THE HIGH COURT

LAND REGISTRY

[2011 No. 3 CT]

IN THE MATTER OF AN APPEAL UNDER SECTION 19(1) OF THE REGISTRATION OF TITLE ACT 1964, AND

IN THE MATTER OF FOLIO 17018L OF THE REGISTER OF FREEHOLDERS OF COUNTY OF CORK (REGISTERED OWNER KILQUAIN LIMITED)

BETWEEN

ANGLO IRISH BANK CORPORATION LIMITED

APPLICANT

AND

KILQUANE LIMITED

FIRST NAMED RESPONDENT

AND

THE PROPERTY REGISTRATION AUTHORITY

SECOND NAMED RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 11th day of March, 2013

1. This judgment relates to an appeal under s. 19(1) of the Registration of Title Act 1964, appealing the decision of the Property Registration Authority dated 29th October, 2010, which refused to register the applicant as the owner of a charge on Folio 17018L, County of Cork. The charge arose under a Deed of Mortgage and charge ("The Mortgage") executed by the first named respondent on 16th December, 2004. The mortgage is more particularly described in the legal submissions filed in support of the appeal under the heading of "Background to the Proceedings". The applicant claims to be entitled to registered in respect of the charge by reason of the provisions of the mortgage to charge not only property currently owned by the first named respondent, but also after acquired property. The lands comprised in Folio 17018L were not owned by the first named respondent at the date of said mortgage, but were acquired subsequently. These lands were, therefore, "after acquired property" under the terms of the mortgage.

2. The formal order (in its operative part dated 29th October, 2010), of the deputy registrar, an officer duly authorised under s. 22(7) of the Registration of Deeds and Title Act 2006, provides as follows:-

> "**READINGS**
>
> ON READING the application instrument No. D20006CK001975W Deed of Charge dated 16th December, 2004, made between the mortgagor and the bank and Folio No. 17018L County of Cork AND APPEARING THEREFROM that the mortgagor acquired the property by virtue of lease dated 12th April, 2005, FURTHER that the mortgagor had no interest in the property at the date of execution of the mortgage, IT FURTHER APPEARS that the provision of section 62(1) of the Act or, in the alternative, section 90 of the Act, have not been satisfied.
>
> **ORDER**
>
> IT IS HEREBY ORDERED THAT the application be refused on the grounds that the mortgagor was neither the registered owner nor entitled to be registered as owner of the Folio at the date of the execution of the mortgage, and the interest, if any, of the bank is not the subject of registration under the Act."

The Appeal

3. The relief sought in a notice of motion is set out in full below:-

> "1. An order annulling the decision of the Registrar of Titles made on 29th day of October, 2010.
>
> 2. An order directing the second named respondent to register a charge by the applicant on Folio 17018L of the Register of Freeholders County of Cork.
>
> 3. Such further or other order or relief.
>
> 4. Costs.

The Submissions

The grounding affidavit and replying affidavit are overshadowed by the excellent submissions prepared on behalf of the parties, the appellants and the second named respondent. The following is a summary of the appellant/applicant's submissions prepared by Mr. Eoin Clifford Junior Counsel, and Mr. James Dwyer Senior Counsel, respectively.

> *"1. These legal submissions are filed in support of an application for the annulling the decision of the Registrar of Titles made on the 29th of October, 2010 and an Order directing the Second Named Respondent to register a charge by the Applicant on Folio 17018L of the Register of Freeholders of County Cork.*

BACKGROUND TO THE PROCEEDINGS

2.(a) The Applicant agreed to advance to Kilquane Limited (hereinafter "the Company") the sum of €77,250,000 to enable the Company to fund a Development comprising a hotel, office and retain units and a car park at Lapps Quay, Cork. A facility letter issued on the 26th August 2004, same was accepted, and ultimately a Deed of Mortgage and Charge ("the Mortgage") was executed by the Company on the 16th December 2004, which Mortgage was intended to operate a valid Charge over, inter alia, all of the lands and premises at Lapps Quay comprising the Development.

(b) The Mortgage included the following provisions at Clause 4.2 and 5 respectively.

> *"The Mortgagor as beneficial owner hereby charges by way of first fixed charge to and in favour of the Lender with the payment of all the Secured Liabilities all other lands, hereditaments and premises of any nature or kind and of any tenure and of whatsoever estate, right or interest therein (including any superior or other estate or interest in the lands, hereditaments and tenements referred to in Clause 4.1) which the Mortgagor may at any time hereafter acquire or become entitled to and assents to the registration of such charge as a burden on such property as is land registered under the Registration of Title Acts and to the registration of the Lender as owner of such charge and to the delivery of the land certificate(s) of such property to the Lender."*
>
> *"If and whenever the Mortgagor shall acquire after the date of this Deed any freehold leasehold or other immovable property or any interest therein (including any superior or other estate or interest in the Mortgaged Properties referred to in Clauses 4.1 or 4.2) the Mortgagor shall forthwith inform the Lender in writing of the acquisition and shall deliver to the Lender the deeds and documents in its possession relating to the property so acquired and the Mortgagor shall if so required by the Lender at the Mortgagor's own expense execute and deliver such documents and do all such acts and deeds as shall be necessary to, grant to the Lender a specific charge on such property in such form as the Lender shall require as further security for the Secured Liabilities, such security being in addition to and not in substitution for the security created by this Deed." (emphasis added)*

(c) Subsequent to the execution of the Mortgage, the applicant became aware that the Company had acquired by lease dated the 12th of April, 2005 from Cork City Council a separate portion of ground comprising a small portion of the development at Lapps Quay. The Applicant has sought to have its interest in this property registered with the Second Named Respondent on the basis of the provisions of the said Mortgage but the Second Named Respondent has refused to register the charge on the basis that the Applicant was neither the registered owner, nor entitled to be the registered owner of Folio 17018L at the date of execution of the Mortgage dated the 16th of December, 2004.

