THE HIGH COURT

BETWEEN:

LOMBARD AND ULSTER BANKING LIMITED

PLAINTIFF

AND

THE GOVERNOR AND COMPANY OF THE BANK OF IRELAND
AND BROOKHOUSE SCHOOL

DEFENDANTS

Judgment of Mr. Justice Costello delivered the 2nd day of June 1987.

Brook House School is a private school situated in the outskirts of Bray, Co. Wicklow. It had been established in 1952 by a Mr. Peter Ross but by 1981 Mr. Ross had retired as headmaster and his son Mark had replaced him. The school was carried on in a large house which, with its surrounding lands, was valued in that year at £700,000. The lands and house were registered lands and were owned by an unlimited company called Brook House School. This, a family company, had been incorporated in 1972 and thereafter it had managed the school. Mr. and Mrs. Peter Ross owned one third of its ordinary shares between them, and their sons Mark and David held one third each. In 1980 a decision was taken to sell the school and a group of parents and friends came together to buy it. A Trust Company was formed called Brook House School Trust Limited whose directors were Mr. Jonathan Brooks, Mr. Brook Johns, Mr. Thomas Campbell and Mr. Robert Myerscough. Mr. Jonathan Brooks is a solicitor and figures prominently in these proceedings. He and his father Mr. Philip Brooks were partners in the firm of Messrs Hickey Beauchamp Kirwan and O'Reilly. Mr. Jonathan Brooks acted as solicitor for both the family company and the new Trust Company, and Mr. Philip Brooks (a long-time family friend)acted for three members of the Ross family in the take-over of the school by the Trust Company. Some of the aspects of that take-over are the subject of these proceedings.

In the early part of 1981 Lombard and Ulster Banking Ireland Limited (the plaintiffs herein) were approached by Mr. Jonathan Brooks to help finance the purchase of the school by the Trust Company. Originally it was thought that this would be effected by a transfer of assets but eventually it was agreed that seventy per cent of the shares in the family company would be transferred

to the Trust Company for £275,000. Lombard and Ulster agreed to lend this sum to the Trust Company but naturally it wanted some security for its loan and so it was decided that the family company would guarantee its repayment and charge its interest in its lands at Bray by way of security for the guarantee. Lombard and Ulster and Mr. Brooks senior and junior were all well aware that this arrangement meant that the family company was indirectly giving financial assistance for the purchase of its own shares and that the entire transaction would be illegal by virtue of section 60 of the Companies Act, 1963 unless the procedures provided for in subsections (2) and (3) and (4) of that section were complied with.

The Deed of Charge which the family company executed in favour of Lombard and Ulster is dated the 21st May, 1981 and duly registered on the Folio. The Bank now seeks a well-charging order but the liquidator of the family company, (the company having gone into liquidation in 1985) now resists this claim on the grounds (a) that there was non-compliance with the procedural requirments of subsections (2) and (3) and (4) of section 60 and that accordingly the transaction, including the granting of the Deed of Charge is illegal, and (b) that the company can now avoid the transaction, including the Deed of Charge, by virtue of subsection (14) of that section.

There is a second and different claim in the case. At the date of the Deed of Charge the Bank of Ireland had an equitable mortgage over the Bray lands of the family company arising from a deposit of the Land Certificate at its Bray Branch to secure the repayment of overdraft facilities granted to the company. In 1981 the company owed the Bank of Ireland about £60,000. Lombard and Ulster knew about this equitable mortgage and would

not lend the money to the Trust Company unless its proposed security was given priority over that of the Bank of Ireland. The Bank of Ireland agreed to postpone its security and a Deed of Postponment was executed. The Bank of Ireland now claim that this Deed is void because it was materially altered by Mr. Jonathan Brooks (acting on behalf of the Lombard and Ulster, the family company and the Trust Company) after the Bank had executed it. The Bank of Ireland supports the liquidator's submission that the Deed of Charge is void and further argues that even if it is valid Lombard and Ulster get no priority over the equitable mortgage because of the invalidity of the Deed of Postponement. It resists the second claim which the Lombard and Ulster makes in these proceedings, namely a declaration that its charge ranks in priority to the equitable mortgage of the Bank of Ireland.

