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*(subject to editorial corrections)**

Delivered:22/02/13

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION (COMPANIES INSOLVENCY)

_____

IN THE MATTER OF FORTHOUSE DEVELOPMENTS LIMITED (IN ADMINISTRATION)

_____

AND IN THE MATTER OF THE INSOLVENCY (NORTHERN IRELAND) ORDER 1989

_____

BETWEEN:

GREGG STERRITT, AS ADMINISTRATOR OF FORTHOUSE DEVELOPMENTS LIMITED (IN ADMINISTRATION)

Applicant;

-and-

1 - ALLIED IRISH BANKS LIMITED
2-21 MAURA McCARTHY AND OTHERS

HIS HONOUR JUDGE BURGESS

[1] The applicant was appointed as administrator of Forthouse Developments Limited ("the Company") by notice of appointment dated 12 May 2010.

[2] The Company was incorporated as a Special Purpose Vehicle for the purpose of developing an apartment complex in Londonderry called "Conar's Court". The Company's major asset is an apartment block development. The development comprises three blocks of apartments, with a total of 47 apartments spread over four floors.

[3] The site on which the development was constructed is comprised in Folio LY85253 County Londonderry. The Company was registered as owner of that Folio

by Deed dated the 28 September 2006, which was registered in the Land Registry of Northern Ireland on 2 March 2007.

[4] The Company sought funding for the development from the first respondent (the Bank). The Bank sought security from the Company in the form of a Mortgage Debenture over all the assets and undertaking of the Company, and in the form of a Legal Charge of the lands and premises comprised in Folio LY85253 County Londonderry. On 28 September 2006 the Company granted the Bank a Mortgage Debenture ("the Mortgage Debenture") and a Legal Charge ("the Mortgage Charge") over the land and premises comprised in Folio LY85253 County Londonderry. It is a requirement that the Mortgage Debenture and Charge should be registered with the Company's Registry within three weeks of the day of its execution, 28 September 2006. In the event the Mortgage Debenture and the Mortgage Charge were received by the Company's Register for registration on 7 November 2006 – well out of time. An application was then made to the Court by the solicitor acting for both the Company and the Bank, Mr Thomas Doherty, for the time to be extended. Despite the parties up to the time of the hearing making strenuous efforts to obtain them, no original documents grounding that application could be produced. In the event the court made a further enquiry and obtained the original affidavit and Summons. These do not differ from the drafts with which the court had been furnished, and therefore no further submissions are necessary.

[5] By an Order dated 14 December 2006 Master Kelly purported to extend the time for registration of the Mortgage Debenture and the Mortgage Charge. I will set out the terms of that Order below, but no time is mentioned in it, although there is reference in the Order of the Companies Registrar that the date was the 4th January. If so, the relevant form (form 402) in respect of both the Mortgage Debenture and the Mortgage Charge are stamped as having been received by the Company's Registry on 5 January 2007 – again out of time. In the event, notwithstanding that this was out of time, the Registrar of Companies certified the registration of both the Mortgage Debenture and the Charge but showed the date of its effect as 7 November 2006, the original date the papers had been received – out of time.

[6] For completeness the Mortgage Charge and Mortgage Debenture were registered in the Land Registry on 2 March 2007. Therefore a search of the Land Registry before 2 March 2007 would not have disclosed the existence of either the Mortgage Charge or the Mortgage Debenture: and in relation to the Company's Office could not have been ascertained before 5 January 2007 – although on what date it was actually entered on the Register, and therefore amenable to being disclosed to anyone making a Company Office Search, is not known to the court.

[7] It will become apparent when I complete the history of the background to this matter that questions now arise as to the process by which the Mortgage Debenture and the Mortgage Charge came to be registered in the Companies Office Register.