THE NATURE OF THE INTEREST OVER AFTER ACQUIRED PROPERTY CREATED BY THE 2004 MORTGAGE

3(a) In Moorview Developments Limited & Ors. -v- First Active plc & Ors' one of the issues before the Court was whether a debenture over future acquired property created a fixed or floating charge. The relevant charge and clause of the debenture provided as follows:

> *"4.1.6. CHARGES unto the bank by way of first fixed charge, all other freehold, leasehold and other removable property now or at any time hereafter belonging to or for any estate or interest vested in the company...."*

(b) The Court had to consider to what extent the debenture captured after acquired property. The argument made by the bank with reference to Clause 3 4.1.6. was that the borrower had charged in favour of the Bank any immovable property which it might subsequently acquire and that such charge was a fixed charge. Clarke J. went on to analyse the issue as follows:

> *"'1. A starting point for the resolution of that dispute requires me to note that the creation of charges by companies over their assets in favour of lending institutions is fundamentally a matter of contract. The extent and nature of the charge depends on what the parties agree. The reason why it is appropriate to categorise charges as fixed or floating is that the use of those terms carry with them a significant number of characteristics. However that is mot to say that there is any necessary legal consequence from the use of the term fixed charge or floating charge. Both are creatures of the document creating them. The document as a whole must be construed to determine the nature of the charge created"*

(c) After taking the view that the use of the terms "fixed and floating" in respect of charges gives a strong indication of the nature of the charge which the parties wish to put in place. Clarke J. decided the issue on the following basis:

> *"1. I am not, therefore, satisfied that there is any legitimate basis for regarding clause 4.1.6 as doing anything other than it purports to do, that is to say that it creates a first fixed charge on all after acquired immovable property. There is no limitation on the scope of after acquired property covered by the relevant charge. Therefore, provided that Salthill can be said to have acquired property which is freehold, leasehold or "other immovable" at any time after the execution of a relevant debenture, then it seems to me dear that clause 4.1.6 creates a first fixed charge on that property* ***with immediate effect'*** *(emphasis added)*

4(a) It is respectfully submitted therefore that the Moorview decision is clear authority for the proposition that a mortgagee can create a fixed charge over future acquired property. It follows from the above that a charge arises with immediate effect once the relevant acquired property is acquired by the Mortgagor.

(b) The Second Named Respondent has contended, in its Replying Affidavits, that "…no charge, legal or equitable, can be created other than a floating charge." It is respectfully submitted that Moorview is clear authority against the above legal proposition. It is important, in this context, to consider the nature of a charge. A charge does not involve the transfer of ownership of the asset and, in the case of registered land in Ireland, a security interest is created by a charge and not by a Mortgage, which effectively conveys or sub-demises land. A charge is a form of security and its nature was described by Atkin LJ in National Provincial & Union Bank of England -V- Chammley

"Where a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt and that creditor shall have a present right to have it made available, that is a charge.

Barron J. in Re Clare Textiles Ltd made the following observation:

"There is nothing special about the term 'charge'. It relates to a contract under the terms of which certain property is available as security to meet the performance of a liability, usually the payment of money.

(c) A charge then is an agreement that the creditor may look to an asset and its proceeds to secure and possibly to discharge indebtedness. An agreement to create a mortgage is a charge in this general sense and this agreement creates an equitable charge. As Breslin states at paragraph 9.19 of his Bankinq Law "strictly speaking an equitable mortgage is an agreement to transfer title by way of mortgage". In Holroyd -V- Marshall Lord Chelmsford said that, immediately upon the assets covered by the mortgage being acquired by the borrower, the lender will have the right to specific performance of the security contract and thereby acquires an equitable proprietary interest in the asset. McCracken J. followed this analysis in Re Valley Ice-cream (Ireland) Ltd. in liquidations. In Bank of Ireland Finance v. Daly, the High Court confirmed the proposition and said that an agreement in writing by which property is to be secured creates an equitable charge. Clearly, however, where there is already in place a charge of future acquired property the charge takes effect without the need for a further Deed when the property is acquired.

6. It is difficult, in the circumstances, to understand how the Second Named Respondent can maintain that a floating charge might have been created over future acquired property. The classic definition of a floating charge is that given by Lord MacNaghten in lllingworth -v- Houldsworthe:

"A specific charge, 1 think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined: a floating charge, on the other hand, is ambulatory and shifting in 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 and grasp."

It is difficult in the circumstances to understand how it could ever be said that the Bank's interest over the future acquired property was effectively floating over it until it was acquired by the Company rather than the usual circumstances of crystallisation, such as the appointment of a Receiver or the winding up of the Company.

7. The Second Named Respondent indicated, in the earlier correspondence dated the 21st of October, 2010, that Clause 5 of the Mortgage clearly qualified Clause 4.2. It is respectfully submitted that a close examination of Clause 4.2 and Clause 5 reveals that this theory is patently incorrect. It is respectfully submitted that the clear wording of Clause 5 suggests that at the option of the lender, the mortgagor might execute further deeds as it should require and, clearly, this is supported by the final part of Clause 5 which provides that: "… such security being in addition to and not in substitution for the security created by this Deed." It is therefore respectfully submitted that the presence of Clause 5 in the Deed cannot invalidate the fact that, under Clause 4.2, the lender obtained a fixed charge over the leased property with immediate effect when the lease was entered into by the Mortgagor.

