IN THE SUPREME COURT OF BELIZE, A.D. 2014

ACTION NO. 902 of 2010

BELIZE TRANSIT LIMITED **CLAIMANT**

AND

NATIONAL TRANSPORT SERVICE LIMITED
(IN RECEIVERSHIP)
BEL-BUS COMPANY LIMITED
(IN RECEIVERSHIP)
BELIZE BANK LIMITED **DEFENDANTS**

BEFORE THE HONOURABLE MADAM JUSTICE SONYA YOUNG

Hearings
2014
23rd September
2015
15th January

Ms. Lisa Shoman SC for the Claimant.
Mr. Eamon Courtenay, SC for the 1st and 2nd Defendants.
Mr. Godfrey Smith, SC and Ms. Leslie Mendez for the 3rd Defendant.

Keywords: Company – Debentures – Fixed or Floating Charge – Crystallization – Receivership – Seizing and taking possession of Third Party Property – Transfer of Property with intent to defraud creditors – Section 149 LPA

JUDGMENT

1. On 10th December, 2010, while the rest of Belize busied itself with preparations for the upcoming festive season, the third Defendant's appointed Receiver of the first and second Defendants, began seizing buses

which the Claimant says were lawfully their property. Such buses, having been properly transferred to them by the first Defendant (on the 2nd December, 2010) and the second Defendant (on the 1st December, 2010) with the prior expressed written permission of the third Defendant. By December 13th the receiver had seized and taken possession of a total of twenty-five buses.

2. They therefore sought the following declarations and remedies:

> *1. A Declaration that the Claimant is the lawful owner of 25 buses which the **Defendants** have unlawfully seized and have taken possession of;*
>
> *2. An Injunction to restrain the Defendants or any of them or their agents and/or servants or agents or otherwise from dealing with or disposing of the said buses;*
>
> *3. An Order that the Defendants shall deliver up to the Claimant the said buses;*
>
> *4. A Declaration that Defendants unlawfully seized and took possession of the said buses, thus preventing the Claimant from being able to offer bus service within Belize City and occasioning loss and damage to your* (sic) *Claimant;*
>
> *5. An Order for the return of those sums of monies being those amounts of cash in the money pouch held by drivers of buses which were, taken at the time of seizure being operated on route within Belize City;*
>
> *6. An Order for Loss and damage as a result of the unlawful seizure of the said buses on December 10, 2010;*
>
> *7. Exemplary damages for the unlawful seizure of the property of the Claimant;*
>
> *8. Interest on all losses suffered by the Claimant at such rate as the court may determine from the date that such loss was suffered until the amount payable is finally paid;*
>
> *9. Costs.*

3. The Receiver of the first and second Defendants disputes the Claimant's titles and their claim to loss and damages. He has counterclaimed for a declaration as to title and an account of and any profits made specifically for the period during which the buses were in the Claimant's purportedly unlawful possession that is 2nd December to 10th December, 2010.

4. The third Defendant states (and the Claimant admits) that there exists three debentures made between the first and second Defendants and the third Defendant. That these debentures created fixed and floating charges over the fixed plants, machinery, assets and equipment of each respective company in favour of the third Defendant.

5. The third Defendant further postulates (like the receiver) that the twenty-five buses were transferred in an attempt to evade them as creditors. They maintain that these transfers were in breach of the existing debentures and deny that any permission was ever given by them to the first or second Defendants to transfer those buses. Two of the twenty-five buses have been sold during the receivership notwithstanding an undertaking given to the court.

The Issues

6. The issues as agreed by counsel in the Pre-Trial Memorandum are as follows:

   (1) Whether the Claimant has good and valid title to the 25 buses transferred to it by the First and Second-Named Defendants?

   (2) Whether the First and Second-Named Defendants validly transferred legal title of the 25 buses to the Claimant?

   (3) Whether the First or second-Named Defendants are entitled to the 25 buses?

(4) Whether the Claimant has suffered loss by being deprived of the 25 buses since December 10, 2010?

(5) Whether the Second and Third-Named Defendants are entitled to an accounting by the Claimants for any profits made while the buses were in its possession?

(6) Whether the transfers made by the First and Second-Named Defendants should be set aside and declared void?

(7) Whether the floating charge held by the Third-Named Defendant over the assets and equipment had crystallized prior to the transfer of the 25 buses.

The Background:

7. This is an old matter having been filed since December 17th 2010 and assigned to another judge. Following numerous amendments to pleadings by all parties the matter began Case Management in 2011 which continued into 2012. This was followed by further amendments to pleadings and culminated in the filing of an amended list of documents and reply to re-amended counterclaim in December 2012. It appears that the assigned judge left the jurisdiction and the matter lay fallow until June 2014 when it was called up for report and further Case Management Conference before this court. At that time the court issued a robust (some may say demanding) order for ensuring a timely hearing of the matter. There was general compliance and a solitary, but brief, extension of time for full compliance. During that period two applications were filed which resulted in the witness statement of the Claimant's purported expert on the value of the twenty-five buses being struck out and the court's refusal to strike out a particular paragraph of the second witness statement of the Claimant's witness Phillip Jones and certain exhibits attached thereto.

8. The matter proceeded to trial on the 23rd September, 2014 where judgment was reserved and the parties requested until the 21st and 28th October for filing of the written closing submissions. The court acknowledges the assistance rendered by all counsel towards the speedy determination of this matter after its delayed resurrection and extends its gratitude for the full and comprehensive submissions presented.

The Evidence:

9. The Claimant filed witness statements for four witnesses. Only two gave evidence – one being absent on the day of trial and the testimony of the other having been previously struck out by the court.

10. David Novelo, the first witness testified that prior to the receiver being appointed he was the Chief Executive Officer of the first and second Defendants and until the 11th December 2010 he was also the Chief Executive Officer of the Claimant. Phillip Jones took over that position on the 11th December, 2010 following a meeting of the Board of Directors. Up to that time the Claimant and the first Defendant worked out of the same premises and operated bus shuttle services on various routes throughout Belize. The second Defendant had a separate compound and provided charter buses for the cruise tourism industry. The three companies however maintained *"a close working relationship and shared resources, buses and personnel as operators of bus transportation services in Belize and the Companies worked together …"* They then pooled resources in order to better service their routes.