[8] In June 2008 construction of the apartments was finished. The sale of eight of the apartments had been completed and a further 26 apartments were agreed for sale by purchasers who at that time signed unconditional contracts, paid deposits but did not complete. Settlements were reached before the administration in respect of two of these apartments, leaving 24 the subject of this action. The applicant helpfully prepared a table setting out details of the relevant sales which had been agreed and which have not completed or been settled. The table shows the date on which the contract was concluded, the dates on which any holding deposits and the contractual deposits were paid to the Company's solicitor Thomas Doherty. I will return to the individual cases in due course. However I can record at this point that all 24 purchasers have since indicated they do not wish to complete their purchases and the applicant has accepted, on legal advice, that these various contracts cannot now be enforced by the Company. The applicant has also accepted, again on legal advice, that each of the purchasers who entered into a contract has the benefit of an equitable lien potentially securing the return of any deposit, interest, and legal costs incurred. However the applicant argues that any lien is against the individual apartment he or she contracted to purchase, and not against any other property of the Company,

[9] The applicant seeks a number of declarations namely:

(a) Whether the Mortgage Charge is validly executed and is therefore effective;

(b) Whether the Mortgage Charge is void against the applicant or the respondents (other than Bank) pursuant to Section 874 of the Companies Act 2006, previously Article 402 Companies (Northern Ireland) Order 1986:

(c) A declaration as to whether the Mortgage Charge is prior to the equitable liens arising to secure repayment of the deposits paid by the purchasers to the Company:

    (i) where the deposit was paid to the Company before registration of the Mortgage Charge and the contract was concluded before registration of the Mortgage Charge:

    (ii) where the deposit was paid to the Company before registration of the Mortgage Charge, but the contract was not included under after the Mortgage Charge:

    (iii) where the deposit was paid to the Company after registration of the Mortgage Charge and the contract was concluded after registration of the Mortgage Charge.

(d) Whether a purchaser's lien extends only to the apartment he or she contracted to buy, or extends to the entirety of the Company's property.

(e) In the specific circumstances of the 3rd, 4th, 5th and 6th Respondents if the deposits paid are held on trust, or form part of the assets of the Company.

The Validity of the Mortgage Charge and the Mortgage Debenture.

(a) The Mortgage Charge

[10] The Mortgage Charge is shown to be made on 28 September 2006 between Forthouse Developments Limited (which the Deed then provides is to be known as "the Mortgagor") and the Bank. The 'property' the subject of the Deed is described in the Schedule as the lands comprised in LY85253 County Londonderry. The issue which arises in relation to this document is its execution, or purported execution by the Company. For the respondents it is argued that the execution does not conform with the relevant legal requirements, and that therefore this Deed should be considered void as not having been executed by the Company.

[11] In the attestation clause a number of possible forms of execution are set out. Two are in the same wording namely:

'Signed, sealed and delivered by Mortgagor's signature
the above-named

_____
In the presence of:

Witness's signature'

The second clause replicates the above and is included should there be more than one party executing the deed as mortgagor: and

The third place available for execution states:

'The common seal of
_____ Limited
was hereunto affixed pursuant to a Resolution of Board of Directors
dated _____ day of _____ 20
In the presence of

(Director/Secretary)

(Director/Secretary)'.

[12] In respect of the Mortgage Charge the common seal of the Company is not affixed nor are the signatures of anyone in the role of Director/Secretary in either of

the two places shown. Instead in the first form of attestation clause while the name of the Company is not included, under the heading "Mortgagor's signature" are the signatures of two parties who we know to be Directors and/or Secretary of the Company. Those signatures are witnessed by Thomas Doherty, and him alone.

[13] It is argued that this form of attestation on behalf of the Company does not comply with the statutory requirements and therefore the deed should be declared void.

[14] During the course of argument I was referred to the judgment of Deeny J in Santandar UK Plc v Anthony Parker (No. 2) delivered on 6 June 2012. However that case related first to a completion of a document in respect of unregistered land. At paragraph [5] Deeny J stated:

> "It is common case that this is not registered land, so I need not deal with the special rules relating to registered land."

Secondly Deeny J went on to say that the document had been completed on 28 June 1991 long before the passing of the Law Reform (Miscellaneous) (Northern Ireland) Order 2005, a provision which further relaxed the requirements regarding the constitution of what was a deed executed by individuals. The 2005 Order makes no provision in relation to the execution of documents by companies.

[15] The relevant statutory provisions in relation to the execution of documents, and specifically the execution of deeds by companies, are contained in Sections 44 and 46 of the Companies Act 2006. The relevant provisions for the purposes of this matter are:

> "**44. Execution of Documents**
>
> (1) Under the law of .. Northern Ireland a document is executed by a Company –
> (a) … ; or
> (b) By signature in accordance with the following provisions.
> (2) A document is validly executed by a Company if it signed on behalf of the Company –
> (a) By two authorised signatories, or
> (b) By a director of the Company in the presence of a witness who attest the signature.
> (3) The following are 'authorised signatories' for the purpose of sub-section (2) –
> (a) Every director of the Company, and

(b) In the case of a private Company with a secretary or a public Company, the secretary (or any joint secretary) of the Company.