8. It is respectfully submitted that the issue raised by the Second Named Respondent concerning the registration of the Mortgage in the Companies Registration Office can have no impact on the question of the registration of this mortgage over the said folio. Clearly the Applicant was not in a position to identify the lease acquired in 2005 at the time it registered the 2004 mortgage in the Companies Office. Therefore it is difficult to understand what could possibly turn, in respect of this application, on the fact that there was no reference to "unascertained property which might be acquired in the future" on the C1 registered with the Companies Office. Even aside from the above, it is respectfully submitted that it cannot be the case that any default by the Applicant with respect to such registration (even if it was to be conceded that there was such default) could have an impact on the issue of what legal interest was created pursuant to the said mortgage when the lease was acquired by the Company

9(a) The argument advanced that the registration of a charge over future acquired property once the same is acquired would run contrary to the principles and policies of registration under the Registration of Title Act 1964, even if this was in fact a valid argument, is wrong. The charge although created cannot affect the property until the same is acquired and even then will only affect same once it has been registered, see Section 74.

(b) There can be no difference in principle between a charge created over land that is already owned and land that might be acquired in the future where the charge in question cannot affect the land until such time as the same is registered as a burden on the folio, as in that sense the date of the creation of the charge is irrelevant.

(c) There is no principle in law which says that an individual cannot charge land which he or she does not yet own, indeed such is the intended effect of many Deeds of Mortgage and Charge, the same in practical terms has no effect until the property is acquired and in the case of registered land same does not take effect until same is registered as a burden on the lands.

10. It is respectfully submitted the Second Named Respondent erred in refusing to register the charge by the Applicant.

4. The following is the submissions made on behalf of the second named respondent by Mr. Micheal O'Connell Junior Counsel.

RESPONDENTS SUBMISSIONS

11. These written legal submissions are filed on behalf of the Second-named Respondent, the Property Registration Authority, in opposition to the Applicant's appeal against the decision of the Authority made on 29 October 2010, and more specifically in response to the outline legal submissions filed on behalf of the Applicant on 15 June 2011.

The issue

12. Although the concepts are somewhat involved, the issue in this case is a very simple one: does a charge by a person over future acquired and unidentified property create a charge over land subsequently acquired which is capable of registration in the Land Register without the need for any further assurance?

13. It is submitted that the emphasised words above mark the central issue in this case, and that by focusing on other distinctions, the Applicant has lost sight of this issue.

Summary of the Second Named Respondent's position

14. The position of the Property Registration Authority may be summed up in the following propositions, which will be expanded upon in greater detail below:

(a) The distinction between what is registrable and what is not registrable in the Land Registry turns on the distinction between legal charges and equitable charges, not on the distinction between fixed and floating charges.

(b) The Registrar of Companies recognises both legal and equitable charges, so the distinction is irrelevant so far as the Companies' Register is concerned.

(c) Equitable rights are not registrable in the Land Registry. Therefore, while legal charges over land are recognised by the Property Registration Authority and are registrable in the Land Registry, equitable mortgages or charges are not registrable.

(d) There is no such thing as a legal mortgage over future unascertained property (real or personal). Likewise, there is no such thing as a legal charge over future unascertained property (real or personal).

(e) The Applicant has established as a proposition of law that a charge can be created over future unascertained property (real or personal).

(f) The Applicant's case plainly admits that such charges are equitable in nature.

(g) The Applicant contends that the charge created here is a fixed and not a floating charge. That point is conceded by the Authority, though it is not material to the question of registrability: an equitable fixed charge is no more registrable than an equitable floating charge.

(h) In this case, we have a charge over future unascertained property, real and personal. As such, it is effective in equity only, not at law. It follows that it is not a legal charge. Thus, it follows that it is not registrable.

The principles and policies of a land registration system

15. The concept of registration of titles based on a map system was introduced in 1891 with the intention of introducing certainty to the question of land ownership. Per Madden J in Re Keogh [1896]1 IR 285 (at 294):

"That Act [the 1891 Act] was designed to relieve the smaller holders in fee from the ruinous expense of a system of Land Transfer and Registry of Assurances, developed under circumstances, and suitable to conditions, widely different from those of a peasant proprietary. But it was also intended to remedy a mischief of a different character. Public money, to a large and increasing extent, has been advanced on the security of holdings, and it became a matter of public and financial importance that the title to those holdings should be kept clear from doubt or complication. "

16. The conclusiveness of the Register is central to this policy. A member of the public or a person interested in some aspect of a registered title is put in a position to search against the ownership of land either on the Register or in the statutory maps (now a digital map) and to be able to rely on the maps and statements of fact therein. Subject to express exceptions, those maps and statements of fact are conclusive and guaranteed by the State. Section 31(1) provides:

"The register shall be conclusive evidence of the title of the owner to the land as appearing on the register and of any right, privilege, appurtenance or burden as appearing thereon; and such title shall not, in the absence of actual fraud, be in any way affected in consequence of such owner having notice of any deed, document, or matter relating to the land; but nothing in this Act shall interfere with the jurisdiction of any court of competent jurisdiction based on the ground of actual fraud or mistake, and the court may upon such ground make an order directing the register to be rectified in such manner and on such terms as it thinks just."