The proceedings were commenced by Special Summons and affidavits filed by all parties. It was clear that the issues of fact in this case could only be determined on oral evidence. No formal order was made ordering a plenary hearing or the filing of pleadings but the parties accepted that the issues in the case are to be found in the affidavits and agreed that they should be determined on oral evidence.

I will consider firstly the claim against the company arising from the Deed of Charge.

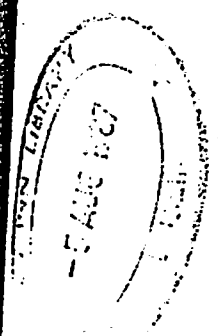
Part I.

The Deed of Charge

(i) The Companies Act, 1963, section 60

Subsection (1) of Section 60 declares that "it shall not be

lawful" for a company to give whether directly or indirectly any financial assistance in connection with the purchase of any shares in the company. The Plaintiffs accept that by guaranteeing the repayment of loan made to the Trust Company for the purchase of the Ross family shares and by supporting its guarantee by a Deed of Charge the company was entering into a transaction made illegal by this subsection. But it points out that certain transactions are exempt from the subsection (1) prohibition and that this was one of them. Subsection (2) of the section provides that subsection (1) is not to apply to the giving of financial assistance if



"(a) such financial assistance is given under the authority of a special resolution of the company passed not more than 12 months previously; and

"(b) the company has forwarded with each notice of the meeting at which the special resolution is to be considered a copy of a statutory declaration which complies with subsections (3) and (4) and also delivers on the same day as such notice was issued a copy of the declaration to the registrar of companues for registration."

The statutory declaration (in effect, a declaration of solvency) has to be made at a meeting of directors held not more than 24 days before the date of the general meeting and it has to be made by the majority of the directors when the company has more than two directors (subsections (3) and (4)). Every member of the company has the right to receive notice of the general meeting and attend at it, and unless all of the members of the company entitled to vote at the general meeting vote in favour of the special resolution the "transaction whereby .. assistance is to be given shall not be carried out before the expiry of 30 days after the special resolution" (to give time for an application to be made to the court to annul it).

(ii) Was there compliance with Section 60?

There were three members of the Board of Directors of the company in May of 1981, Mr. and Mrs. Peter Ross and their son Mark. This meant that two of these were required to make the statutory declaration referred to in subsection (2). These three held one preference share in the company each and as these were the only shares with voting rights all had to agree to the terms of the special resolution. But David was a holder of one third of the ordinary shares and he was entitled to obtain notice of the general meeting (although not entitled to vote at it). At the end of May, 1981 only Mr. Peter Ross and Mr. Mark Ross were in Ireland, David and Mrs. Ross being at that time in England.

Mr. Mark Ross swore an affidavit in these proceedings to the effect that he did not attend any meetings of directors or shareholders in Mr. Brooks offices in Dollard House and did not make the statutory declaration required by the section to validate the transaction. This was not evidence at the hearing, but it means that the plaintiffs were required to prove compliance with the section. An official from the Companies Office produced its Brook House School file. It contains a document which is dated the 22nd May and purports to be a copy of a statutory declaration made by Mr. Peter Ross and Mr. Mark Ross in the presence of a Mr. Muldowney, a Commissioner for Oaths. But the making of the statutory declaration was expressly put in issue in this case and the production of the Companies Office file does not prove that the Declaration was made. Mr. Muldowney is dead but the Declaration could have been proved by someone familiar with his signature or by evidence from Mr. Peter Ross (whose non-attendance at the trial was left unexplained). It has not therefore been

established that the declaration of solvency was made by directors as required by the subsection. All the Plaintiffs were able to prove was the filing of a document which purported to be a copy of a statutory declaration which had been made on 22nd May 1981.

As to the meetings of directors and shareholders, the Companies Office file contains a document purporting to be a minute of a meeting of the directors of Brook House School and a document purporting to be a minute of a general meeting of its shareholders at which resolutions to comply with section 60 were adopted. Each of these were signed by Mr. Peter Ross as chairman. But these documents do not prove their contents. Section 145 of the Act requires that every company should keep minutes of general meetings and directors meetings in books kept for this purpose. Brook House School had minute books but there is nothing recorded in them for 1981 or subsequent years. The Plaintiffs cannot therefore rely on section 145 (2), which makes a minute entered into a company's minute book signed by the chairman of the meeting admissible as evidence of what occurred at the meeting. The documents on the Companies Office do not prove that the resolutions required by the section were passed or even that the meetings were held.