(4) A document signed in accordance with sub-section (2) and expressed, in whatever words (the underlining is mine), to be executed by the Company has the same effect as if executed under the common seal of the Company.

(5) In favour of a purchaser a document is deemed to have been duly executed by a Company if it purported to be signed in accordance with sub-section (2).

A 'purchaser' means a purchaser in good faith for valuable consideration and includes .. a mortgagee.

(6) …

(7) …

(8) …"

Section 46 of the 2006 Act provides:

"**46. Execution of Deeds**

(1) A document is validly executed by a Company as a deed for the purposes of section 1(2)(b) of the Law of Property (Miscellaneous Provisions) Act 1989 (c 34) and for the purposes of the law of Northern Ireland if, and only if—

(a) it is duly executed by the Company, and

(b) it is delivered as a deed.

(2) For the purposes of subsection (1)(b) a document is presumed to be delivered upon its being executed, unless a contrary intention is proved."

[16] "Mortgagor" is defined by the Mortgage Charge as the Company. Under the words 'Mortgagor's signature' in the attestation clause, it was signed by two parties who, although they have not referred to themselves as Director and/or Secretary, are nevertheless known to be the Director and/or Secretary of the Company – and the Bank would have been aware that they were Directors as indeed would be

Mr Doherty acting on its behalf. Under the provisions of Section 44(5) the Bank as mortgagee for considerable consideration could assume the document had been duly executed by the Company if it purports to be signed in accordance with Section 44(2).

[17] For the sake of completeness there is no requirement that the signature of the Director and/or Secretary required to be under seal.

[18] I therefore find that the execution of the Mortgage Charge accords with the relevant statutory provisions.

[19] Turning then to the Mortgage Debenture, this creates a floating Charge over all of the assets of the Company. The copy of this Deed which was furnished is undated, but it is accepted by all parties that it was executed on the same date as the Mortgage Charge, namely 28 September 2006. The court is in some difficulty in that in its copy the second schedule, which refers to 'the property' is blank. However the body of the deed is sufficiently certain in that it charges the assets set out in Clause 3(b), which would include a specific equitable Charge on all future freehold and leasehold property belonging to the company during the continuance of the security, together with a variety of other debts and credit balances. This deed is executed under the heading:

> "Present when the seal of Forthouse Developments Limited was affixed hereto pursuant to a resolution of the Board of Directors in the presence of:-
>
> There here appears the signatures of the Director and Secretary of the Company, and it specifically states their offices in the Company.

Given the quality of the copy Deed furnished to the Court, it has no way to decide whether a seal was affixed in any form. I therefore proceed on the basis that the signature of the Director and Secretary are annexed as representing an execution by the Company. Given that two authorised signatories are included there is no requirement for a witness – see Section 44(2)(a).

I therefore determine that the execution of the Mortgage Debenture complies with the relevant statutory requirements.

[20] An argument was taken as to the delivery of the deed. However the provisions of Section 46 of the 2006 Act make it clear that a document is presumed to be delivered upon its being executed, unless a contrary intention is proved. No evidence was given of such a contrary intention.

[21] Therefore I determine that both the Mortgage Charge and the Mortgage Debenture are valid.

Registrar's Certificate

[22] The relevant sections in relation to the issues arising from the registration of the two deeds of charge with the Registrar of Companies, falling as they do within the provisions of section 860 of the Companies Act 2006, are sections 869, 870, 873 and 874 of the 2006 Act. Section 869 relates to the Register of Charges to be kept by the Registrar. The relevant portions for the purposes of this action are:

> "869 **Register of charges to be kept by registrar**
>
> (1) The Registrar shall keep, with respect to each company, a register of all the charges requiring registration under this Chapter.
>
> ……..
>
> (4) In the case of any other charge created by the company the registrar shall enter in the register the following particulars-
> (a) if it is a charge created by the Company, the date of its creation, and if it is a charge which was existing on property acquired by the company, the date of the acquisition,
> (b) the amount secured by the charge,
> (c) short particulars of property charged, and
> (d) the persons entitled to the charge.
>
> (5) The registrar shall give a certificate of the registration of any charge registered in pursuance of this Chapter, stating the amount secured by the charge.
>
> (6) The certificate –
> (a) shall be signed by the registrar or authenticated by the registrar's official seal, and
> (b) is conclusive evidence that the requirements of this Chapter as to registration have been satisfied.
>
> (4) …"

[23] The relevant provisions of section 870 are:

'870 The period allowed for registration

(1) The period allowed for registration of a charge created by a company is –
(a) 21 days beginning with the day after the day on which the charge is created:

[24] The relevant provisions of section 874 are:

" **Consequence of failure to register charges created by a company**

(1) If a company creates a charge to which section 860 applies, the charge is void (so far as any security on the company's property or undertaking is conferred by it) against
(a) a liquidator of the company,
(b) an administrator of the company, and
(c) a creditor of the company,
unless that section is complied with.

(3) Subsection (1) is without prejudice to any contract or obligation for repayment of the money secured by the charge: and when a charge becomes void under this section, the monies secured by it immediately becomes payable."

[25] The relevant provisions of section 873 are:

" **873** Rectification **of register of charges**

(1) Subsection (2) applies if the court is satisfied –
(a) that the failure to register a charge before the end of the period allowed for registration, or the omission or mis-statement of any particular with respect to any such charge ….
(i) was accidental or due to inadvertence or to some other sufficient cause;
(ii) is not of a nature to prejudice the position of creditors or shareholders of the company, or
(b) that on other grounds it is just and equitable to grant relief.

(2) The court may, on the application of the company or a person interested, and on such terms and conditions as seem to the court just and expedient, order that the

period for registration shall be extended or, as the case may be, that the omission or misstatement shall be rectified."

[26] The history of the Mortgage Charge and Mortgage Debenture and their registration were as follows:

(a) Both documents were completed on 28 September 2006:

(b) In order to comply with the provisions of Article 402, the charges required to registered with the Registrar of Companies on 19 October 2006.

(c) The relevant Form (402) setting out the particulars of a Charge or Mortgage for the purposes of the 2006 Act were signed by a Director of the mortgagor on 5 October 2006.

(d) The documents were not received by the Companies' office until 7 November 2006, and the Registrar refused to accept them.

(e) By letter dated 29 November 2006, Doherty and Company, solicitors acting on behalf of the Bank and the Company, forwarded an Originating Summons supported by an affidavit of Thomas Doherty seeking a court order to enable the registration of the Mortgage Charge and Mortgage Deed to proceed. Implied in that was an application for an extension of time under the provisions of section 873, although not specifically stated. The application was ex parte. The affidavit of Mr Doherty stated that the papers had been duly dispatched on 5 October 2006 but returned unregistered as they were not received by the Registry until 7 November 2006. No mention is made in the affidavit of the fact that in the intervening time Mr Doherty on behalf of the Company had received deposits from a number of solicitors on behalf of purchasers, deposits which would on the applicant's concession have given rise to a form of equitable lien. The Master therefore was not aware of the potential rights of third parties, nor were such third parties put on notice of the existence of the charges or the application by Mr Doherty. No explanation is given for this omission. I will return to this.

(f) On 14 December the Master made an order the form of which tends to suggest that evidence was given by Mr Doherty. The court is not aware of what that evidence was, and Mr Doherty has refused to sign any affidavit or give sworn evidence as to any role that he has played or statements that he has made in relation to this whole matter. In the

event the order which was granted is in a somewhat confusing form. It reads:

> "IT IS ORDERED that the mortgage debenture dated 28 September 2006 and charge dated 28 September 2006 both made between both made between Forthouse Developments Limited having its registered office at William Street, Londonderry (the Respondent herein) of the one part and Applicant of the other part registered at the Companies Office."

(g) No mention is made of the 2006 Act at all let alone any specific section. However I am prepared to accept that juxtaposed with the originating summons it would be for an extension of time. But the Order does not specifically grant any extension of time at all, or in terms which would have set the date by which the Charge could be extended. The provisions of section 873 do not constrain the court as to the length of time to be granted – it could be shorter than the 21 days provided by section 870 but may well be longer, for example where a period such as Christmas intervenes. However we can glean some clue from the Certificates of Registration of the Mortgage Debenture and the Mortgage Charge which refer to the Order of the Master in terms that time for registration was extended to 4 January 2007.