11. For all intents and purposes they acted liked a family, most likely because the second and third Defendants had been incorporated by the Novelo

family, of which David Novelo was a member, and his father David Novelo Sr., had since 1979 purchased the Claimant (then doing business under another name).

12. When given leave to amplify his evidence the witness for the first time explained that the Novelo family since 2008 no longer owned the Claimant. Two companies Sizzle and Lamber, whom he seemed to know nothing about, had bought the company. As part of the arrangement of sale, the Claimant and the first and second Defendants continued to share the garage, fuel, office space, administrative and management staff but they all had their own accountant.

13. Under cross-examination it became clear that although he knew nothing of these two new owner companies, he did in fact own a company bearing a similar name - Lamber Free Zone Limited. When pressed further, he revealed the names of Miley or Ismile Garcia and Sandra Garcia as the owners of the Claimant following Sizzle and Lamber. They, he said, were shareholders in a company called *"Liverpool Trucking Something,"* to whom the Claimant had been transferred sometime around the end of 2008.

14. Under David Novelo's management three debentures were executed. One between the first Defendant and the third Defendant dated 8th November, 2006 and two between the second and third Defendants dated 30th September, 2005 and February 22nd, 2007. Those debentures are substantially the same in terms except as to the amounts, the company's name, date, signatories and content of the schedules attached.

15. They all contained Clause 19(8) which states that the company covenants with the bank that during the continuance of the security the company will *"not save with the written consent of the bank sell or otherwise dispose of the whole or any substantial part of its undertaking or assets."* The Debentures by Clause 5 created, as accepted by all parties, a fixed charge on all the machinery and equipment mentioned in the schedule. Those schedules contained lists of buses for which all the Certificates of Registration had to be lodged with the bank as security. He explained that whenever a bus was sold or disposed of he would notify the bank and obtain the original registration. Similarly, the Certificates of Registration for any new purchases had to be lodged with the third Defendant for *"safe keeping."* However, under cross-examination he explained that for buses bought with shareholders' money only copies of the Certificates were sent to the bank.

16. For various reasons, which are not relevant here, the first and second Defendants began to encounter financial difficulties and struggled to stay afloat. In late January, 2009 he, David Novelo, approached the Senior Vice President of the third Defendant – Louis Swasey, and explained the dire straits in which the first and second Defendants had found themselves. They discussed transferring thirty-six buses from the first and second Defendants to the Claimant since the Claimant's fleet was in poor condition. It was the Claimant, he said, who had kept the first and second Defendants viable with liberal injections of funds. With this transfer of buses the Claimant would be better placed to cover the existing debt of the two Defendants. It was he, David Novelo, who provided Louis Swasey with the list of buses from which, he, Swasey subsequently (February 2009) prepared the letter consenting to their transfer from the second Defendant to the Claimant.

Following this, Swasey authorized the release of the original Certificates of Registration. He maintained this account under cross-examination.

17. In April 2009, he explained, the Claimant managed to save the duty required to effect transfer of four buses (they had originally been imported duty free). For business reasons (to better service the obligation to the third Defendant) those four buses were transferred from the second Defendant to the first Defendant (not to the Claimant as purportedly authorized). Copies of the transfers were sent to the third Defendant (as was the custom with floating assets). It was not financially possible to transfer any more buses as they, (the three companies) were all attending to the loan obligations with the third Defendant. The financial position of the first and second Defendants worsened.

18. In late 2010 he *"realized that the situation with NTSL and Bel-Bus was becoming critical and that if I did not do something to safeguard the exposure that Belize Transit had with respect to NTSL and Bel-Bus, that Belize Transit would be in serious problems. Belize Transit was the only profitable entity of the three and I had a responsibility to the shareholders of that company who were pressing me to secure the assets of Belize Transit as much as possible."*

19. During the week prior to November 30, 2010 he began to make all efforts to transfer the buses. Around November 22nd or 23rd he asked Phillip Jones to effect same. On the evening of the 30th November, 2010 he met Mr. Mario Sabido of the third Defendant who informed him that he was there on behalf of the third Defendant to make demand on the second Defendant and wanted to inspect and inventory all the buses, equipment and assets. Mr. Sabido agreed to provide the request in writing. Through cross-examination he disclosed that at that time he realized there were issues of possible

foreclosure. He therefore recalled his fiduciary duty to the Claimant and decided to transfer the buses. He made the necessary arrangements.

20. Two letters of demand from the third Defendant were sent the next day December 1st, 2010 – one addressed to the second Defendant and the other to Mojocar Limited (an affiliate). These letters demanded immediate payment, and gave notice of the third Defendant's intention to immediately seize and take possession of the second Defendant's chattels and things secured by the security instruments. They also reserved the right without further notice to appoint a receiver.

21. David Novelo says he made various enquiries to ascertain whether a receiver had in fact been appointed for the second Defendant, they proved futile. That same day he instructed Phillip Jones to ensure the transfer of the buses as he felt the Claimant was the beneficial owner and he needed to safeguard its assets. Seven of those buses were transferred on the 1st December and the remainder were transferred on the 2nd December, 2010. The witness then said that he was aware that on the 10th December, 2010 at around 9:30 a.m. Kevin Castillo came to the first Defendant's compound armed with his appointment and declared that as receiver and manager, on behalf of the third Defendant, he was taking over the first Defendant. By this time he, David Novelo, knew that the first Defendant was insolvent and unable to pay its debts. He could not say the same with any certainty for the second Defendant. The twenty-five buses and four others were seized. Those four buses have since been returned to their rightful owners. A letter demanding the return of the remaining buses was sent by the Claimant's attorney to the receiver but yielded little. The Claimant has therefore not been able to

properly service its routes. Further, an inspection of the buses carried out in April 2013 showed them to be in a deplorable condition.