17. In a similar vein, sections 37, 44, 52 and 55 of the 1964 Act detail the effect of first registration and registration on foot of a Transfer. Subject to the exceptions expressly reserved in those sections, the title vests in the new owner "free from all other rights, including rights of the State."

18. The exceptions to the conclusiveness of the register are express. Most commonly arising in practice are the "section 72 burdens" which require attention in every purchase of land. Those burdens are not relevant to these proceedings. In addition, it was the case at one time that a deposit of the original Land Certificate would create an equitable charge that held its priority without registration: see section 105(5) of the 1964 Act. As such, the original Land Certificate was an essential closing document in a sale of registered land. But Land Certificates are no longer issued and section 105 of the 1964 Act is repealed (see section 73, Registration of Deeds and Title Act 2006).

19. Fundamental to the achievement of conclusiveness and certainty is the notion of keeping equity off registered titles.

As Glover (Registration of Ownership of Land in Ireland (Dublin, 1933) puts it (at p. 14):

> *"The register shows the person who is in fact the owner. How that person got on the register is no business of the purchaser; whether the registered owner holds the land subject to a trust is no concern of his; the register is the bridge that transports him safely across the morass of trust and equities through which the purchaser of unregistered land must struggle at his peril; for they do not affect the land; and on being registered as owner, his ownership is subject only to the registered burdens, and such of the special and limited class of burdens that affect registered land without registration as in fact exist over the land he acquires. "*

20. Section 92 of the 1964 Act provides:

> *"(1) Subject to the provisions of this Act, notice of a trust shall not be entered in the Register.*
>
> *(2) None of the following shall by, reason merely, of the receipt by the Registrar of an instrument relating to land for the purpose of a registration, be affected by notice of any trust contained in or arising out of matters contained in such instrument: (a) [The Authority];*
>
> > *(b) A registered transferee for valuable consideration of the land;*
> >
> > *(c) A registered owner of a charge created for valuable consideration on the lands;*
> >
> > *(d) A person claiming an interest created for valuable consideration in a registered burden on the land.*
>
> *(3) In this section "trust" includes express, implied and constructive trusts."*

21. The foregoing is not to say that equitable interests (including equitable charges) cannot be created over registered land. They can; however, they are not recognised by the Land Registry, and the rights of the charge or other beneficiary must gain recognition in a court of equity before they can affect the rights of the registered owner. The chargee can protect himself against wrongdoing by the registered owner by registering a caution, an inhibition or a lis pendens on the Folio: however such registration merely puts in place a mechanism by which the chargee is put on notice of any attempts to override his interest. It does not amount to any recognition of that interest (or, in the case of a lis pendens, of the merits of any action being taken).

22. In summary, equitable estates or interests are and have always been deliberately kept off the register. Such interests, which include equitable mortgages and charges, are incapable of registration. The Property Registration Authority deals with perfected transactions, on foot of recognised instruments, and not equitable interests arising out of the complete or imperfect transaction

23. In contrast, legal charges are registrable: see section 62 and 69(1)(b) of the 1964 Act.

What is necessary to create a legal charge?

24. Charges are governed by section 62 of the 1964 Act. Section 62(1)-(7) (as amended by the Land and Conveyancing Law Reform Act 2009) provides as follows:

> *"62.-(1) A registered owner of land may, subject to the provisions of this Act, charge the land with the payment of money either with or without interest, and either by way of annuity or otherwise, and the owner of the charge shall be registered as such.*
>
> *(2) There shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form but, until the owner of the charge is registered as such, the instrument shall not confer on the owner of the charge any interest in the land.*
>
> *(3) Any power, howsoever conferred, to borrow or lend money on the security of a mortgage shall be construed as including power to do so on the security of a registered charge.*
>
> *(4) On registration of the owner of a charge on land for the repayment of any principal sum of money with or without interest, the instrument of charge shall operate as a legal mortgage under Part 10 of the Land and Conveyancing Law Reform Act 2009 and the registered owner of the charge shall, for the purpose of enforcing his charge, have all the rights and powers of a mortgagee under such a mortgage including the power to sell the estate or interest which is subject to the charge.*

25. It is plain from the foregoing provisions that a charge over registered land is a different thing from a charge as understood by a court of equity, and it is submitted that the Applicant's failure to appreciate this is its central error giving rise to these proceedings. A charge over registered land is a creature of statute. It is the only form of charge that gives the chargee an entitlement to seek an order for possession in a summary manner. It is deemed to have the effect of a legal mortgage, although unlike a mortgage, legal title to the land remains with the owner. A charge over registered land is therefore unique, and that is confirmed by the words in sub-section (1): "A registered owner of land may, subject to the provisions of this Act, charge the land... "

26. Most important, for present purposes, is sub-section (2) which provides that "there shall be executed on the creation of a charge, otherwise than by will, an instrument of charge in the prescribed form. Forms are indeed prescribed in the Land Registration Rules 1972 to 2009. Rule 113(l) provides:

"A charge for the payment of money, and a transfer and release thereof, shall be made by instruments in such one of Forms 67 to 72 as may be applicable."

27. The forms in question are attached as Appendix I to these submissions. It will be seen that every one of them requires the "heading as in Form 11 ". Form 11 requires the Folio in question to be identified. Likewise, it will be seen that the body text of each of the forms requires a description of the property, identified by its Folio number.

28. It is well to note that these requirements are no great digression from what is required by the creation of a legal mortgage in relation to unregistered land. A legal mortgage of unregistered land must contain a description of the land: no bank would ever advance monies based on a deed of mortgage that simply referred to "all the borrower's land", even if they had the comfort of knowing that the borrower indeed was possessed of a lot of it.