(h) The Form 402 in respect of both of the Mortgage Charge and the Mortgage Debenture, returned in November to Mr Doherty, is now stamped as having been received on 5 January 2007 outside what appears to have been the time given by the Master by the Order of 14 December 2006.

(i) The Certificates were then granted by the Registrar of Companies but are stated to have been given under her hand on 7 November 2006, the date when the original Form 402 and the accompanying documentation were received, out of time, by the Companies Office.

[27] This is an extraordinary sequence of events in relation to the documentation and the registration after the extended time which had been granted, and then the backdating of that document. The fact is that the Mortgage Charge and the Mortgage Debenture would not have appeared on the Register of Companies until on or after 5 January 2007, charges created more than three months earlier, a period of time during which Mr Doherty on behalf of the Company was receiving monies from bona fide purchasers. If nothing else the purpose of registration is provide a warning to persons dealing with the Company that someone is claiming to have a charge on the Company's property – to afford them the right and opportunity to

ensure that their interests are properly protected and that they do not act to their detriment.

[28] As to the application for extension and the form of the Master's Order I will return after I have dealt with the argument on behalf of the respondents that I should look behind the Certificates of Registration. There was a considerable amount of argument as to whether or not the court has power to treat the Certificates of Registration other than as conclusive evidence that the requirements as to registration have been satisfied. The court has looked at this anxiously but has concluded that the Certificate of the Registrar is conclusive evidence that the requirements have been satisfied. In Reg v Registrar, ex p. Central Bank of India [1986] QB 11148 referring to the provisions of Section 98(2) of the Companies Act 1948, which is framed in the same wording as Article 873 of the 2006 Act, Lord Justice Slade stated (at 1178E-F):

> "The essential point in which it will be seen I respectfully differ from the judge is to the relevance, if any, of the error or errors of law made by the Registrar in the course of the registration of this Charge. The judge considered that these areas meant that the Registrar had usurped jurisdiction which he did not have in effecting the registration and that Section 98(2) did not preclude the court from enquiring into such usurpation. My conclusion is a different one. Section 98(2), in my opinion, by itself shows the intention of the legislature that the Registrar is to have jurisdiction finally and conclusively to determine the question whether or not the requirements of Section 95(1) have been complied with in any given case, and that he cannot be said to be acting beyond his powers even if he made an honest error of fact or of law or mixed fact and law in the course of determining this question."

And at page 1176 Lord Justice Slade also stated:

> ".. the legislature, in enacting Section 98(2), has, in my opinion, evinced a clear intention that no one (except the Attorney General: see below) should be entitled to adduce evidence for the purpose of attacking the correctness of the Registrar's answer, once it has been incorporated in a Section 98 Certificate.
>
> In the face of the 'conclusive evidence' provisions of Section 98(2), I driven to the conclusion … that

> Sections 95 and 98 on their true construction confer upon the registrar the power to decide finally and conclusively *all* ancillary questions, whether they be questions of fact or law, or mixed fact and law, which fall to be decided in determining whether the requirements of Part III of the Act as to registration have been complied with in any given case. Even the clearest evidence that he had come to a wrong conclusion in answering any of the questions would not entitle anyone (except the Attorney General: see below) to claim that he acted beyond his powers, since Section 98(2) would preclude the court from considering such evidence."

And at page 1177A he further states:

> "If these conclusions are correct, it must follow that, even if the Registrar erroneously registers the Charge which should not have been registered and gives a consequent Section 98 Certificate, such error may be incapable of correction. However, lest it be thought that this position may give rise to undue hardship or injustice, I would draw attention to two points. The first is the limited nature of the effect of a registration and a consequent Section 98 Certificate. It does *not* operate to confer validity on a charge which is invalid for reasons other than lack of registration. All it does is to give a chargee who has a valid charge protection against the statutory invalidation of that Charge against the liquidator and creditors of the Company which would occur by virtue of Section 95(1), if the Company were to go into liquidation and the Charge were unregistered. As soon as a charge has in fact been registered, whether or not correctly, persons considering advancing money to the Company will have notice of its existence and can make further enquiries if they wish. Even if a Charge has been incorrectly registered (for example because the prescribed particulars were delivered out of time) I think there are likely to be very few, if any, creditors who could, on the subsequent liquidation of the Company, show they had suffered any substantial injustice as a result of this erroneous registration. The legislature, no doubt, had in mind a limited effect of a

> registration in providing for his certificate to be conclusive."