22. Next was Phillip Jones the current Chief Executive Officer of the Claimant. Up until December 2010 he was the Chief Operating Officer of the first Defendant. On that date Kevin Castillo came to the first Defendant's compound, explained that as Receiver and Manager he was taking over the first Defendant on behalf of the third Defendant. Throughout that entire day he, Phillip Jones, received reports of the seizure of several buses, some were taken off their routes and drivers were forced to surrender their money pouches. Four of the buses seized were only being used by the first and second Defendants. They were returned some three months later. He contended that none of the buses were hidden from the receiver and no records were removed from the compound. Since the seizure, the Claimant has been forced to lease other buses and could not provide its regular service. He discussed further expenses and difficulties occasioned by the Claimant after the seizure, including new licences, loss of customers and routes.

23. In relation to the transfers he says that during the week prior to November 30th, 2010 Mr. Novelo gave him a copy of the consent letter from the third Defendant and the original certificates. He effected the transfers on the 1st and 2nd December, 2010. He produced original Certificates of Registration for twenty-four of the twenty-five buses. He went on to speak of the inspection of the buses he made on the 11th April, 2013 with Mr. Gilbert Neal, the former Chief Mechanic for the Claimant and the first and second Defendants. He explained how he took photographs and made notes while

checking both the interior and exterior of the buses. He presented same to the court. The buses, he said, were rusted and damaged, their interior was mildewed and water damaged. Many had been cannibalized, seemingly for spare parts. He maintained that when seized, the buses were all in good working condition as required by new policies instituted by the Transport Department of the Ministry of Transport. Under cross, the witness informed that he reported to the shareholders of Liverpool Trucking – Miley Garcia and Company.

24. The Defendants presented three witnesses, the receiver Kevin Castillo was first. He explained how when the second Defendant defaulted, on its obligations to the third Defendant, he was appointed by the third Defendant on the 10th December 2010, as joint receiver with Arturo Vasquez (Castillo's instrument of appointment is dated 1st December, 2010). He was similarly appointed receiver for the first Defendant that same day. He immediately served copies of his appointment at the Companies' registered office and then he went to the compound in the company of three police officers. The locks had to be broken to gain entry. On entering the office he discovered all the records had been removed, the computers were gone and so was the server for the accounts/cash office. There was no security monitoring system or tools present on the compound. He says he was told by a staff member that the computers had been taken away the week prior. Under his direction some of the buses were parked and secured at the compound. Others were found hidden behind scrap buses at the Novelo Ranch the next day. Four were recovered in Belmopan City on the 13th. He confirms that the twenty-five buses, according to the records at the Transport Department,

had been transferred to the Claimant on the 2nd December, 2010. He has been unable to find any consideration paid for these transfers.

25. Under rigorous cross-examination he maintained his opinion that some of the buses had been hidden. He stated with certainty that the security system had been removed leaving only the shell of the cameras and that the records had been removed a week prior. He admitted that he never provided an inventory of the buses to anyone (including the Claimant) and that he only allowed inspection of the vehicles by the Claimant after an order of the court had been made.

26. Elmer Herrera, the Recovery Manager of the third Defendant testified to the existence of and exhibited the three debentures. He also testified to the appointment of the Receivers Arturo Vasquez and subsequently Kevin Castillo, on the default of the first and second Defendants to fulfil their obligations under the debentures.

27. Under cross he accepted that prior to the appointment of the receivers he had no dealings with either the first or second Defendants' accounts and could not speak to what the third Defendant did in relation to either before such appointment.

28. Louis Swasey then testified on behalf of the third Defendant. He was no longer in its employ at the time of the trial. He acknowledged the two debentures made between the third and the second Defendant. He stated categorically that he never gave permission to transfer the buses nor did he sign the letter dated 5th February, 2009 purporting to give such permission. He maintained this under cross. He said he was not the Accounts Manager for the first and second Defendants and even when pressed seemed to know

very little of their dealings with the third Defendant. What he did say, however, was that he has never given permission to the first and second Defendants to transfer any buses held under the floating change. However, from time to time originals of Certificates of Title of such buses had been delivered to the bank and in his opinion those buses could be sold with the bank's permission.

The Issues:

29. This court prefers to deal with Issues 1 and 2 together as "Good and Valid Title." It seems neater somehow.

Good and Valid Title:

30. The Claimant presents 25 undisputed and deemed authentic certificates of registration as prima facie evidence of ownership of the 25 buses. The Defendants say that although they may have title, it isn't good or valid for the following reasons:

1. The property was transferred with intent to evade creditors. I state with urgency that this simply makes the transfers voidable under Section 149 of the Law of Property Act Cap. 190. It may be a good claim but not a good defence in this matter. The transferee has a defeasible title, good unless and until avoided through court proceedings brought under the statute. Indeed, if the transfers were found by the court to be void it would affect the validity of title, but it does not give a receiver or a creditor the right to seize property already transferred to a third party. He may suspect fraud but it is the court which must determine whether the transfer has been fraudulent. The receiver needed first to obtain a declaration that the transfers were void before he could possibly be entitled to seize such property as he did. In the

interim and after making the necessary inquiries the receiver could have sought the aid of the court. The proper procedure is typically to seek a temporary restraining order to halt misconduct and a freezing order to secure any assets subject to the alleged fraudulent activity. The Claimant is guaranteed its right to property which neither the receiver nor a creditor can interfere with with such impunity.

2. Next, the Defendants say that the property was transferred to the Claimant in breach of Clause 19(8) of the Debentures and or that the floating charge had crystallized before the transfers had been effected. But what has this got to do with the third party and seizure of its property. The Defendants say that since the debentures charged the property it must be clear that the creditors intended to have the property as security not simply damages. *"A debenture creates a proprietary interest affecting the rights of third parties. It is up to the court to control the effect of their creation on the rights of innocent third parties who play no part in the negotiation of the rights created."* ***Evan v Rival Granite Quarries Ltd (1910) 2 KB 979.***

31. So the Court will now consider the debentures.

The Debentures:

The Defendants submit that the debentures created fixed charges over all the buses. If this is so, then from inception, the third Defendant had control over those charged assets because a fixed charge specifically attaches. If such a charge exists but the chargor disposes of the charged assets notwithstanding the prohibition on such dealing, the chargee expects some remedy. The rule is that the chargee can follow its proprietary interest in the charged assets into the hands of anyone who is not a bona fide purchaser for value without notice or trace the charged assets into their substitutes in the hand of the

defaulting chargor. Clearly this does not mean that good title cannot pass at all. It simply means that that title may pass encumbered or the debenture holder may have the right to the proceeds of their sale.