29. We know that in this case the 2004 Mortgage contains no reference to Folio 17018L of the Register County Cork. Therefore, in order to be registrable, the instrument must be in such other form as may appear to the Authority to be sufficient. The first thing to bear in mind is that the Act recognises the expertise of the Authority and imports a degree of defence to the opinion of the Authority. But more importantly, it is plainly stated and restated in the sub-section that the instrument itself must charge or reserve the payment of the secured money out of the land. This 2004 Mortgage does nothing of the kind. It does not refer to "the land" at all.

30. A legal mortgage of future property, not identified in the mortgage document, is an impossibility. This is clearly put by Mr Breslin, in the same section of his work [Banking Law (2nd Ed.)] cited by the Applicants:

> *"A legal mortgage can only take place if the mortgaged assets are identified in the mortgage document and the mortgagor owned them when he executed the document. Accordingly, an anticipatory legal mortgage, or legal mortgage of future property, is not possible....*
>
> *The Courts of Equity facilitated granting security over future assets. An equity mortgage or charge granted for value over assets to be acquired by the borrower after the mortgage or charge is created takes effect as a contract - it is merely a right in personam. It is not a right in rem because the charger does not own the asset when he grants the charge. "*

31. Mr Breslin cites Goode (Commercial Law) at pp 626-627 as authority for the first proposition above. Professor Goode in another of his works, Legal Problems of Credit and Security (4th Ed.) makes clear the distinction between legal and equitable security in the following terms (at paragraph 1-12):

> *"Legal and Equitable Security*
>
> *(1) Nature of the distinction.*
>
> *A security interest may be either legal or equitable. We have seen that a limited legal security interest arises from a pledge or a lien. To take effect at law in the hands of the creditor any other form of security must be a **present transfer of an existing asset**, the transfer must be to the creditor himself and must be made in conformity with any statutory formalities and the transferor's title to the asset must be a legal title, not merely an equitable interest. Accordingly a security interest may be equitable for any one of six reasons, namely that (a) **it relates to future property**; (b) there is no transfer or agreement for transfer at all, merely a charge, (c) there is no present transfer, merely an agreement for transfer or a declaration of trust by the debtor; (d) the transfer is not made in accordance with the formal requirements for the transfer of legal title, (e) the transfer is not made to the creditor but to a third party as trustee for the creditor; or (f) the transferor's title to the asset is equitable, not legal. The essential difference in effect between a legal mortgage and an equitable mortgage or charge is that a legal mortgage has priority over subsequent interests whereas an equitable mortgage or charge may be over reached, dispositional to a bona fide purchaser for value of the legal title without notice of the equitable interest. " (emphasis added)*

32. So it is plain: a mortgage or charge over future-acquired security operates in equity only. Equity operates in personam. Rights and interests registered in the Land Registry must be in rem.

The position advanced by the Applicant

33. It is not surprising that the Applicant should have been in a position to cite authority for a number of the propositions it advances, as they are uncontroversial:

> *(a) A fixed charge may be created over future-acquired property (Moorview Limited v First Active plc (Unreported, High Court (Clarke J), 17 July 2009). This is uncontroversial and conceded because - in equity - that has been the case since Holroyd v Marshall (1862) 10 HLC 191 (also cited by the Applicant). While the property the subject matter of the charge in Moorview was registered land, it was not held that the charge in question was legal charge, still less that it was registrable as a charge under section 62. If such a finding were to have been made, the Second-named Respondent would urge this Court not to follow the decision, on the grounds that it would have flown in the face of all authority on the distinction between legal and equitable security. But it is submitted that it is not necessary to do so: Moorview concerned a priorities dispute between two competing parties and neither the issue of whether legal or equitable security had been created nor whether the charges were registrable were argued before the court: the issue was whether a fixed or floating charge had been created. If the court had been required arising from the arguments to address the nature of the charge created, it is submitted that the answer would have to have been that it was an equitable fixed charge. Incidentally, the Folio concerned in that case (Folio 59867F of the Register County Galway) is appended as Appendix II to these submissions, and it will be seen that the charge is, quite properly, not registered as a burden on that Folio.*
>
> *(b) Again, no issue is taken with the dicta cited from the decisions in National Provincial and Union Bank of England v Charnley [1924] 1 K.B. 431 and Re Clare Textiles Ltd (Unreported, Supreme Court, 1 February, 1993). It is perhaps unfortunate that the quotation taken by the Applicant from the earlier case was cut short. It is set out in*

fuller detail below:

> *"Where in a transaction for value both parties evince an intention that property, existing or future, shall be made available as security for the payment of a debt, and that the creditor shall have a present right to have it made available, there is a charge, even though the present legal right which is contemplated can only be enforced at some future date, and though the creditor gets no legal right of property, either absolute or special, or any legal right to possession, but only gets a right to have the security made available by an order of the Court. If those conditions exist I think there is a charge. " (emphasis added)*

So it is plain that the security is equitable in nature.