And later on page 1177E:

> "Two special cases may arise on which I wish to express no concluded opinion in this present judgment, because it is not necessary to do so. … The second special situation might arise where the certificate had been obtained by fraud. Even in that case a direct attack on the certificate would, at least prima facie, be ruled out by Section 98(2) (see In Re Eric Holmes (Property) Limited [1962] Ch. 1052, 1072 (*per* Pennycuick J) although it might well be that the court would act in personam against the fraudulent party so as to prevent him taking advantage of the fraudulently obtained certificate (see, for example, Lazarus Estates Limited v Beasley [1956] 1 QB 702): and furthermore, a creditor personally damaged by the fraud might be able to take proceedings for damages: see In Re C.L. Nye Limited [1971] Ch. 442, 474 per Russell LJ.
>
> Leaving aside these two special cases however my conclusion is that on an application for judicial review by any person other than the Attorney General, the court is precluded by Section 98(2) from going into the question whether or not the requirements of Part III of the Act have in fact been complied with in connection with a particular application for registration of a charge, once the registrar has given his certificate. I see no room for limiting the effect of Section 98(2) by a process of implication which would exclude from its ambit proceedings by way of judicial review in cases where the certificate has been given under an error of law. Without such implication, I do not see how the judge's conclusions can be sustained."

[29] For the reasons given I accept that the Certificates in this matter are conclusive as complying with the provisions of the 2006 Act. I am reinforced in that conclusion by the fact that section 873 while permitting rectification of the register or an extension of time in which to register, makes no provision for the removal of a charge from the register.

[30] I therefore conclude that for the purposes of the Companies Act the Mortgage Debenture and the Mortgage Charge are duly registered by the decision of the registrar which is conclusive.

[31] I therefore turn to the next question, the issue of priorities as between the charges in favour of the Bank and the equitable liens of the purchasers. I will deal first with the general principles relevant to this issue, and then address the individual respondents.

[32] As regards the general principles I am aided greatly by the submissions on behalf of the applicant who addresses various scenarios involving registered, registerable, unregistered and unregisterable charges at paragraphs [19]-[24] of his skeleton argument. I am grateful to Mr W Gowdy BL for his endeavours. I am also grateful to Mr Michael Egan BL on behalf of the majority of the respondents who in his argument accepts Mr Gowdy's conclusions in these paragraphs. Mr David Dunlop BL on behalf of the Bank acknowledges the concept of the equitable lien by reason of payment of a deposit, but argued that the liens do not have any priority in any circumstances over the Bank's charges. There are four other purchasers whose positions in terms of priority is somewhat different to the majority, but I will deal with those on an individual basis.

The Master's Order

[33] I have already made reference to the application made by Mr Doherty on behalf of the Company and Bank and the affidavit which grounded it. I referred to the fact that despite the fact that he had been receiving deposits creating equitable liens through the months of the September, October and November and indeed up to the date of the Order of 14 December, he made no such disclosure to the Master. If he had done so it would have been open to the Master to take two steps:

- The first to insist that the matter proceed on an inter partes basis; and/or
- It would have been open to the Master to include in her Order two provisions addressing potential rights of third parties:

(a) The inclusion of a term in a form commonly known as Re Charles Limited [1935] WN 15. This provides for the rights of a company or any unsecured creditor to be addressed in two ways namely:

> "It is ordered that the Company or the administrators or any unsecured creditors of the Company be at liberty to apply to discharge this order within 14 days of this order."

And a proviso in terms:

> "In case the company or administrators or any unsecured creditor shall within 14 days of this order apply to this court to discharge this order the Claimant will submit to the jurisdiction of this Court and will abide by any order that the court may make in the case of the discharge of this present order for rectification of the Register of Charges of the Company kept by the Registrar of Company by the removal therefrom of any registration affected by this present order."

