*) 2 of the Deed the other moneys covenanted to be paid are only referable to clause 3 of the Deed.'

He proceeded then, in para 14, to what he regarded as the terms of clause 3 (but which are, in fact, the terms of clause 4(1)) with respect to the entitlement of the appellant to 1,000 acres and, as well, to the undisputed evidence that that acreage was included in what Mr Hamze sold to the government and he posed, correctly in my view, the following question: 'Is the value of the 1000 acres part of the moneys covenanted to be paid?' I have not, with respect, been able to find a direct answer to this precise question anywhere in the written decision of the judge below. What I have, however, found is the conclusion at para 16 that 'it is fair to hold that the [appellant] is entitled to his 1000 acres or the equivalent in money.' The judge naturally went on to determine the value of 'the [appellant's] interest in the 1000 acres' as best he could, arriving at a figure of BZE $1,253,530.00. He awarded interest on that sum at the rate of 6 per centum from 'the date of the sale or transfer' (although the sale and 'transfer' occurred on different dates) to the government.

VI - *Appeal No 25: Argument*

36. Before this Court Mr Williams submitted that the judge below erred in making his determination and assessment as to what moneys other than the principal sum were due from Mr Hamze to the appellant. He invited this Court to vary or set aside the award of the judge below and to make its own award in the sum of BZE $5,358,990.00 with interest at 6 per centum per annum from 'December 10th (*sic*) 1999' until payment, with costs to the appellant.

37. Mr Williams's main complaint was that, in making his assessment, the judge below failed to construe the mortgage deed as a whole. He said that two sub-clauses of the deed, namely sub-clauses 4(1) and 4(5), indicated the interests of the appellant.

38. Sub-clause 4(1) has been tangentially adverted to above (para 16) as dealing with matters not integral to the charge. It obviously refers to the same 1,000 acres of land previously mentioned at clause 3(2), (3) and (4) of the mortgage deed when it states:

> '4. [Mr Hamze] and the [appellant] hereby agree and declare as follows:
>
> (I) that the [appellant] shall be absolutely entitled to the aforesaid 1,000 acres and [Mr Hamze] shall be obliged to

convey the same to and at the cost of the [appellant] free and clear of this mortgage on demand.'

Clause 4(5), referring to the 5,000 acres previously mentioned at clause 3(4) and (5), reads that the parties further agree and declare

'(5) To use their best efforts to cause the development of the aforesaid 5,000 acre parcel, the sale thereof and the sharing of the expenses and the proceeds of sale equally, but otherwise subject to the terms hereof.'

39. Mr Williams's further submission was that, in the light of these two sub-clauses, the appellant had an interest in 3,500 acres, that is to say, the entire 1,000 acres and a half of the 5,000 acres. By his calculations, the price of one acre was BZE $1,531.14 and therefore, in the absence of evidence that Mr Hamze had incurred any expenses on development of the land, the interest of the appellant was worth BZE $5,358,990.00, which, he said, was the sum of money the government should have been required by the court below to pay into court under section 60(1). After all, argued Mr Williams, proceeds of sale were 'monies to be paid'. A covenant to pay was an agreement to pay and there was such an agreement in clause 4(5). Moreover, Mr Williams contended, the judge below had seen fit to consider certain acts covenanted to be carried out under clause 3 on the reasoning that:

'[s]ome of these things are quantifiable in monetary terms which could be said to be reasonably contemplated to be "other moneys".'

That was, according to Mr Williams, sound reasoning and it could be applied in the case of clauses 4(1) and 4(5) as well.

40. Mr Williams, in what I saw as a last-ditch effort, also invited this Court to order the payment to the appellant of the sum of BZE $2.6 million (the part of the purchase price of the land unpaid to Mr Hamze) as a 'larger additional amount' under section 60(1) of the LPA (BZE).