(c) The parties are entirely ad idem as regards the point made in paragraph 4(c) of the Applicant's submissions, where it is accepted that that charge over future property is equitable in nature. Without needing to labour the issue, Lord Westbury made the distinction in question in Holroyd v Marshall itself, in the following terms (at page 210/211):

> *"It is quite true that the Deed which professes to convey property which is not in existence at the time is as a conveyance void at law, simply because there is nothing to convey. So in equity a contract which engages to transfer property, which is not in existence, cannot operate as an immediately alienation merely because there is nothing to transfer.*
>
> *But if a vendor or mortgagor agrees to sell or mortgage property **real or personal**, of which he has not possessed at the time, and he receives the consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, there is no doubt that a **Court of Equity** would compel him to perform the contract, and that the contract would, in equity, transfer the beneficial interest to the mortgagee or purchaser immediately on the property being acquired. This, of course, assumes that the supposed contract is one of that class of which a Court of Equity would decree the specific performance. If it be so, then immediately on the acquisition of the property described the vendor or mortgagor would hold it **in trust** for the purchaser or mortgagee, according to the terms of the contract. For if a contract be in other respects good and fit to be performed, and the consideration has been received, incapacity to perform it at the time of its execution will be no answer when the means of doing so are afterwards obtained..." (emphasis added)*

Interaction of Clauses 4.2 and 5 of the 2004 Mortgage

34. The Applicant seems to maintain the argument that, because Clause 5 of the 2004 Mortgage (i.e. the covenant on the part of the company to execute further assurances in order to perfect the security contracted for in relation to future property) is stated to be "in addition to and not in substitution for the security created by this Deed", it does not constitute any acknowledgement that the security created by Clause 4.2 is incomplete. There is plain logical fallacy in this position: if Clause 4.2 created a complete and perfected security over "all other lands, hereditaments and premises of any nature and kind and of any tenure and of whatsoever estate right or interest therein (including any superior or other estate or interest in the lands, hereditaments and tenements referred to in Clause 4.1) which the Mortgagor may at any time hereafter acquire or become entitled to" as the Applicant maintains, then Clause 5 could not possibly be required in any circumstance. While, of course, the internal contents of a particular lender's security documentation does not change the law relating to the creation of security, the existence of Clause 5 is a clear acknowledgement of the state of the law i.e. that while Clause 4.2 creates equitable security, in order to create legal (and therefore registrable) security over the after-acquired property, further assurance is required.

Alternative remedy available to the Applicant

35. The most surprising element of the Applicant's position is the refusal to do what is legally open to it to do in order to overcome the imperfection in its security. As indicated in the replying affidavit of Mr Lynch, Clause 12 of the 2004 Mortgage grants to the appropriate officers of the Applicant the authority to perfect its security. 12.2 in particular provides as follows:

> *"For the purpose of further securing the interest of the Lender in the Mortgaged Properties and the performance of the obligations of the Mortgagor under this deed, **the Mortgagor** by way of security hereby irrevocably appoints the Lender and the persons deriving title under it and separately each Director. Manager. Officer and Secretary of the Lender and any Receiver appointed hereunder severally to be its attorney (with full power to appoint substitutes and to sub-delegate) in its name and on its behalf or otherwise and as its act and deed to do anything **and to execute, seal or deliver or otherwise perfect any deed, assurance, agreement, instrument or act which may be required by the Lender or by any Receiver, or may be deemed proper by the Lender or bY any Receiver for any of the purposes of this Deed which the Mortgagor is obliged to execute and do under the covenants herein contained** and generally to use the name of the Mortgagor in the exercise of all or any of the powers hereby conferred on the Lender or any receiver appointed hereunder." (Emphasis added)*

36. Thus it is apparent that, having catered in its security documentation for precisely the difficulty that has arisen, the Applicant has decided - for reasons that have never been explained - that the easy remedy is not good enough for it and that it prefers to persuade the court to compel the Property Registration Authority to abandon 120 years of practice and a fundamental principle of the registration system, and to don the mantle of a Court of Equity.

Section 99 of the Companies Act 1963

37. The position advanced by the applicant in its written legal submissions at paragraph 8 is surprising, to say the least. The applicant seems to rely on the infirmity that existed in 2004 as justification of some sort for the fact that it seeks to rely on a charge not registered in the Companies Registration Office as required under section 99. A clearer case of pulling one's self up by one's boot laces could not be found in a legal context, it is submitted.

38. It is then suggested that the defect in registration in the Companies Registration Office could not have an impact on the issue of what legal interest was created pursuant to the 2004 mortgage. The impact is plain and it is stark: Section 99 of the Companies Act, 1963 provides that:

> *"every charge created ... being a charge to which this section applies, shall ... be void against the liquidator and any creditor of the Company, unless the prescribed particulars of the charge, verified in the prescribed manner, are delivered or received by the registrar ... within 21 days after the date of its creation ... "*

39. It is for that reason that Rule 114 the Land Registration Rules prescribes that:

> *"Where, on registration of a charge created by a company within the meaning of the Companies Act, 1963, a certificate has not been produced to show that the charge has been registered in accordance with the requirements of Section 99 of that Act, a notice to that effect shall be entered in the register ".*

40. Thus, although it is not of itself a bar to the registration of a legal charge (and we are not dealing with a legal charge here), to suggest that it has no impact is quite incorrect.

Distinction between equitable charges and feeding the estoppel

41. It is respectfully submitted that, at Paragraph 9 of the written legal submissions filed on behalf of the Applicant, two distinct concepts, first, charges over after-acquired property, and secondly, the doctrine of feeding the estoppel, are conflated. Conflating these two distinct concepts is liable to give rise to confusion in an application such as the present. The latter doctrine provides that, where a conveyance or transfer of an interest in land takes place prior to the grantor/transferor acquiring the land, title will automatically pass upon his getting in the title in question. Thus, the grantor/transferor is estopped from relying on the order of events so as to deprive the grantee. It is important to recall that the doctrine of feeding the estoppel is a common law doctrine and not an equitable one.