If the Order of the Master were then sent to the Companies Registrar he or she would refrain from issuing a certificate unless and until it became clear that the extension of time was not going to be revoked by reason of any application by the Company, an administrator or unsecured creditors.

(b) A second term, again often included, particularly when no other parties are on notice, would be in terms that:

> "This order is without prejudice to the rights of any person acquired between the date of the creation of the legal Charge and the date of its actual registration."

[34] By any of these means the rights of others are protected by providing a mechanism allowing for such persons to make representations as to why an extension of time should not be permitted; or reserving their rights. While it was possible for the Order to have included these terms even in the absence of specific information about the existence of any such other parties, nevertheless where the person making that application knows of potential rights of others which potentially would be made subservient to the applicant if the order of the court were to be granted, it is at best unfortunate and at worst a deliberate attempt to mislead the court and thereby put the priority of the chargee in this case above that of potential purchasers, who in good faith and without notice had sent substantial sums of money to the agent of the chargee. The court can find no reason whatsoever as to why Mr Doherty did not make the position clear to the Master other than he was seeking to protect his client's interests without any regard to the rights of others.

[35] In Munster and Leinster Bank Limited v McGlashan [1937] I.R. 525, Meredith J stated:

> "… Equity recognises a lien on the lands in favour of the vendor to secure the unfilled obligation of the

> purchaser, which in equity is of course binding on a third party with notice. This lien is bestowed by equity for the protection of vendors – as in the converse case for the protection of purchasers, who have paid the purchase money but not obtained the conveyance – quite independently, as is well settled, of any contract between the parties. That is only reasonable, because the typical cases are those where the obligations on one side or the other are prematurely performed … and subsequently where what gives rise to the lien was from the nature of the case not in contemplation."

This therefore bestows the same binding quality in respect of a purchaser's lien as it affects a third party with notice of its existence.

[36] Mr Thomas Doherty was, as I have now said on a number of occasions, fully aware not just of the receipt of numerous cheques received by him for deposits before he applied to and appeared before the Master seeking an extension of time, but had negotiated them before application. The amount of the deposit paid under the contract specifically refers to it including credit being given for any holding deposits, which therefore became part of the deposit paid under the contract. It is also possible for me to go further. Mr Doherty received numerous contracts from purchasers' solicitors with those deposits long before he appeared before the Master. However any analysis of those contracts disclose that despite negotiating the cheques sent with the contracts in respect of deposits, the contracts themselves were not dated until in and around either 10 or 12 January 2007, immediately after the registration of the bank's charges by the company's registrar. I believe that this was a conscious action on the part of Mr Doherty.

[37] This latter conclusion has three ramifications:

(a) That the bank, acting through its agent, cannot in equity claim that it was unaware of these contracts and these payments:

(b) In his reasoned argument Mr Gowdy represents that the lien comes into existence when a contract is completed. He will, I hope, forgive me not addressing his comprehensive arguments, but in this case, where there has been in my opinion a deliberate manipulation of the signing and acceptance of contract process, to the detriment of the purchasers, I must instead address this on two bases one of which is grounded in the concept of "when the equities are equal, the first in time prevails". I am satisfied on this ground alone that I should determine:

- The creation of the lien should be on the date either of the receipt of the cheque for the deposit or certainly at the latest, the date of it being negotiated:
- That in such cases the deposit includes the holding deposit:
- That the bank were on notice of that lien before any order was made by the Master extending time for the registration of the charges in the Companies Office, which resulted in the establishment of the validity of those charges.

(c) I referred earlier to the comments of Slade LJ as to the possibility of setting aside a registration of a certificate were that registration was based on fraud. While I am highly critical of Mr Doherty in this matter I do not believe that the grounds exist for me to consider that he acted fraudulently. However his actions and omissions were unconscionable and partial in favour of his client to the detriment of the purchasers whose cheques he had negotiated. The court is entitled to consider whether or not there is a breach of natural justice where a chargee through its duly authorised agent fails to disclose facts which might have led to the registrar not registering either charge (or in this case to allow the Master to afford protection to the respondents to prevent an extension of time being granted and therefore to the charges being registered). In The Queen v The Registrar ex parte Central Bank of India at page 1170C Layton LJ stated:

> "As to the breach of natural justice … if a chargee fails to disclose facts which might have led to the registrar not to register a charge, he may find in a dispute with an unsecured creditor that he is estopped from relying on the charge."