32. On the other hand, if the court finds that only the scheduled buses were held under a fixed charge and all the other buses were held under a floating charge then issues of crystallization arise. Prior to crystallization the chargor is free to dispose of the assets unencumbered without the chargee's consent and good title could pass. In fact, the chargor cannot be prevented from using those assets to pay its unsecured creditors while the charge continues to float.

Fixed or Floating Charge:

33. The Defendants tried, without true conviction to assert that the buses were all held under a fixed charge. Counsel presented the UK High Court case of ***The Russell Cooke Trust Company Ltd. v Elliott [2007] EWHC 1443 (Ch)***. They relied on its finding that regardless of the intention of the parties, as evinced by the label ascribed to a charge, the categorization of the charge is one of law. In their view, since there were restrictions to the free use of the charged assets and their removal from security, regardless of their label in the debenture as a floating charge, in law, a fixed charge, rather than a floating charge was created. They also quoted Clause 19(8) of the instant Debentures. "*The Company hereby covenants with the Bank that during the continuance of this security the Company will:*

(8) Not save with the written consent of the Bank sell or otherwise dispose of the whole or any substantial part of its undertaking assets."

34. Let us juxtapose that clause with the one in the ***Russell Cooke*** case

> "*4 RESTRICTIONS* The borrower shall not, without the prior written consent of the lender:
>
> (a) *create or permit to subsist or arise any Encumbrance or any right or option on the Property or any part thereof. Subject as aforesaid, any mortgage of or charge on the Property created by the Borrower (otherwise than in favour of the Lender) shall be expressed to be subject to this Deed*;
>
> *(b) sell, convey, assign or transfer the Property or any interest therein or otherwise part with or dispose of any Property or assign or otherwise dispose of any moneys (sic) payable to the Borrower in relation to the Property or agree to do any of the foregoing;*
>
> *(c) exercise any of the powers of leasing or agreeing to lease vested in or conferred on mortgagors by common law or by statute or accept the surrender of any lease, under-lease or tenancy or agree to do any of the foregoing;*
>
> *(d) part with or share possession or occupation of the Property or any part of it or grant any tenancy or licence to occupy the Property or agree to do any of the foregoing."*

35. The difference in the Clauses are so stark that blind reliance on this case may not be wise. The restrictions in the Russell Cooke case were far stricter and more precise than that of the case now under consideration. It speaks to the property (which the Judge accepted as meaning properties in the existing context) or any part thereof. The Judge said at paragraph 32: "*the restrictions that exists ... are indeed very significant in particular Causeway is simply not free to dispose of* ***<u>any</u>*** *of the assets the subject of the secondary security without the consent and participation of the mortgagee ... That says Mr. Oakley is simply inconsistent with the notion of a floating charge and means that this charge must be a fixed charge."* (emphasis mine) But he went on to say at paragraph 39 – *"I suppose that one*

could have a floating charge with certain restrictions on alienation, but there comes a point where the restrictions or alienation and disposal dealing are such that the charge can no longer be said to be floating so far as that is a meaningful concept."

Therefore, instead of simply relying let us consider Our Clause in light of other decisions on this most trying area of the law.

Our Clause:

36. Our Clause certainly allows for sale of some part of the assets without the necessary consent. The chargee is free to remove a certain part of its assets from security without permission. It can carry on its business in the normal way, creating debts and dealing with the assets unencumbered. The issue of permission only comes into play as it relates to the entire or a significant portion of the assets. (There is no definition in the debentures of what constitutes a significant portion).

37. I agree that a requirement for the bank's consent to deal with assets is inconsistent with the nature of a floating charge but case law has established that without sufficient control by the lender a charge by any name may in fact be floating. Our Clause lies somewhere in the middle of the spectrum and makes it difficult to characterize. You see, there is a restriction, but that restriction is not total. Was this an attempt by the draftsman at something akin to automatic crystallization (a concept which the British Courts are reluctant to recognize and have, in clearer cases than this, sought to maintain control)? Could the attempt to dispose of all or a significant portion of its assets signify that the chargor's undertaking would cease to be a going concern hence requiring the intervention of the debenture holder? Could this be the debenture holder's mechanism to be given notice of the state of the

Company's affairs? Is it simply a regular breach like any other breach of the covenants in the debenture? It's true nature is revealed only by delving deeper.

38. What I consider first is that a fixed charge is a security device. Its existence is dependent on the obligation by the chargor to preserve that security for the benefit of the chargee. If the chargor is at liberty to withdraw assets from that security at will, on this basis alone the charge should be floating. In ***The Russell Cooke*** case Justice Mann referred to the Court of Appeal decision in ***National Westminster Bank PLC v Spectrum Plus Limited and Others [2005] 2 AC 680***. That decision finally created certainty where previously there was conflict. The issue for determination by the law Lords in ***Spectrum*** was whether something which purported to be a floating charge was in fact a fixed charge. They stressed, importantly, the need to prevent **all** dealings by the chargor with the property charged (emphasis mine). The question posed was whether the restriction imposed on the book debts went far enough. An answer comes not by looking at the declared intention of the parties, but to the effect of the instrument creating the charge and the nature of the rights over the charged assets which have been granted to the chargee or reserved to the chargor.

39. I find it useful to include two of the many attempts at defining a floating charge which they considered. ***Yorkshire Woolcombers Association case [1903] 2 Ch 282, 295:***

> *"I certainly think that if a charge has the three characteristics that I am about to mention it is a floating charge.*

(1) *If it is a charge on a class of assets of a company present and future; (2) if that class is one which, in the ordinary course of the business of the company, would be changing from time to time; and (3) if you find that by the charge it is contemplated that, until some further step is taken by or on behalf of those interested in the charge, the company may carry on its business in the ordinary way as far as concerns the particular class of assets I am dealing with."*

40. And **Evans v Rival Granite Quarries Ltd ibid at 999:**

"A floating security is not specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallise into a fixed security."