There was no witness called who could give evidence of having attended meetings of the directors or of shareholders of the family company held to comply with the section. Mr. Jonathan Brooks had prepared draft minutes of meetings which he contemplated would be held in his offices in Dollard House on the 21st May and he included in the drafts resolutions which he contemplated would be adopted to comply with the section. He also contemplated

that he and his father would attend the meetings on the 21st and recorded this fact in the draft he had prepared. These documents were drafted before Mr. Brooks left for a visit to the United States of America. His visit lasted for a week and he returned on the 20th May. He was in his office on Thursday 21st May and on Friday 22nd May but he says that he cannot now recall any meetings of the Board of Directors of the family company which were attended by any member of the Ross family on either day, or of any meetings of the shareholders of the company on either day. He does, however, remember a meeting of the Board of Managment of the school out at Bray on the evening of the 21st but it was not concerned with section 60 matters. Mr. Philip Brooks died in 1984 but it was established that he was in his office on 21st and that he may have been there for part of the 22nd. His assistant, Mr. Cunningham recalls seeing Mr. Peter Ross and Mr. Mark Ross in Dollard House on either the 21st or the 22nd, but he says he did not attend any meeting with them and he did not see them execute a Statutory Declaration on either day. Mr. Kirwan, another partner in the firm of Messrs Hickey Beauchamp Kirwan and O'Reilly was acting for Lombard and Ulster in the transaction but did not attend any meetings of the family company or its directors. The documents in the company office were purportedly signed by Mr. Peter Ross as chairman of the two meetings. But Mr. Peter Ross was not called as a witness and no explanation for his absence was vouchsafed by the plaintiffs. Neither was Mr. Mark Ross called to give oral testimony.

There was, however, certian circumstantial evidence offered from which certain limited inferences of fact can be drawn. On the 21st May Mr. Philip Brooks wrote to Mr. David Ross in England in the course of which he observed that his father and

and brother, Mark, were having meetings that day to pass resolutions necessary to complete the transaction. On the 22nd May Mr. Jonathan Ross telephoned Ulster and Lombard to say that all legal formalities had been complied with. The Deed of Charge is dated the 21st May and the seal of the company was witnessed by Mr. Brooks and Mr. Myerscough as directors of Brook House School, a designation which was incorrect unless they had been appointed directors in accordance with the proposals recorded in the minute drafted by Mr. Brooks for the meeting proposed for the 21st May. In addition the Companies Office wrote on the 24th June to Messrs Hickey Beauchamp Kirwan and O'Reilly returning the Special Resolution and pointing out that this was dated the 21st May and that the Statutory Declaration was dated the 22nd May.

It is obvious that this letter drew attention to a potentially serious situation, namely, that the documents filed clearly pointed to a non-compliance with the section because the statutory declaration post-dated the meeting. If the documents had inaccurately recorded the date of the meeting it is reasonable to assume that the error would have immediately been rectified. But it was not. No reply was sent to this letter for nearly four years and Mr. Brooks gave no evidence to explain this omission. It is true that he then wrote on the 1st July 1985 pointing out that the date of the meeting had through inadvertence not been changed in the minutes but he accepts that he is merely assuming that the meeting was held on the 22nd as he assumed that the section had been complied with and he agrees that he has no recollection of any meetings on either the 21st or the 22nd.

The cumulative effect of this evidence is to raise an inference (a) that meetings of shareholders and directors were in

fact held and (b) that they were held on the 21st May. But the evidence does not entitle me to hold that the resolutions contained in the draft minutes were adopted at them. And there is further relevant evidence which has to be considered. The notices convening the meeting of shareholders (which contained a consent to short service) were not sent to Mrs. Ross and David Ross until the 21st May and would not have reached them, at the earliest until the 22nd May. Accordingly, no special resolution could have been validly passed at any general meeting on the 21st as the requisite notice had not been given for it. It follows that there was non-compliance with section 60 in at least two respects (a) the required statutory declaration was not made at a director's meeting on 21st May, and (b) any resolution that might have been adopted by the shareholders could not have been a special resolution.

