

IN THE SUPREME COURT OF BELIZE, A.D. 2007

CLAIM NO. 400 OF 2007

BETWEEN:

BANANA ENTERPRISES LIMITED **Claimant**

AND

NOVA TOLEDO LIMITED **Defendant**

**PROVIDENT BANK AND TRUST
OF BELIZE LIMITED** **Interpleader
Claimant**

Ms. Darlene Vernon for interpleader claimant.

Mr. Dean Lindo SC for interpleader defendant/judgment creditor.

AWICH **Chief Justice (Ag)**

18.5.2011

JUDGMENT

1. *Notes: Interpleader application; interpleader claimant is a mortgagee; it gave notice of charge on the property after property had been attached by deputy sheriff and sold by auction; the charge, the security, was a floating charge – meaning of floating charge; whether it crystallised automatically upon the mortgagor suffering distress of property by attachment in execution of judgment.*

2. The debtor, Nova Toledo Limited, by a deed of mortgage made on 26.5.2006, charged all its assets with the sum of US \$8,700,000.00 loaned to it by the Provident Bank & Trust of Belize Limited, now the

interpleader claimant. The material particulars of the charge were stated as follows:

“WHEREAS

- (1) The Mortgagee has by a facility letter agreement bearing date March 21.2.2006 (“the Agreement”) made between the Mortgagor and the Mortgagee, agreed to lend to the Mortgagor the sum of US \$8,700,000 by way of a fluctuating overdraft loan evidenced by a demand promissory note.

- (2) The Mortgagor has agreed to create a mortgage debenture (“the Mortgage Debenture”) over all its assets whatsoever and wheresoever located (both present and future) including but not limited to all tangible and intangible assets, all choses-in-action, all movable, immovable, and real property and all fixtures and respect of such liabilities or for keeping the Mortgagor’s account(s) PROVIDED that in the event of a default by the Mortgagor in the payment of any amount(s) of principal or interest due (the “Outstanding Sum”) under the Agreement or this Mortgage Debenture to the Mortgagee, the Mortgagor shall pay to the Mortgagee the

Outstanding Sum(s) together with interest thereon at a rate of 2% per annum above the Interest Rate.”

...EVENTS OF DEFAULT

(9) Notwithstanding anything hereinbefore contained, the monies secured hereunder and all unpaid interest which have accrued thereon shall become immediately due and payable and the security hereby created enforceable:

(1) if (a) the Mortgagor fails to pay as required by the Agreement or this Mortgage Debenture any amounts of principal or interest thereon or other amounts payable to the Mortgagee and such failure has not been remedied by the Mortgagor within 30 days ...;

(2) if the Mortgagor is in breach of any covenant herein or in the Agreement or fails to abide by any term or condition contained herein or in the Agreement;

(3) if any distress or other form of execution is levied against the property and any assets of the Mortgagor and any company affiliated to the

Mortgagor and the same is not discharged within seven (7) days of the same being so levied; or

(4) if any winding-up order is made against the Mortgagor or any company affiliated to the Mortgagor, or the Mortgagor files a petition for bankruptcy, or makes any re-organization, or enters into any compromise arrangement; or other proceedings for the relief of debtors and the same is not dismissed or stayed ...”

3. The two copies of the mortgage deed filed at court by the interpleader claimant are unsatisfactory. Several pages are missing out of it, paragraphs 4 and 5 under the heading “THE CHARGE” are omitted and some sentences do not make sense, perhaps from copying. However, it has been common ground that the deed created a floating charge, not a fixed charge, over the assets attached and auctioned.
4. The loan sum was payable with interest, and payment was by instalments. Upon certain defaults the total sum due plus interest would become due and payable; and “the security hereby created [would become] enforceable.” This interpleader claim however, does not turn on this provision. It is not in evidence that Nova Toledo defaulted in payment of the loan or that Provident Bank sought to act against Nova Toledo on the security provided for the loan.

5. In the course of trading between 27.4.2004 and 15.5.2007, Nova Toledo incurred debts totalling BZ \$25,822.45 owed to Banana Enterprises Ltd, the interpleader defendant. The latter issued a court claim for that sum plus interest. Nova Toledo failed to serve and file acknowledgement of service of the claim form. On 22.11.2007, default judgment was entered for the sum claimed plus interest in favour of Banana enterprises Ltd. The total judgment debt was \$30,760.75.

6. A writ of *feri facias* was issued and the deputy marshal attached goods belonging to Nova Toledo on 31.3.2008, 14.10.2008 and 2.12.2008. On 11.12.2008, Provident Bank gave notice to the Marshal claiming the goods attached. Despite the notice, the deputy marshal on 2.1.2009, auctioned the goods and paid the proceeds in court. On 6.8.2010, seven months after the auction, and eight months after the notice by Provident Bank, Banana Enterprises gave notice disputing the claim of Provident Bank.

7. The Marshal has made an interpleader application under R. 54.1(2) of the Supreme Court (Civil Procedure) Rules, 2005, for an order to determine whether Banana Enterprises or Provident Bank was entitled to the goods when they were attached and auctioned. The money in court will be paid accordingly. The sum, the proceeds of the auction sale was not disclosed in the affidavit of the deputy marshal. That should always be done.