41. Mrs McSweaney McKoy, for the respondent, did not, even before this Court, confine herself to the argument that, if there were covenants by Mr Hamze to pay moneys other than the principal sum of US $1 million, they would have to be looked for in clause 3 of the mortgage deed. She continued to insist (up to a point), as she had done below, that clause 4(4), in particular, was, in her words, 'part of what should be assessed as "other moneys covenanted" which is stated in Clause 2'. Consequently, she emphasised, the appellant had a duty under the mortgage deed to share in the expenses of general development of the 5,000 acres of land that were to be sold. For reasons which I myself could not identify anywhere in her submissions, she said that the amount of money to be paid by the government into court should, in the light of clause 4(4), depend on the amount of its own huge expenditure on the land purchased from Mr Hamze. As I

understood her, however, it was her final submission on this question that the only covenant to pay money in clause 3 was that to be found in sub-clause (5), which concerned the principal sum itself rather than 'other moneys'.

42. On the matter of the award of a 'larger additional amount' under section 60(1) of the LPA (BZE), Mrs McSweaney McKoy further submitted that there was no 'special reason', on the evidence, for such an award.

VII - *Appeal No 25: determination*

43. It is indeed regrettable that the formal order entered in Appeal No 5 on 18 July 2007 did not faithfully reflect what was said by the President on 21 June 2007 and recorded in the transcript for that day. What was to be ascertained and assessed was the other moneys covenanted to be paid (regardless of who was to be the payee) under the mortgage. The qualification 'to the appellant' was wrongly added and, in my view, may well have helped to set the judge on the wrong course. As I see it, had it not been for the addition of these two words, the judge might well have felt no need to venture beyond the covenants clause, clause 3, in his search for 'other moneys covenanted to be paid', a point to be elaborated upon below: see para 48. The presence of these two words, coupled with the omission of the words 'if any' between the words 'moneys' and 'covenanted' could easily have operated to place on the judge below undue pressure to find in other clauses of the mortgage deed that which, in my respectful view, simply did not exist, namely, a covenant, or covenants, by Mr

Hamze to pay money other than the principal sum to the appellant. This, I would stress, is not to say that, if the formal order had properly omitted the words 'to the appellant', the expression 'if any' would have been necessary.

44. That said, I turn to the submissions of Mr Williams in Appeal No 25. As I adumbrated in the immediately preceding paragraph, I am unable to accept the argument that the judge was required to be more generous to the appellant in his findings as to what other moneys were covenanted to be paid under the mortgage deed. Indeed, I consider that there was no basis for his conclusion that 'other moneys covenanted to be paid' included a sum of money representing the interest of the appellant in 1,000 acres of land. The covenants in the mortgage deed are, in my opinion, to be found only in clauses 1 and 3 thereof. The parties saw fit to include in their mortgage deed a covenants clause which opened with the words '[Mr Hamze] hereby covenants with the [appellant] as follows …' To search in every nook and cranny, so to speak, of an agreement for what, although not so called, may amount to a covenant by one of the parties may be fair and reasonable as a general rule. But that cannot be the right approach in a case where the agreement contains a special clause devoted exclusively to covenants by that party and a further clause (such as clause I of the Deed of Mortgage in this case) expressly creating a covenant. And, bearing in mind that the expression 'other monies hereby covenanted to be paid' is, as already noted at para 14, *supra*, far from original, its presence does not, *per se*, indicate, in my view, that the parties, in adopting it as part of the language of their

deed, were implying that the deed in fact contained covenants for the payment of such 'other moneys'.

45. In clause 3 Mr Hamze covenanted to do six different things or sets of things. Broadly speaking, these were as follows:

1. To determine the unit cost of a land survey;
2. to 'procure' and pay the cost of a survey (which cost, it is common ground, was, in fact, never incurred);
3. to provide a 'road access';
4. to undertake and complete the survey, sub-division and clearing of certain lands and the construction of certain roads;
5. to apply and pay US $1 million derived in a particular manner 'in satisfaction of the debt due to the [appellant]' in priority to certain other payments;
6. to permit entry by the [appellant] into and upon the charged property and 'remedy and make (*sic*) defect which may be found therein'.

The fifth of these things involves, in my view, the same sum of US $1 million which is the subject of the covenant for payment contained in clause 1. It is, in other words, not a covenant for the payment of 'other moneys' for the purposes of clause 2, as Mr Williams suggested. It speaks of 'the debt' and not of 'any

debt', thus ruling out, in my view, the possibility that it may be a reference to other moneys, such as a portion of the proceeds of any sale of the 5,000 acres which might, at some time in the future, be due to the appellant but unpaid by Mr Hamze. The purpose of the relevant sub-clause, 3(5), is, obviously, not the unnecessary repetition of the covenant for payment set out in clause 1 but the articulation of a binding promise on the part of Mr Hamze to repay the principal sum before 'all other (*sic*) payments incurred in relation to the development of the … 5,000 acre parcel'.