It was urged on the Plaintiff's behalf that compliance with the requirements of section 60 was satisfied when (a) the shareholders had authorised their solicitor to take all necessary steps and when (b) by informal consent all the shareholders agreed to what actually was done by some of their members. In this connection reliance was placed on Re Duomatic Ltd (1969) 2 Ch. 365; Re Bailey Hay (1971) 1 W.L.R. 1352; Re Gee and Co (Woolwich) Ltd (1975) Ch. 52; Cane -v- Jones 1980 1 W.L.R. 1451. I cannot agree. The section makes illegal the granting of financial assistance (as defined) and if exemption for a transaction in breach of subsection (1) is claimed because of the adoption of the procedures laid down in subsection (2) and (3) and (4) then strict compliance with the procedures is necessary. It is not sufficient to show that all the shareholders had authorised their solicitors to take the necessary steps and

that they subsequently ratified what in fact was done. If the procedural requirements were not adopted the transaction is an illegal one, if in fact it involved the granting of financial assistance contrary to subsection (1).

(iii) The effect of non-compliance with section 60.

It is now necessary to consider the parties rights in the light of these findings of fact. Subsection (1) of section 60 declared that subject to certain other subsections "it shall not be lawful for a company to give directly or indirectly financial assistance for the purchase of its own shares", and subsection (14) provided that:

> "Any transaction in breach of this section shall be voidable at the instance of the company against any person (whether a party to the transaction or not) who had notice of the facts which constitute such breach".

What this means is (a) that although a transaction in breach of the section is illegal it is only "voidable", not void, and (b) it is only voidable against a person who had notice of the facts which constituted the breach.

There are three issues arising on the "notice" point in this case. Firstly, the liquidator has argued that the phrase "transaction in breach of the section" means the carrying out of a transaction prohibited by subsection (1) and that as Lombard and Ulster knew that the transaction was prohibited by subsection (1) it had sufficient "notice" for the purposes of subsection (14) to enable the company avoid the transaction. I do not think that that can be correct. The subsection does not permit the avoidance of a transaction which is "in breach of subsection (1) of this section" but "any transaction in breach of this section". And so, if a lender knows that an attempt to validate a prohitited transaction and avoid breaching the section by adopting

the procedures set out in subsection (2), (3) and (4) is to be made I do not think that he has notice of any breach within the meaning of the subsection unless it can be shown (a) that there was in fact non-compliance with the subsections and (b) that he knew of the facts which resulted in non-compliance.

Secondly, as to the onus of proof. If, as has happened in this case, a defendant puts in issue the validity of a transaction prohibited by section 60 the onus is on the Plaintiff to establish his case. However, if he fails to establish the validity of a transaction it does not follow that his claim on foot of a Deed which is part of the transaction and is otherwise valid fails - the transaction is merely a voidable one. And it seems to me that the onus is then on the company which seeks to avoid it to show that the Plaintiff had "notice" as required by subsection (14). This means that in this case the liquidator must establish as a matter of probability that Lombard and Ulster had "notice" that there was non-compliance with the provisions of subsection (2), (3) and (4). If he cannot do so the Deed of Charge is enforceable.

Thirdly, as to the nature of the "notice", it is not sufficient for the liquidator to show that if Lombard and Ulster had made proper inquiries that they would have ascertained that the company had failed to comply with the subsections. It must be shown that Lombard and Ulster had "actual notice" of the facts which constituted the breach, that is (a) that they or their officials actually knew that the required procedures were not adopted or that they knew facts from which they must have inferred that the company had failed to adopt the required procedures, or (b) that an agent of theirs actually knew of the failure or knew facts from which he must have inferred that a failure had occurred (see; Bank of Ireland v Rockfield Ltd (1979) I.R. 21, 37).

"Constructive notice" of the failure is not sufficient for subsection (14).