8. *Determination*

The affidavits filed do not disclose why the notice of claim given by Provident Bank on 11.12.2008, was not responded to within seven days by Banana Enterprises. Provident Bank did not raise it as an issue in the affidavit of Jose Marin filed on its behalf, and did not raise it as an issue in court. Parties simply joined issue as to whether the floating charge in favour of Provident Bank had crystallised before the auction sale.

9. A floating charge is defined in Jowitt's Dictionary of English Law, First Edition, as: "*security which is an equitable charge on the assets for the time being of a going concern; it allows the business to be carried on and the property comprised in it can be dealt with in the ordinary course of business, until the undertaking charged ceases to be a going concern, or until the chargee in some way or other intervenes when the charge 'crystallises'.*" As early as 1897 in the case, **Government Stock and Other Securities Investment Co. Ltd. v Manila Railway Co. Ltd. [1897] A.C. 81**, Lord Macnaghten said at page 86, of a floating charge that:

"A floating security is an equitable charge on the assets for the time being of a going concern. It attaches to the subject charged in the varying condition in which it happens to be from time to time. It is of the essence of such a charge that it remains

dormant until the undertaking charged ceases to be a going concern, or until the person in whose favour the charge is created intervenes.”

10. Then later in, **Illingworth v Houldsworth [1904] A.C. 355**, at page 358 Lord Macnaghten further described a floating charge as:

“ambulatory and shifting in its nature, hovering over, and so to speak, floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach or grasp.”

11. The law has since developed to include automatic crystallisation of a floating charge upon occurrence of an event agreed by the mortgagor and mortgagee to result in crystallisation automatically – see **In re Woodroffes (Musical Instruments) Limited [1886] Ch. 366**. Accordingly I would add that development to the definition and define a floating charge as: a security, a charge on the assets for the time being of a going concern, which allows the assets to be dealt with in the ordinary course of business until the undertaking charged ceases to be a going concern or until the chargee in some way or other intervenes, or until the occurrence of an event agreed to by the mortgagor and mortgagee to result in automatic crystallisation.

12. The crucial question in this case is whether when the deputy marshal attached the goods by taking walking possession of them on 31.3.2008, 14.10.2088 and 2.12.2008, the floating charge in favour of Provident Bank had crystallised, or whether by the attachment of the goods the floating charge automatically crystallised, so that the goods became the subject of a fixed charge and only Provident Bank could receive the proceeds of the sale of the goods until the bank's loan was paid in full.
13. Provident Bank would like the court to hold that the provisions of paragraph 9 of the mortgage deed, in particular sub-paragraph (3), mean that the attachment of the goods by the marshal, was an event of automatic crystallisation of the floating charge, so that the items of goods attached became automatically the subject of a fixed charge, and only the bank could receive the proceeds of the auction sale, upto the balance of the loan owing.
14. Banana Enterprises argued that the Bank should have given notice or seized the goods in order for its floating charge to crystallise.
15. Case law shows that for a long time it was assumed that cessation of carrying on business as a going concern automatically caused a floating charge to crystallise. **In re Woodroffes (Musical Instruments)** case confirmed the assumption. See also **In re Brightlife Ltd [1987] Ch. 200**. Two other events such as appointment of a receiver and

liquidation (winding up of a company) have the same effect of cessation of carrying on business as a going undertaking; and have been made statutory events upon which crystallisation of floating charge occurs.

16. Outside those three events case law shows that whether or not an event is to be regarded as one for automatic crystallisation of a floating charge must be a matter for agreement of the party, and court must decide it by interpreting the agreement of the parties.

17. In this claim the relevant paragraph in the agreement is paragraph 9(3) which states:

“9. Notwithstanding anything hereinbefore contained, the monies secured hereinunder and all unpaid interest which shall have accrued thereon shall become immediately due and payable and the security hereby created enforceable:

...

(3) if any distress or other form of execution is levied against the property and assets of the mortgagor and any company affiliated to the mortgagor, and

the same is not discharged within seven (7) days
of the same being so levied;”

18. In my view the words in paragraph 9(3) fall short of authorising automatic crystallisation. Suffering distress or other form of execution renders the security enforceable. That means that it entitles the mortgagee to move to give notice that the security has crystallised or to enforce its right by seizing and selling the security. The words do not mean that the security, the floating charge, is thereby automatically crystallised. An example of a provision where a floating charge crystallised automatically on the happening of an event is, **In Re Parmanant Houses (Holdings) Ltd.** The mortgage deed in that case provided at paragraph 6.1 that:

“forthwith upon the occurrence of any of the events of default ...
(b) the security hereby constituted ... shall crystallise and
become immediately enforceable.”

19. In this claim my conclusion is that Provident Bank needed to take some action to attain crystallisation of the floating charge. It did not. There has been no evidence that when Banana Enterprise made a claim Nova Toledo had ceased carrying on business as a going undertaking. There can be no ranking of the claim of Banana Enterprises in a scheme of priority when Nova Toledo is operating as a going undertaking. Banana Enterprises is entitled to collect the proceeds of

the auction sale of the goods attached on 31.3.2008, 13.10.2008 and 2.12.2008.

20. The interpleader claim of Provident Bank and Trust of Belize is dismissed. Provident Bank will pay the costs of the interpleader claim to Banana Enterprises Limited; and Provident Bank may recover the costs paid from Nova Toledo Limited.

21. **Delivered this Thursday the 19th day of May 2011**

At the Supreme Court

Belize City

**SAM LUNGOLE AWICH
Acting Chief Justice
Supreme Court**