41. The Privy Council in ***Agew v Commissioners of Inland Revenue [2001] 2 AC 710*** accepted that the third characteristic of Lord Millet's description in ***Yorkshire Woolcombers*** was the hallmark of a floating charge. That, Lord Scott agreed, (and I find no reason to disagree) distinguished it from a fixed charge. Lord Scott went on to state at paragraph 107 and I quote wholesale:

"Suppose, for example, a case where an express assignment of a specific debt by way of security were accompanied by a provision that reserved to the assignor the right, terminable by written notice from the assignee, to collect the debt and to use the proceeds for its (the assignor's) business purposes, ie, a right, terminable on notice, for the assignor to withdraw the proceeds of the debt from the security. This security would, in my opinion, be a floating security notwithstanding the express assignment. The assigned debt would be specific and ascertained but its

> status as a security would not. Unless and until the right of the assignor to collect and deal with the proceeds were terminated, the security would retain its floating characteristic... Nor, in principle, can there be any difference in categorisation between those grants and the grant of a charge over the specified assets expressed to be a fixed charge but where the chargor is permitted until the occurrence of the specified event to remove the charged assets from the security. In all these cases, and in any other case in which the chargor remains free to remove the charged assets from the security, the charge should, in principle, be categorised as a floating charge. The assets would have the circulating, ambulatory character distinctive of a floating charge."

42. For all these reasons this court finds that the buses not scheduled were held under a floating charge. Having so found it means that the chargor was free to do, with those assets, whatever it liked in the ordinary course of business until it wanted to dispose of a significant part or all of it. I do not think there is any doubt that the transfer of the fleet of buses of both the first and second Defendants would amount to anything less than a significant part of their assets. This was never in issue. The mere fact that the Claimant admits knowing of the debentures and strenuously proffers the third Defendant's purported letter of consent informs that they have likewise accepted that the transfer of the buses warranted such consent in accordance with those debentures. Therefore, authority for this course of action by the first and second Defendant companies rests on the bank's consent.

43. **The Bank's Consent:**

The evidence provided through David Novelo was that the bank gave its consent verbally and then in writing. The debentures require written consent so I find no need to discuss the evidence surrounding any other form. He

produced a copy of a letter purported to be signed by Louis Swasey, the then Deputy Manager of the bank. Louis Swasey adamantly denied this. The Claimant was unable to produce the original as David Novelo testified that it was lost. He had last seen it *"in January or February of this year."* I agree with Counsel for the Defendants that evidence as important and germane to one's case as this, should have been safely stored not left in such a circumstance that it could possibly be misplaced. It is, after all, the fulcrum of their case. Such an excuse for its absence was really unacceptable. Further, at final case management, an order was made for the production of all originals at the trial. Failure to preserve documents covered by standard disclosure after the commencement of proceedings may result in adverse inferences being drawn see ***Infabrics Ltd. v Jaytex Ltd. (No. 2) [1985] FSR 75.*** I chose to draw such an inference.

44. What also casts great doubt on that letter is other evidence given by David Novelo. He claims that he gave Louis Swasey the registration numbers of the buses to be transferred. The court was unable to fathom the necessity for this since his evidence also was that copies or original certificates were always lodged with the bank once a bus was bought. Why then would the bank need this information from him? Certainly they would have a record. One may overlook this, save and except that David Novelo never quite said how he got the originals from the bank. Under amplification he said they were delivered to him. Most mysterious! He also says that he kept certain originals if the bus was bought with shareholder's money. How many originals did he have by 2010 especially since only one of those buses transferred was on the Schedules to the debentures.

45. Then it defies common sense and logic that the bank – a creditor, would release its main security in the hope of being paid by a third party, not a party to the debentures. A third party who could possibly have leased the buses from the first and second Defendants, if according to the Claimant, it was necessary to have them registered in the Claimant's name in order to run on the Claimant's route. A full transfer however makes no good commercial sense. Moreover, if this really was the reason for the transfer, why did they take from 5th February, 2009 (the date of the letter), to 1st and 2nd December, 2010, to effect this change. It was not for the bank to prove the non-existence or falsity of the document. He who asserts must prove. I am not satisfied on the evidence provided that the Claimant has discharged this burden.

Consequences:

46. Since I find that the third Defendant gave no written permission, the transfer of the twenty-five buses, must have been done in breach of the debentures. A breach of this covenant, in accordance, with Clause 9 resulted in the principal and accrued interest becoming immediately payable and the security enforceable (emphasis mine). The bank under Clause 10 also had the right to swoop down and take possession of the chattels and things in the security which is an old common law form of crystallization intervention. Part of enforcing their security would have been the appointment of a receiver. Such an intervention would also in fact crystallize the floating charge under Clause 5. I could find nothing in the debenture to support the view that a breach of the debenture automatically crystallized the floating charge. That was not an agreed event at all and I reject the Defendants'

indirect assertion. To my mind there must be actual intervention by the lender and the debentures in the proviso to Clause 9 supports this:

> *"PROVIDED always and it is expressly AGREED that if the Company shall default in the performance of any of its foregoing covenants the bank may in its discretion but shall not be obliged to take such steps as to the bank may seem expedient for the reparation of such default."*

47. In ***Government Stock and other Securities Investment Co. Ltd. v Manila Railway Co [1897] AC 81*** Lord Macnaughten agreed that a debenture holder's right to intervene might be suspended by agreement. But for crystallization there must be a cessation of business or an intervention by the debenture holder. Lord Shard went on to say: "I should have great difficulty in any case even upon the construction of the instrument which has been presented, in holding that if the creditors in these debentures lay by and took no step whatever to arrest the business, or to put a receiver in charge of the business, they could affect anyone in the transaction of business with the Company."

I echo these sentiments without hesitation.

The Bank's Intervention and Crystallization:

48. The third Defendant started taking action according to David Novelo around the 30th November, 2010 when Mr. Mario Sabido one of their officers, came to the Bel-bus compound to make a demand on Bel-bus and/or to inspect and inventory the buses, equipment and assets. They agreed to leave the Bel-bus watchman and police officers to guard the gate. The next day Bel-bus received a letter of demand and notice that the third Defendant intended to

enforce its security. The second Defendant Company transferred 7 of its buses to the Claimant.