With these considerations in mind I now turn to the evidence in the case. It is perfectly clear that neither Lombard and Ulster or any of its officials had any idea that the required procedures which they knew were to be adopted, had not in fact been carried out; on the contrary, they were expressly told by Mr. Brooks that all legal formalities were complied with and it was only on that representation that they allowed the loan to the Trust Company to be effected. What remains for consideration therefore is whether any of its agents had "actual" notice of non-compliance with the statutory procedures. And what is crucial on this issue is that Mr. Jonathan Brooks was not the "agent" of Lombard and Ulster.

Mr. Brooks knew the directors of Lombard and Ulster well and his firm, Messrs Hickey Beauchamp Kirwan and O'Reilly had frequently acted for the Bank. Mr. Brooks was, however, acting for the borrowers (the Trust Company) and the proposed mortgagors (the family company) in this case and on the 19th May Lombard and Ulster wrote a formal letter to the family company stating, inter alia, that "the solicitor for the Bank in this matter will be A.H.D. Kirwan of Dollard House, Wellington Quay". Thus Lombard and Ulster nominated Mr. Kirwan a partner in the firm of Messrs Hickey Beauchamp Kirwan and O'Reilly and not Mr. Brooks to act on its behalf. Mr. Kirwan (their agent) had no actual knowledge that the provisions of section 60 were not compiled with and he knew no facts from which he must have concluded that they were not complied with. He wrote to his clients on the 22nd May informing them that the section had been complied with but he must have done this from information given to him by Mr. Jonathan Brooks because he was in no way involved in the meetings of directors or shareholders of the family company.

It follows, therefore, that even though the transaction was in fact one which was rendered illegal by subsection (1) of section 60 the company is not at liberty to avoid it as the Plaintiffs had no notice of what had happened . The Deed of Charge is valid, and the Plaintiffs are entitled as against the company to a well-charging order in respect of the sum of £787,670.84 (the amount now due on Lombard and Ulster's loan) and the usual consequential orders. (The question of its invalidity on an entirely different ground is answered in the Plaintiff's favour in Part II hereof).

PART II

THE PRIORITY OF THE PLAINTIFF'S DEED OF CHARGE

(a) The agreement to postpone

Lombard and Ulster's Deed of Charge is dated the 21st May, 1981. It was registered on the 21st September, 1983. The Bank of Ireland's unregistered equitable mortgage arose from the deposit of the Land Certificate on the 29th November, 1979. Lombard and Ulster had notice of this prior unregistered equitable estate and made it a condition of its loan to the Trust Company that its proposed security would have priority over that of the Bank of Ireland. There is no doubt that the Bank of Ireland agreed that this should be so. Originally it was thought that a second charge would be executed and registered in its favour, but on the 11th June 1981 it wrote agreeing to the execution of a priority agreement whereby it would postpone its mortgage in favour of the Charge to be executed in favour of Lombard and Ulster. On the 15th June Mr. Brooks sent a draft priority agreement to the Bank of Ireland. On the 6th July it was returned with minor amendments.

These were acceptable and the agreed draft together with engrossments were sent on to the Bank on the 6th July.

(b) The Deed of Postponment

The draft having been agreed there then occurred the series of events which have given rise to the claim by the Bank of Ireland that the Deed which the parties executed is void. The parties in the agreed draft were to be the Bank of Ireland, Lombard and Ulster and "Brook House School", the unlimited company and registered owners of the land and who in the draft was correctly described as the "mortgagor". Notwithstanding its prior approval of the draft the Law Department of the Bank of Ireland decided to alter the engrossment by providing that the Deed should be made between the Bank of Ireland, Lombard and Ulster and "Brook House School Trust Limited". It effected this change by typing-in the words "Trust Limited" after the words "Brook House School" in three places in the Deed. It then had the Deed executed by the Bank, explaining in a memorandum to the Bray Branch that this execution was "strictly subject to the name of the third party... being altered to read Brook House School Trust Limited since that is the name of the company". On the 13th August in a letter headed "Brook House School Trust Limited" the Bray Branch sent to Mr. Brooks the executed Deed of Postponment in duplicate adding "We note that you will now have them completed by Lombard and Ulster Banking and also by Brook House School Trust Limited". The letter did not expressly point to the change effected in the engrossment.