46. With the exception of the things to be done under sub-clause (2), none of the remaining five things, or groups of things, listed in clause 3 forms part of a covenant for the payment of money. This, in my view, is manifested at a glance and calls for no elaboration. As already indicated above, it was common ground that the cost to be paid under sub-clause (2) was never incurred.

47. As to clause 4(5), set out at para 38, *supra*, I am unable to see how it can possibly be construed as giving rise to a covenant for the payment of money. As observed in passing at para 16, *supra*, the reference to the sharing of expenses and proceeds of sale in this sub-clause seems to me to be entirely out of place. The opening words of the sub-clause, by which the parties agree to use their best efforts, are apposite to what I see as its true subject matter, namely, the future development and sale of the 5,000 acres in question, but not to the sharing of expenses and proceeds. It would not be right, in my respectful view, to accord

to words which clearly do not belong in this sub-clause the importance which Mr Williams would attach to them.

48. Accordingly, I concur in the opinion of the judge below that 'under section (*sic*) 2 of the Deed the other moneys covenanted to be paid are only referable to clause 3 of the Deed'; but, respectfully, I do not agree with him (paras 14 and 16 of his decision) that Mr Hamze effectively covenanted to pay other moneys in clause 3(3). Indeed, it is not accurate to say, as the judge did at para 14, that the appellant was entitled to 1,000 acres under clause 3. Strictly speaking, whilst it may be said of clause 3 that it is not inconsistent with such an entitlement, there can be no doubt that the provisions creating the entitlement are to be found in clause 4(1) alone. I can only conclude that the judge somehow confused the terms of clause 4(1) with those of clause 3 (significantly, perhaps, he did not specify the sub-clause of clause 3 that he had in mind in writing the opening sentence of para 14); but, with respect, to use what is in fact clause 4(1) as the basis for a covenant to pay 'other moneys' after having explicitly acknowledged that 'other monies covenanted to be paid are only referable to clause 3 of the Deed' is, in my view, radically to contradict oneself.

49. I must say that I consider myself to be fortified in my principal conclusion in this appeal by the fact that it accords with the purpose of the Deed of Mortgage as succinctly stated in its recital (ii) (highlighted at para 12, *supra*). That purpose is to secure the repayment of the loan only, rather than such

repayment together with the payment of a share of the proceeds of any future sale of land. Similarly fortifying, to my mind, is the fact that the covenant for payment (set out at para 13, *supra*) was not, though it could have been, drawn so as further to provide for the payment by Mr Hamze to the appellant of such a share.

50. I would only add that, in my opinion, the suggestion that a covenant to pay 'other monies' should properly be sought outside the covenants clause of this particular Deed of Mortgage assumes a false semblance of cogency (evanescent, happily) only when raised, as here, against a third party. In a hypothetical case where it was raised against Mr Hamze himself, the suggestion would, in my view, immediately stand out as derisory and wholly unworthy of a moment's consideration.

51. It was for these reasons that I reached the conclusion on 20 June 2008 that this Court should allow Appeal No 25 but only to the extent of acceding to the appellant's request for the setting aside of the award made by the judge below on 24 October 2007.

VIII – *Appeal No 5: determination*

52. Mr Elrington's main point in Appeal No 5 inevitably fails for the reasons already given above in support of the decision in Appeal No 25 to set aside the award of the judge below. Mr Williams's argument before this Court was

essentially a refinement of Mr Elrington's effort insofar as such effort was based on acceptance of the proposition that the deed in question was, in fact as well as in law, a deed of mortgage.

53. In deference to Mr Elrington's apparently considered change of mind on the point as to the supposed encumbrance based on a trust for sale [as noted above (at para 27) he returned to it after a seeming proper abandonment (pointed out at para 24, *supra*)], I will deal with it. There can, with great respect, be no substance in this point. Before this Court, though not before that below, Mr Elrington, as will be recalled, cited in support of it the provisions of section 103 of the LPA (BZE). As material for present purposes, section 103(1) (whose marginal note reads 'Definition of encumbrances') states:

> '103. – (1) The following rights, burdens and dealings other than legal charges, that is to say –
>
> …
>
> (c) dealings with the land which, in the event of sale, would limit the free use and disposal thereof by the purchaser, such as … rights in or over the land arising out of any trust or settlement, whether created by will or deed;

…

> shall be encumbrances … which may be recorded under Part VI of the General Registry Act.'