49. The third Defendant says that on that same day it also appointed Arturo Vasquez as receiver of the second Defendant Company. Evidence of this appointment was not before the court. Reference to it was made by witnesses for the Defendants and seen in the appointment of Kevin Castillo. The Claimant (not the Defendants) also exhibited a notice filed at the Companies Registry dated the 1st December, 2010 showing Vasquez's appointment on the 1st December, 2010. That document was received by the Registry on the 8th December, 2010. Although it gives notice it does not prove appointment – see ***RA Cripps and Son Ltd v Wickenden and Another [1973] 2 All ER 606***. Without the Instrument of Appointment or some evidence from the receiver Arturo Vasquez himself I do not find that his appointment has been satisfactorily proven and I so hold.

50. The third Defendant subsequently appointed Kevin Castillo as receiver of both the first and second Defendant Companies. Castillo says and the third Defendant agrees, that he was appointed on the 10th December, 2010. His Instrument of Appointment is dated the 1st. The Claimant asserts that the document lodged at the Companies Registry giving notice of his appointment is undated. But that is immaterial since the document clearly states the date of his appointment as the 10th December. I am inclined to accept the 10th since he (Castillo) testified to this and began taking action on the 10th. I find that the Instrument of Appointment must contain an error as to the date. The Claimant also submits that the first and second Defendant Companies were not given notice of this appointment. The debenture at

Clause 9 allows that where the Company defaults in repayment of any principal or interest then the entire sum becomes immediately payable and the security enforceable. There is no requirement to give notice of the appointment. In any case crystallization would be achieved with or without notice of the receiver's appointment - See ***Wickenden*** case (ibid).

51. In my view the appointment of the receiver on the 10th December, 2014 crystallized the assets (held under the floating charge) of the first and second Defendant Companies. When the charge crystallized it fixed on the assets then owned by the Company. It would catch any assets acquired up to that date but it will miss any which had already been disposed of. The assets in contention had by then been transferred and were not caught and the transferee's title would be good unless avoided for any reason by the court.

52. Consideration of issue number 6, in my view, is most appropriate now as I find it would in effect resolve all other outstanding issues.

Transfer with intent to defraud creditors:

53. Business people make transfers of property all the time. When these transfers are made specifically out of indebtedness a question of whether it is prejudicial to creditors arises forcibly. Fraudulent transfer law is old but it is an essential check on debtor misbehaviour. Counsel for the first and second Defendants presented the very helpful, very lengthy, case of ***Tradepower (Holdings) Ltd. (in liquidation v Tradepower (Hong Kong) Ltd. and others [2009] HKCFA 103 [2010] 1 HKLRD 674***. This case gave a thorough review of the development of our modern fraudulent conveyance law and dates it back to the Statute 13 of Elizabeth enacted in England in the 16th

Century. This ancient act is the precursor of both our Section 149 of the Law of Property Act and Section 60 of the Conveyancing and Property Ordinance under consideration in that judgment. For this reason case law history dating back to this statute continues to be relevant and we can better understand the present statutes as a crystallizing of this long and tortured history. At paragraph 38, Justice Ribeiro PJ opined: "*It is relevant to note Section 60's statutory ancestry since the case law or the meaning of the statute of Elizabeth has continued to exert an important influence on the construction and application of succeeding legislation. Statue 13 of Elizabeth 1, (5 also known as the Fraudulent Conveyances Act 15) made illegal and void any transfer made for the purpose or with the intent of hindering, delaying or defrauding creditors."*

54. My understanding is that up until the 17th Century, England had precincts (not only churches) in which debtors could take sanctuary. While living there they would be immune from execution by their creditors. Before fleeing to such a precinct it became usual for debtors to sell all they had to friends and relatives for a nominal sum with the understanding that the debtor would subsequently reclaim his property once the creditor had relinquished his claim. The Statute of 13 Elizabeth was intended to curb this practice. It was replaced briefly by the Law of Property Amendment Act 1924 Schedule 3 Part II paragraph 31 and then Section 172 of the Law of Property Act 1925 which is equivalent to our Section 149.

55. The courts and legislatures since then seemed to struggle with the difficult matter of defining the term "with intent to defraud." What has always been clear however, was the need to give the widest possible interpretation to the Statute in order to suppress fraud –***Twynes case [1601] 3 Co Rep 806, Cadogan v Kennett [1776] 2 Cowp 432***. Dixon CJ in ***Hardie v Hanson***

[1900] 105 CLR 451 at 457 suggested that an 'intent to defraud' is an 'intention to cheat' the creditors of access to the assets transferred. Gaudron J in ***Cannane v J Cannane Pty Ltd. (in liquidation) [1998] 192 CLR 557 at page 572*** thought that 'fraud' in that sense involved the notion of detrimentally affecting or risking the property of others, their rights or interest in property, for an opportunity or advantage which the law accords them with respect to property."

56. This issue has however been settled in Belize by virtue of the CCJ decision ***Atlantic Corporation Ltd. v Development Finance Corp & Novelo's Bus Line Ltd. (In Receivership CCJ Appeal No CV 7 of 2011.*** The court referred to ***Lloyds Bank Ltd. v Marcan [1973] 1 WLR 1387*** which has long been authority that the word defraud was designed, to reproduce the expression hinder, delay or defraud in the Statute of Elizabeth and was not intended to be configured to cases of fraud in the ordinary modern sense. The CCJ accepted this interpretation when at paragraph 45 they said: *"Pennycuick VC rightly made two useful points. First, he emphasized that the history and case law on S172 of the LPA and its predecessors made clear that the word "defraud" was not concerned with deceit at common law, but merely carried "the meaning of depriving creditors of timely recourse to property which would otherwise be available for their benefit." Second, to escape liability, the transferee had to show that he had no notice actual or constructive, of the intent to defraud it was not enough to show that he was not fraudulent or was not implicated in the fraudulent intention."*

57. The court went on to state: *"Indeed Atlantic's Statement of Claim only alleged that DFC had actual or constructive notice of the Debenture, not that DFC had full knowledge of the Debenture so as to be party or privy to the intent to defraud of NBLL. In the absence of Atlantic pleading that DFC was privy to any intent to defraud of NBLL,*

this issue should not have been investigated at all. Thus the efforts of Counsel for DFC were misplaced in submitting that Atlantic's claim was vitiated by not pleading and proving that DFC was implicated in NBLL's intent to defraud Atlantic."