The obverse is the case where a person entitled to a Charge over an interest in property has, knowingly or unknowingly, allowed or encouraged a subsequent encumbrancer to assume to his detriment that his security has priority. In those circumstances that person may be estopped from asserting priority if it would be unconscionable to do so – see Taylor's Fashions Limited v Liverpool Victoria Trustees Limited [1982] QB 133N at 151-152:

> "This is in accordance with the doctrine of estoppel by representation, recognised both at law and in equity, namely, that where one by one's words or conduct causes another to believe the existence of certain state of things, and induces him to act on that belief, and the

> latter in so doing alters his own position, the former cannot aver against him the existence of a different state of things."

[38] I determine as follows:

(i) That where contracts were returned to Mr Doherty with a cheque for the deposit, then the date for the creation of the equitable lien is the date on which that cheque was negotiated:

(ii) If in those circumstances a holding deposit had been paid, that holding deposit became part of the deposit under the contract and therefore has also the benefit of the equitable lien as at the date of the negotiation of this latter cheque.

These rulings determine the rights of purchasers referred to in paragraph [4](C), (a) and (d) set out in Mr Gowdy BL's skeleton argument since deposits were paid and negotiated before the registration of the charges – whether the contract had been accepted or not. I believe it also determines the position as to those cases based on trust in terms of priority. As to the extent of the liens I will deal with this in paragraph [39] below.

(iii) Where a deposit was paid after the registration of the charge, the charge takes priority since it was registered. In such circumstances the lien did not arise until after the registration of the charge. An open Companies Office search, or an open Land Registry search by a purchaser's solicitor would have disclosed that registration and left it open to the purchaser's solicitor to take protective measures for their client(s). It is established that a holding deposit does not attract the benefit of the concept of an equitable lien.

(iv) Some of the contracts that I have considered were conditional on the obtaining of a mortgage. It may be that over and above the rights to priority under sub-clauses (i) and (ii) above a purchaser has an additional right to the return of the deposit. None of the files produced to me have furnished me with details relating to this aspect of the case and I have not addressed it. It is included in this ruling for the purpose of reserving those purchaser's rights if it is ever required at a future stage.

Extent of lien

[39] There is agreement between all of the parties as to the extent of the lien. This is set out in paragraph [30] of Mr Gowdy BL's skeleton argument in the following terms, and I agree with them:

> "[30] It is submitted that a purchaser's lien arises on foot of a contract for the purchase of land, the lien ought, as a matter of logic, to extend only to the land agreed to be sold. Support for this proposition is found in Re Barratt Apartments Limited [1985] IR 350, 357 and Halsburys Laws of England Volume 68 Lien at paragraph 864:
>
> > 'A purchaser of land who has paid a deposit or money on account of the purchase price to the vendor and has then lawfully repudiated his contract has, in addition to a legal lien on any title deeds in his possession, an equitable lien on the vendor's interest in the land agreed to be sold for all sums paid by him under the contract on account of the purchase money, together with interest on it. The lien extends to interest paid on the unpaid balance of the purchase money and to the costs of a claim for specific performance. It also extends to the purchaser's costs of investigating title where a good title is shown to the property contracted to be sold, including the costs of an application to the court in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract'."

[40] This I believe leaves the fifth and sixth respondents in a separate, although I believe an additional basis from the other respondents who have been purchasers of apartments. This is helpfully set out in a skeleton argument on their behalf from Mr Martin McDonnell and I simply record that these respondents should be paid in accordance with the terms of the order of this court dated 12 May 2010.

Conclusion

[41] For the reasons stated above where I have determined that the equitable lien in respect of a particular purchase has priority over the charge, the applicant should pay the proceeds of sale of any apartment first to discharge that lien and thereafter towards the charge. To the extent that the court has determined that the equitable lien does not have priority over the charge and then subject to the payments above referred to the applicant should distribute the proceeds of sale in accordance with his circular letter of 21 October 2010 (Tab 8 of Exhibit GS1).

[42] Finally no representations have been made yet in relation to the question of costs. The court will fix a date for submissions to be made in the context of the rulings herein contained, but at this stage refers to the extent of a lien as set out in paragraph [39] above.