42. A careless application of this doctrine would suggest that a charge created over after an-acquired property is simply one which comes into existence and takes effect as soon as the property is gathered in. But it is important to recall that the conveyance by the grantor/transferor must be a legal conveyance/transfer/mortgage/charge of specific property to trigger the doctrine of feeding the estoppel. If A were to convey to B "(a) Blackacre and (b) all property which I might acquire in the future", then, assuming he had no land at the time of the transfer, but subsequently acquired Blackacre and Whiteacre, the doctrine of feeding the estoppel would see title to Blackacre pass automatically to B, but in respect of Whiteacre would give B only a right to sue for a decree of specific performance for the necessary further assurance.

43. Thus, what the Applicant appears to be doing here is confusing the doctrine of feeding the estoppel with the law relating to charges over after-acquired property. On the plain terms of sections 62 and 90 of the 1964 Act, the doctrine of feeding the estoppel would appear not to apply to registered land at all. There is, however, an English decision to support the proposition that this doctrine of feeding the estoppel applies to registered land in England and Wales. The case was First National Bank v. Thompson [1996] 1 All ER 140. In that case, the specified property was transferred by two parties to a third at a time when one had a contract to acquire it but title was not in, the land was registered. It was held that, when the land was acquired by the vendors, it automatically passed to the purchaser notwithstanding the fact that only registered owners and persons entitled to be registered were entitled to transfer an interest in that registered property. However, the distinction between that case and the present is as stark as the example given above. Crucially, in Thompson, there was a specific description of the property in question.

44. It is submitted that the question whether the doctrine of feeding the estoppel applies to registered land in Ireland does not have to be decided in this case, as this is not a case about that doctrine.

Conclusion

45. In all of the foregoing circumstances, it is respectfully submitted that the 2004 Mortgage is not registrable as a burden on Folio 17018L of the Register County Cork and the Applicant should properly be left to the remedies it has provided for itself in Clauses 5 and 12 of the said mortgage.

CONCLUSIONS

A. While the submissions and, in particular, the submissions on behalf of the second named respondent go outside the basis formally stated for the refusal of registration in the second named respondents order, to which the notice of motion – appeal relates, it is appropriate that all points made on both sides would be taken into consideration for the reason that it is important that whatever decision is made is such as will have as wide an application to ensure the integrity of the Registration of Title Acts and the rules so as to maintain the system which is proven to be commercially reliable and predictable through the years.

B. While the second named respondent's submissions queried why the applicant/appellant was not in a position to present a charge executed by the first named respondent in respect of the after acquired property, the subject matter of this appeal, when making written submissions it seems that he accepted, as the court accepts Mr. O'Dwyer's explanation into a complex set of circumstances which gave rise to corporate-partnership events which reasonably and without suspicion precluded such outcome.

C. On the authority of the judgment of Clarke J. in *Moorview Ltd & Ors v. First Active Plc & Ors* (Unreported, High Court, 17th July, 2009), I am of the opinion that the charge set out in Clause 4.2 of the Deed of Mortgage constituted no more than a contract in *personam* between the parties thereto carrying with it the right of the applicants/appellants to register the charge element in the mortgage as a charge under the Registration of Title Act 1964 on the Folio. As the charge becomes registered upon the ascertainment of the Registrar of the fact that the chargor is the registered owner of the land, (provided that the material required as listed in Form 17 is available), then, the charge is registered. The conclusiveness of the register then swings into action, and the entry in the Folio of the charge as a burden and the creation of a separate Folio in respect of the charge do not create any interest in the land, except that through the conclusiveness of the register. Through this conclusiveness they establish the charge in the

scheme of priorities of persons who may share in the value of the property as a security through notification in *rem* of the claims of the chargee. To facilitate this taking or sharing in the value of the property in the event of the security being required, the chargee may have whatever powers are conferred by the mortgage-charge instrument and/or by law. A mere contract in *personam* then never becomes not an interest in land, but a contract which is clothed with the consequences of registration and operation of law.

D. Clearly, this transformation (by registration) is an insubstantial figment of intention in the case of future acquired property. This intention, however, becomes substantial whenever the chargor acquires future property, which means that they have become registered owner of future property. That occurred in the case of the lands in Folio 17018L.

E. I accept the submissions of Mr. O'Connell that the acquisition of this after acquired Folio does not create an estoppel by the Deed of Mortgage-Charge which may be fed by the acquisition of the after acquired Folio. Such a proposition does not recognise that estoppel by deed is to be understood in this jurisdiction as the completion or perfection of an inadequate title or interest in land which is conveyed by a deed which is cured or filled by the occurrence of some instrument or fact relating to the land conveyed in the deed.

F. Having regard to the foregoing, the question as to whether the after acquired property may be charged through the registration process may be answered only by examining whether the documentation considered in its entirety, which was furnished to the registrar with Form 17 for the purpose of obtaining such registration, complies with the Registration of Title Act. Two issues arise here. Firstly, the registrar has argued that as the mortgagor/chargor was not the registered owner of the after acquired property on the date of the mortgage charge, the charge was not created by the registered owner. However, the operative time for considering whether the mortgagee or chargee was the registered owner is when the chargor, that is the appellant/applicant, presents the documentation to the registrar for registration, which in this case was after the acquisition of the after acquired property and the registration of the chargee (the first named respondent) in respect thereof. For that reason, I consider that the objection fails.