Mr. Brooks did not then notice what had been done and does not now recall when he first realised what had happened. He acknowledged the Bank's letter on the 20th August and wrote on the 16th September stating that

the Deed of Postponment had been completed by Lombard and Ulster "and we are awaiting a meeting of directors of Brook House School Trust Ltd to have it completed early next week". He was obviously still not aware that the draft had been altered and was then apparently prepared to have the Deed completed by the Trust Company and not by the unlimited company. Thereafter a long delay occurred and notwithstanding a considerable number of reminders the Deed was not executed until the month of June of 1982.

It would seem that shortly before its execution Mr. Brooks discovered that the engrossments he had sent to the Bank of Ireland had been altered so as to alter the name of the mortgagor. He then concluded that this alteration must have been an error and he erased with the aid of a correction fluid from the engrossments the words "Trust Company" which had been inserted in typescript by the Bank, with the result that the third party to the Deed became the unlimited company. The Deed was executed by "Brook House School" by the affixation of the seal. He did not draw the attention of the Bank to what he had done, and merely wrote a letter on the 18th June 1982 which was headed "Brook House School Trust Ltd" which stated "we regret the delay in sending you the Deed of Postponment but this has now been stamped and we enclose one copy for your records." The official in the Bray Bank who received back the Deed did not notice the alteration which was not initialled in any way. It was filed and it was some years later that the Bank realised that the Deed it had executed had subsequently been altered.

It has long been established that a material alteration to a Deed after it has been executed by one party renders it void. The principle has been stated thus in Halsbury's "Laws of England" 4th Ed. Vol 12 paragraph 1378:-

> "If an alteration (by erasure, interlineation, or otherwise) is made in a material part of a deed, after i execution by or with the consent of any party to or person entitled under it, but without the consent of the party or parties liable under it, the deed is made void. The avoidance, however, is not ab initio, or so as to nullify any conveyancing effect which the deed has alrea had, but only operates as from the time of the alteratio and so as to prevent the person who has made or authoris the alteration, and those claiming under him, from putti the deed in suit to enforce against any party bound by i who did not consent to the alteration, any obligation, covenant, or promise thereby undertaken or made".

This principle can be illustrated by reference to three cases. In Sellin .v. Price (L.R. 2 Ex. 189) a Deed of composition was prepared and executed by a debtor. It was purported to have been entered into with creditors named in a schedule to the Deed The schedule was added subsequently and it was held that the addition of the schedule was a material alteration which rendere the Deed void. Ellsemere Brewerey Co. .v. Cooper (1896) 1.Q.B. 75 was a case where four persons as sureties executed a Bond of Suretyship. One of the parties, after three had executed it, amended the document so as to limit his liability below that originally stipulated in the Bond. It was held that this was a material alteration which rendered void the entire Bond. In Suffel .v. Bank of England (L.R. 9 Q.B.D. 555) the holder of a note issued by the Bank of England who had purchased it for value unsuccessfully sued on foot of it, the Court holding that the unauthorised alteration in the numbers on the Note made after its issue was a material alteration and vitiated it.

The situation in this case is a curious one. The Bank now accepts that the proper party to the Deed of Postponment was the unlimited company (Brook House School) and not the Trust Company (Brook House School Trust Limited) and that it was in error in changing the engrossment as the Trust Company was not the owner

of the land and had not mortgaged it and could not do so. But it argues that it had executed the Deed with the Trust Company as the Third Party to it and that Mr. Brooks had made a material alteration in it after it had done so and so rendered the Deed void. I think this submission is correct. To change a party to a transaction, to alter a Deed after it has been executed by one party by adding a different party to that provided for in the executed Deed, amounts to a material alteration in it. Mr. Brooks was right in concluding that the Bank had been in error in altering the engrossment, and wrong in the steps he took to rectify that error. He was not entitled to amend the executed Deed in the way he did and the result is that the Deed is void.

This conclusion by no means ends the case and I now have to consider the effects of this finding on the parties rights.

(c) The validity of the Deed of Charge.