This brings me to the following:

58. The Claimant in their skeleton arguments and closing submissions stated: *"It is also of note that no fraud is specifically pleaded, nor any particulars of fraud provided by the Defendants..."* and *"... the bank is ... asking that the court accept that the transfers were made in pursuance of fraud, which is not specifically pleaded and declared* (sic) *that the transfers* (sic) *made with the* **"clear attempt to evade the third Defendant as a creditor"."** They then presented a number of cases dealing with pleading fraud in the ordinary common law sense. They are however not relevant or helpful in matters such as the present. Counsel for the first and second Defendants responded that additionally, it was not in the Claimant's mouth to raise this issue at this time. I agree.

59. Although it is clear that the Defendants need not plead or prove that the Claimant was implicated in the 'intent to defraud,' they should at the very least have pleaded that they had some notice of it. The precise wording of the first and second Defendants counter claim is:

> *"11. The transfers by the First Defendant were a clear attempt to evade the Third Defendant as creditor and should therefore be set aside. The transfers by the First Defendant were done 1 day after the Second Defendant, a sister company of the First Defendant, had been placed into Receivership by the Third Defendant, and one day after Attorney for the First Defendant, Ms. Lisa Shoman wrote to the Third Defendant expressing the First Defendant's fear that it would similarly be pleaded."*

> *13. "In the circumstances, the First and Second Defendants claims that title to the 25 buses transferred to the Claimant and set out in **Annex 1** should be set aside and should revert to each of the First and Second Defendants."*

60. And in the amended defence which is repeated in the counterclaim:

> *"The First and Second Defendant say that the Claimant may have title to buses listed in the schedule marked A as set out at paragraph 2 of the Claimant's Second Amended Statement of Claim, but the Claimant's titles are liable to be set aside as they were transferred by the Second Defendant, Bel-Bus Company Limited and the First Defendant, National Transport Services Limited, in an attempt to evade the Third Defendant as creditor …"*

61. I make it clear that the issue is not whether 'intent to evade creditors' could be construed as being sufficient for a claim of 'intent to defraud creditors'. From the authorities already cited I feel that it is certainly sufficient. The enduring legacy of the statute of Elizabeth is that intent to defraud includes the purpose of delaying as well as defeating creditors. However, the Defendants' pleadings go only so far as alleging that the transfers were done by the second and third Defendant Companies with that intent. It really pleads nothing against nor touches the Claimant in any way. Nonetheless, the Claimant joined issue and regarded that issue as live and crucial to the counterclaim. They included it in the pre trial memorandum and dealt with it adequately at trial. When Counsel for the Claimant sought leave to amplify David Novelo's witness statement she specifically enquired whether the transfer of the buses was an attempt to evade creditors. He replied that it was not. They had had the authorized approval of the bank since February and there was no intention to prejudice the bank. I do not feel it necessary to

cite other instances throughout the evidence presented by the Claimants which dealt with the bona fides of the transfer of the property. Rather, I rely on ***Slater v Buckinghamshire County Council [2004] ECWA Civ 1478, LTL 10/11/2004.*** There "*it was held that the trial judge was entitled to make a finding of fact on an issue which had not been specifically pleaded but which the parties clearly regarded as live and crucial to the case, and which they adequately dealt with at trial."* Blackstone's Civil Practice 2013 23.7.

62. In the present case although in my view the pleadings were not properly done they should have been attacked a long time ago or objected to as a live issue and been treated as such. There can be no doubt however that the Defendants in their counterclaim were of the view that the transfer of the buses was done with intent to defraud the third Defendant as a creditor and that the receiver appointed had been prejudiced by those transfers. The evidence also proved that the knowledge and intent of the Claimant and the first and second Defendant Companies were identical. The issue falls properly to be considered.

Application of Section 149:

63. Section 149 provides as follows:

> *"(1) Except as provided in this section, every transfer of property ... with intent to defraud creditors, shall be voidable, at the instance of any person thereby prejudiced.*
>
> *(3) This section shall not extend to any estate or interest in property transferred for valuable consideration and in good faith or upon good consideration and in good faith to any person not having at the time of transfer, notice of the intent to defraud creditors."*

64. As to its proper application, the court in ***Atlantic Corporation Ltd. (ibid)*** had this to say: "*So the burden under Section 149(1) lies on the person seeking to avoid the transfer, and that under Section 149(3) lies on the transferee."* This latter burden reflects the normal burden placed on a person who claims that he is not bound by some legal property interest because he is a bona fide purchaser of a legal estate for value without notice see ***Barclays Bank PLC v Boutler and Another [1999] 4 All ER 513.***

65. The Supreme Court of Belize in ***Norman Angulo Liberty v Corozal Free Zone Development Limited and Another Action No. 302 of 1999*** adopted a similar approach which was also the position expressed in ***Halsbury's Law 4th Ed. Vol. 18 at para. 365*** which states:

> *"In an action to set aside a conveyance ... the onus of proof of intent to defraud rests upon the Plaintiff where the conveyance is for valuable consideration. Where, however, the conveyance is voluntary, and even perhaps where it is for valuable consideration short of full consideration, then on proof that at the time of its execution ... the natural consequence of the conveyance was to defraud creditors, or that the circumstances under which the conveyance was effected bore one of the indications or badges of fraud subsequently mentioned, the onus of disproving an intent to defraud passes to the defendant."*