G. However, the second named respondent pursued the issue of the instrument of charge not being in the prescribed form. It is clear from the foregoing that if there was an instrument of charge, it was the mortgage. The prescribed form abstracted in the schedule to Mr. O'Connell's submissions is indeed a very short form. The reality in practice accepted by all sides is that instruments of charge are very complex, and the practice seems to be that a short instrument of charge setting out the basic details is put forward with an annexed document setting out the details of the contract between the chargor and the chargee. The simple document sets out the facts from which a charge may be noted with the unnecessary personal covenants reserved for inspection outside of the Folio and, essentially, containing contractual provisions between chargor and chargee. Where solicitors' firms are acting for institutions, the registrar may make regulations for a common form prescribed form and it is noteworthy and very material that, in this particular case, the mortgage was accepted even with the surplus reference to after acquired property as satisfying the registrar "as being a prescribed form" in respect of the other property in respect of which the second named respondent was the registered owner at that time.

H. In the context of deciding whether a document complies with the standard of being a prescribed form, not only must the court look at the statutory provision and the type of prescribed form as abstracted from the schedule to the rules by Mr. O'Connell and annexed to his submissions, but the court also must consider the format of rules 52 and 53 of the Land Registration Rules of 1972 (which have been more or less continued and replicated in the 2012 Rules, Statutory Instrument No. 483, which have now commenced in February, 2013). I set out the rules as follows:-

> *"52. (1) The forms of transfer, charge and other dispositions prescribed by these Rules shall be used in all transactions to which they refer or to which they are capable of being applied or adapted, with such alterations and additions as the transactions may require and the Authority allows.*
>
> *(2) Instruments for which no form is prescribed shall be in such form as the Authority shall direct or allow, the scheduled forms being followed as closely as circumstances will permit.*
>
> *53. If it appears to the Authority that any application or instrument is improper in form or in substance or is not clearly expressed or does not indicate with sufficient precision the particular interest or land which it is intended to affect or refers only to matters which are not the subject of registration under the Act or involves registration of a restriction which would be unreasonable or calculated to cause inconvenience or is otherwise expressed in a manner inconsistent with the principles upon which the register is to be kept, it may refuse registration or register subject to such modifications as it shall approve."*

I. It will be seen that the combined effect of Rules 52 and 53 gives a schematic, functional context as to how the registrar is to view instruments, especially ones which he views as being possibly improper. The eventual catch-all standard is one to avoid instruments which would be "unreasonable or calculated to cause inconvenience or (are) otherwise expressed in a manner inconsistent with the principles upon which the register is to be kept". While from its execution the mortgage providing for the charging of after acquired property in the context of registered land would raise suspicions in regard to the principles upon which the register is to be kept, in the outcome when there is a registered after acquired property, there is THEN sufficient information which can be furnished through the mechanism of Form 17 and the up to date affidavit/declarations in relation to family law, occupation/consents and s. 72 burdens, which can be registered as if, in fact, the chargor had under Clause 5 of the mortgage, or its equivalent, actually executed a charge.

J. The provisions of Clause 5 and 12 of the mortgage may be regarded as standard editions which do not preclude the course being pursued by the applicant/appellant.

K. Any difficulties brought to the attention of the court by reason of the non-registration of the charge pursuant to s. 99 of the Companies Act is dealt with by the rules by means of the registrar fixing a note of non-registration to the registration, but such fixing of the note does not preclude the registration of the applicant on the Folio and it is for the applicant/appellant to work out its own salvation in relation to the effects of that – suffice it to say that there may be an interesting debate in relation to just how the question of timing of the registration of the charge in the companies office is to be determined with reference to the date of registration on the Folio (if such question has not been decided by courts deciding these matters in the corporate law area).

L. It is appropriate to consider the opinion of the court in this appeal in the context of how matters might be dealt with by the registrar by way of expanding the sub-rules relating to the types of instruments of charge which may be used or by the Rules Committee dealing with the matter at high level. I make the following points:-

> (i) If directions are to be given by the registrar in relation to forms, one must be conscious that conveyancers might (given their tendency towards tautology) incorporate after acquired property clauses in all forms of charge. I consider

that such clauses are totally unnecessary in, (for instance), residential mortgages or other specifically tailored mortgages or charges. They may be necessary in some commercial charges in site assembly/development situations.

(ii) It must be considered that an after acquired property clause in a charge when regarded in the light of the decision of the court in this case might open up the possibilities of ingenious schemes - if not fraud and lack of transparency. The decision in this Court would probably have been otherwise had Mr. Dwyer S.C. not convinced the court that the failure of the applicants to insist on the second named respondent executing a Deed of Charge, was *bona fide* arising from an explicable corporate/partnership risk in the commercial area (this may have an influence on how the costs order might be made in this case). However, the registrar examining an application such as this will not have the advantage of a High Court examination of the merits and *bona fide*s of the application and, hence, I consider that the registrar in making sub-rules or the Registration of Deeds or Title Rules Committee making general rules, ought to consider an additional form (an affidavit or declaration to be enclosed with Form 17 on the application for registration) setting out sufficient information to enable the registrar to have the same opportunity to ascertain (as the court did in this case) that the bypassing of the original mortgagor (chargor) and failure to rely on an executed charge from them (as just happened in this case) is *bona fide* and justified by the legal and commercial situation and in no way questionable or likely to lead to fraudulent or unprudential or non-transparent schemes.

M. Accordingly, I allow the appeal and await submissions from counsel in relation to costs.