I have already concluded that the liquidator's attack on the Deed of Charge based on the non-compliance with section 60 of the Companies Act fails and I now have to consider the attack on its validity mounted by the Bank of Ireland based on what happened to the Land Certificate. On the 2nd April 1979 Mr. Brooks received the Land Certificate from the Bank of Ireland (which had been deposited to secure the indebtedness of the family company) to enable the family company sell off portion of the lands. The usual undertaking in writing was given in respect of it. His firm undertook to hold the Land Certificate

> "in trust for the said Bank and not to do any act which would enable the property dealt with by them or any part of the said property to be mortgaged or assigned or in any way dealt with without the said Bank's consent, or their lien thereon to be in any way postponed or prejudiced".

In May 1981, when the transaction in suit was in train, the Land Certificate had not been returned to the Bank of Ireland (indeed it seems that it was not returned until 1985) and was still retained by Mr. Brooks. In order to have the Lombard and Ulster Deed of Charge registered in the Land Registry it was necessary for him to produce the Land Certificate. This Mr. Brooks did and it was urged that in parting with it and using it for the purposes of having the Deed registered he was acting contrary to the undertaking given to the Bank of Ireland and that the registration thus procured was void.

As I do not think that Mr. Brooks acted in breach of the undertaking I do not have to consider the effect on the validity of the registration had he done so. He was obliged not to do anything which would allow the property to be mortgaged "without the consent of the Bank", but it is clear that the Bank expressly agreed to the registration by Lombard and Ulster of its Deed of Charge and it seems to me that in using the Land Certificate to effect what the Bank had agreed to did not involve any breach of the commitment given to it. The Deed of Charge was, in my view, validly registered.

(d) The priorities

So, it is established (a) that the Bank of Ireland is the owner of an unregistered valid estate in the lands, (b) that Lombard and Ulster is the owner of a subsequent valid registered charge, and (c) that the Deed of Postponment by which the Bank of Ireland postponed its interest to that of Lombard and Ulster is void. Which Bank, then, has the first claim to the proceeds of the sale of the encumbered lands?

It seems to me that the claim of the Lombard and Ulster must prevail, and this for two reasons. Firstly, the agreement which the parties entered into for the postponment of the claim of the Bank of Ireland was an enforceable agreement. The correspondence to which I have referred clearly shows the existence of a concluded contract. If it was a contract which was required by the Statute of Frauds to be evidenced in writing (which I doubt) a sufficient memorandum of it is to be found in the letters and related accompanying documents. The Deed of Postponment may be void because of the alteration effected in it after it had been executed by the Bank of Ireland but that cannot alter the fact that the Bank had prior to its execution entered into an enforceable agreement to postpone its claims. That agreement stands and is not vitiated by the court's findings in relation to the Deed which it was intended would give effect to the parties' agreement. The Deed is void but that does not prohibit the Court from giving effect to the parties' contract.

Secondly, Lombard and Ulster get priority from the provisions of the Registration of Title Act, 1964. Its title to the rights conferred on it by the Act as owners of the registered charge is not, in the absence of actual fraud, affected by the notice it had of Bank of Ireland's prior equitable estate (section 31). And the unregistered rights of the Bank of Ireland cannot affect the registered owner of a charge created on the land for valuable consideration (section 68 (3)). The Bank of Ireland could, by holding on to the Land Certificate, have prohibited the registration of the Lombard and Ulster Deed of Charge and could thus have preserved its priority. But by agreeing to registration it lost it.

I will make a declaration, therefore, not precisely as sought in paragraph (2) of the Indorsement of Claim but simply to the effect that the Plaintiffs Charge ranks in priority to that of the Bank of Ireland's equitable mortgage.

Finally, I stated during the hearing that I would later explain a ruling I made at the end of the Plaintiff's case in response to an application by the liquidator of the family company to non-suit the Plaintiffs. I will do so, briefly, now. Had, by cross-examination or otherwise, it been shown that there had been non-compliance with the section 60 procedures and that Lombard and Ulster or its agent had actual notice of this then I would have acceded to the application. But this was not how matters stood. The evidence then established that the transaction was an illegal but not a voidable one. As the liquidator could adduce no evidence to put the matter further the Plaintiffs were then entitled to the relief claimed.

Approved
JC
22.C.'87