66. Essentially the purpose of Section 149(1) is to enable the setting aside of transactions where the intention of the transaction was to put assets out of the reach of creditors. Whether that was the intention is a question of fact to be determined at the time of the transaction – ***Freeman v Pope [1870] LR 5 Ch App 58 (CA)***. It is therefore necessary in each case to "... look at the whole of the circumstances surrounding the execution of the conveyance and

then ask yourself the question whether the conveyance was in fact executed with the intent to defeat and delay creditors ..." Re ***Holland [1902] 2 Ch 300 at 372 (CA)***. The section does not apply simply because a consequence of the transaction proves to be a depletion of the assets available to the creditors. It cannot simply be assumed that a debtor is trying to evade creditors if he merely pays off one creditor without attendant circumstances such as the ability to keep possession of the property he purports to transfer. The actual intention must be specifically determined. It may ideally be proven by evidence provided by those involved in the transaction or by drawing certain inferences from the timing and circumstances of the transactions ***Moon v Franklin [1996] BPIR 196.***

67. Although there may exist more than one intention and those intentions may be with good reason we must be certain that the intention to defraud creditors was the substantial purpose behind the decision – ***Royscott Spa Leesing v Lovett [1995) BCC 502 CA***. Now a Company cannot be said to be able to have a purpose in mind or an intention so any purpose of the company must be formed in the minds of those human beings controlling the Company. We begin our inquiry there.

The Evidence:

68. David Novelo, by his own admission, asserts the controlling role he played as CEO for the transferors and the transferee. He must be accepted as having the authority to transfer the said assets. So it is his intention that must be scrutinized closely to establish what the actual intention of the transferors was. He was motivated, he said, by his fiduciary duty to the Claimant whom he knew to be a creditor of the first and second Defendants.

But he also knew that the third Defendant was a creditor (of the first and second Defendants) holding registered debentures.

69. He admits this and so the Claimant admits this. Because of his strategic position as CEO he had a greater opportunity to forecast the companies insolvency than the creditors who rely only on scrutiny and careful monitoring. He also admits knowing at the date of transfer that at least one of the two was insolvent. That is key. Lord Gifford LJ in ***Freeman v Pope (ibid)*** at page 545 tells us that "where the financial position is precarious it is objective evidence of an intention to defraud if he acts to put property out of the reach of creditors." This court finds that at the time of the transfer the transferees were both heavily indebted and unable to meet their existing liabilities.

70. We next consider the dates of the transfers and the date when he David Novelo became aware that a demand for payment was going to be made by the third Defendant. He was also well aware that that demand heralded the appointment of a receiver and the crystallization of the floating charge. We also consider the letter written to the third Defendant by Counsel acting for National Transport Ltd. That letter is dated December 1, 2010 and according to David Novelo was written at his request because he *"was concerned that the Belize Bank would place NTSL under receivership and in so doing jeopardize the future of NTSL …"*

71. That letter sets out information relating to a judicial review action undertaken by the first Defendant Company in respect of road service permits. There it is stated "My clients have instructed that I provide you

with this information because they are concerned that the Bank intends to place National Transport Limited and its affiliated Companies in receivership and to foreclose upon its undertakings and assets. Such action is based upon the recent steps taken without notice, by the Bank, in respect of Bel-Bus Company Limited, as guarantor for Mojocar Management LLC to seize and take possession of the undertaking chattels and assets listed in two debentures .." That letter goes on to state in the next paragraph; "As you are well aware the reason that NTSL has been unable to service debt obligations to the Bank has been because of the actions taken by the Transport Board."

72. We now consider the flurry of activity and the eagerness in having all the buses transferred as soon as he David Novelo gained the knowledge of the impending demand. We consider the connection of the transferors to the transferee. They were like a family sharing accommodations, assets and resources. We consider David Novelo's own words (see paragraph 18).

73. I find the behaviour of David Novelo to be inherently objectionable. I cannot help but draw the irresistible inference from the surrounding circumstances that David Novelos's substantive motivation (hence the transferors) was to thwart creditors. He intended that "the family" ought to keep possession of the property which he purported to transfer. The Claimant was the only profitable member at that time so it received the assets. Who could he have been securing them from, other than creditors, in particular the third Defendant. That to my mind is what influenced his mind at that time. As such it renders the transfers void and of no effect except if the transferee can prove that it falls within Section 149(3).

Section 149(3)

74. Again we consider the evidence. The Claimant maintains that they were creditors of the first and second Defendants but they have proven no debt. Nor have they proven any payment for the buses. The onus is now on them to prove that they are entitled to the protection Section 149(3) provides. Having not proven a valuable or good consideration the court is left to presume that the transfer of the buses was nothing more than a gift. A company in the normal course of its business is not allowed to give gifts of this nature. In any event debts must be paid before gifts could be given ***Freeman (ibid)***. A donor is mandated to be just before he can be generous. They have failed dreadfully on that limb. Although the court need go no further in its enquiry, I feel compelled in order to ensure completeness.

75. So, did the Claimant have knowledge of the first and second Defendants' intention to defraud its creditors? I answer resoundingly in the positive. The same controlling entity of the transferors controlled the transferee. Their knowledge was identical. David Novelo certainly knew and had notice of same. A grantee of a known insolvent without consideration, cannot claim ignorance of the fraudulent intent of the grantor. The transfers must accordingly be avoided. The buses are to be treated as if they were never transferred. The Claimant can therefore not prove ownership to same. Ownership is restored to the first and second Defendant companies. It is now open to the receiver of the third Defendant, he having been appointed on the 10th December, 2010, to lay claim to them as he sees fit. The Claimant's complicity in the fraudulent transfer deprives it of any benefit derived therefrom. It must accordingly account for and pay over same to the first and second Defendant companies.

ORDER:

1. The claim is dismissed.
2. Judgment for the first and second Defendants on their counterclaim.
3. It is declared that the transfers of the twenty-five buses are void, having been made with intent to defraud creditors.
4. The transfers are accordingly set aside.
5. Ownership of the buses reverts to the first and second Defendant Companies.
6. The Department of Traffic is to rectify its records accordingly.
7. The Claimant is to give to the first and second Defendants an account of and pay over all profits realized for the use of the twenty-five buses for the period 2nd December, 2010 to 10th December, 2010.
8. The Claimant shall pay interest on those profits at the rate of 3% per annum from the 2nd December, 2010 to the date the taking of the account is completed.
9. Any party may make application to the court for directions as to the manner in which such account is to be taken.
10. Costs to the Defendants to be assessed if not agreed.

SONYA YOUNG
JUDGE OF THE SUPREME COURT