These provisions cannot properly be considered without reference to sections 104 and 105 of the same Act which, respectively, provide as follows:

> '104. An encumbrance in respect of unregistered land shall be made, constituted or created by a deed of encumbrance which shall be recorded under Part VI of the General Registry Act.
>
> 105. Subject to the provisions of the General Registry Act, an encumbrance over and upon any land … recorded under that Act shall become binding on the land from the moment of the … recording thereof.'

Read together, these sections indicate that, in the case of unregistered land an encumbrance must be made by deed, a special form of which (Form 30) is provided for under Rule 38 of the General Registry Rules, which deed must then be duly recorded at the Land Titles Unit. (In the case of registered land, the requirement of recording is replaced by that of registration.)

54. In this case, there was no evidence before either Court that an encumbrance was ever 'made, constituted or created' for the purposes of section 104. There can therefore be no suggestion that any deed of encumbrance was ever recorded as statutorily required. In those circumstances, even if it be assumed, for the sake of argument, that there was in this case a trust for sale which gave the appellant rights in or over the land, Mr Elrington's contention must be rejected as based on an incomplete foundation, that of an unrecorded, and hence non-binding, encumbrance at best.

55. This brings me to the matter of the suggested order for the payment by the government of a 'larger additional amount' within the meaning of section 60(1) of the LPA (BZE). As noted above (para 40), this was raised by Mr Williams not in Appeal No 5 (which, indeed, he did not argue) but in Appeal No 25. In my view, this matter is relevant solely in Appeal No 5 and should, in strictness, have been raised during argument in that appeal rather than Appeal 25; but I consider that it should be dealt with here if only because this Court, having posed a particular question to Mr Williams, allowed him to raise it in his reply. That said, I am of the opinion that there is no force in this submission. The subsection in question empowers the court below to require a 'larger additional amount' only 'for special reason' and I, for my part, have found no indication in the record that any evidence was adduced with a view to showing that such a reason existed. Indeed, it is a good question whether there was evidence before the court below

to support even the award of an 'additional sum' within the meaning of the same subsection. That, however, is not a question before this Court.

56. It only remains to consider what I have alluded to above as the overarching contention of the respondent's counsel both here and below. I refer to the submission that the government was in this case a purchaser for valuable consideration without notice. The observation has already been made (para 19, *supra*) that the government adduced no evidence to show that it ever investigated the title of Mr Hamze prior to its purchase of the land in question. There was, in short, no evidence that the mortgage was ever discharged pursuant to the order that was later set aside. To attempt, in those adverse circumstances, to downgrade the legal charge to an equitable interest (as counsel for the respondent is recorded, at pp 28-29 of the transcript for the afternoon of 11 June 2007, as having done) and then invoke against it the equitable doctrine of notice was, in my respectful view, unenlightened creativity. As is pointed out in *Cheshire and Burn's Modern Law of Real Property* (16th Ed) (2000) at pp 60-61, the equitable doctrine of notice enables a purchaser to take an estate free from trusts and equitable interests. Legal estates and even the smallest of legal interests are not, however, affected by that doctrine: *op cit*, at pp 56-57. 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 legal interest to the chargee though it does not convey to him a legal estate.' [Emphasis added.]

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. Therefore, in my opinion, the equitable doctrine of notice was wrongly invoked by the respondent's counsel. I consider it important for this to be made clear lest the fact that the Court dismissed Appeal No 5 should be misinterpreted as signalling acceptance of the respondent's fundamental position.

57. I was in agreement with the other members of this Court that there should be no orders as to costs in these appeals.

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SOSA JA

CAREY JA

58. If I might say so respectfully, Sosa JA has, with admirable clarity and comprehensively, dealt with the convoluted matters raised in this appeal. I agree with his analysis and conclusions and have nothing which I might usefully add.

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CAREY JA