BOOK REVIEWS

COMPANY CHARGES—by W J Gough, LLB(Hons)(Cantuar), PhD (Cantab), Barrister and Solicitor of the Supreme Court of NZ. London. Butterworths, 1978. liii + 442 pp. Price NZ$55.00.

Dr Gough is a Christchurch practitioner whose book is the product of research undertaken for the PhD degree at Cambridge University. In my view, it is an outstanding piece of work — well researched and full of penetrating analysis of what is a notoriously difficult branch of our law. In the words of an English reviewer, "the book is a work of very considerable industry and scholarship." There can be no doubt that it should become compulsory reading and then an essential reference text for lawyers specialising in the fields of commercial and company law. The book is primarily intended as a statement and discussion of the English law relating to company charges. However, this does not diminish its usefulness for New Zealand lawyers. The comparable New Zealand, as well as Australian, law, where different, is also considered.

Although I do have some reservations and criticisms which will be mentioned in the course of this review, I must emphasise here that they detract only a little from the excellence of the book which has certainly added a welcome new dimension to the published literature in the field of secured transactions. Furthermore, the author's thought-provoking and penetrating analysis, together with some controversial conclusions, seem to invite more academic and professional debate. The following pages represent, in part, an initial modest attempt to respond to the author's challenge.

Perhaps my major reservation relates to the author's style which makes reading of the book far from easy. It is characterised by very long sentences interrupted by qualifying or explanatory statements in parentheses. Often these parenthetical statements are unnecessary because they repeat points already clearly made. On other occasions they could have been reduced to footnotes to help the flow of the text. I believe that the length of the book, which accounts for the steep price tag of $55, could have been considerably reduced if it had been written in a more economical style. The author's style, when coupled with the somewhat closely set printing of the text and the minutely printed footnotes, means that great feats of concentration are often required when a chapter is being read.

The author states in his preface that his aim "is to provide a definitive account of the law relating to security contracts and security assignments entered into and given by companies." In addition, he is "very much concerned to describe the evolution of certain security forms as well as to suggest the likely direction of their development in the future." Although both these aims are achieved, it is the latter which, from my academic perspective, is one of the book's most impressive features.

The book is divided into eight parts. Part I is introductory and deals with the general law relating to the creation and effect of security interests. Part II, perhaps the most important and controversial section of the book, examines the floating charge and contains a detailed analysis of the origins and development of this form of security as well as the current law. Parts III-VI deal with the Companies Registration System. The objects of the system, the securities subject to it, and the consequences of registration and non-registration are all thoroughly explained. Part VII deals with registration of company charges under other systems. Part VIII contains a further explanation and summary of the priority rules considered at various stages of the previous text. The book concludes with a series of appendices, the most interesting being Appendix IV which suggests a number of specimen clauses for inclusion in the floating charge security.

The remainder of this review will be devoted to a more detailed outline of the contents of the book and some of the author's major conclusions, together with some of my thoughts thereon.

Part I

Part I consists of four chapters. Chapter I (entitled "Security Generally") contains a succinct and most valuable introduction to the nature of security contracts, the regulation of priority disputes, the meaning of the term "proprietary interest" and the various types of proprietary interest recognised by the courts of common law and equity. The chapter is marred a little, however, by the continual reference to the 1st edition of Sykes, *The Law of Securities,* instead of to the revised and substantially enlarged 2nd edition of 1973. (A 3rd edition was published in 1978). This recurs throughout the book.

Chapter 2 ("Capacity To Grant Security") briefly discusses the ultra vires doctrine, the company's borrowing power and its power to give security. Chapter 3 (in my view misnamed "The Advantage of Floating Security") discusses the generally favourable position which company debtors enjoy in relation to the giving of security. As the author explains, this favourable position has arisen mainly as a result of the non-application to company charges of the reputed ownership clause of the Bankruptcy legislation (now repealed in New Zealand) and the restrictive provisions of the Bills of Sale/Chattels Transfer legislation. This chapter contains the only discussion in the book of the Chattels Transfer Amendment Act 1974, which enables unincorporated dealers to grant instruments by way of security over their stock-in-trade. New Zealand readers may find the author's treatment of this Act disappointingly brief.

Chapter 4 ("Specific Assignment") builds on the introductory material in Chapter 1. Its main object is to provide the necessary framework for the analysis of the floating charge which follows in later chapters. Accordingly, the author explains the concept of a *specific* proprietary interest and the requirements, both at common law and equity, for the creation of such an interest, drawing together the common principles applicable to security and non-security assignments. As part of this process, the different attitudes of common law and equity to assignments of future property are also discussed in detail.

Part II—The Floating Charge

Part II is divided into eight chapters (5-12). Chapter 5 examines the origins of the floating charge and the exact nature of the security it provides. The author devotes particular attention to an explanation of how it is that a floating charge creates a present charge over the assets of the company yet, at the same time, does not constitute a specific charge attaching to individual assets until crystallisation occurs. It is this apparent contradiction which makes the concept of the floating charge difficult to grasp. For what it is worth, and at the risk of incurring the author's wrath for continuing the use of the metaphorical language which characterises so many of the judicial descriptions of the floating charge, I have found it useful for teaching purposes to describe the floating charge as an "umbrella-type" security; ie it "covers" the assets for the time being of the company and in this sense provides an immediate security, but it does not attach or fasten on to individual assets so that they can be freely disposed of by the company in the course of its business.

A disappointing feature of this chapter (see pp 65-67) and some of the analysis which follows in later chapters (eg pp 77, 84, 115-116, 123, 128 and 192) is the author's unqualified acceptance of the judicial rationale for treating a charge over a company's trading assets as "floating". The rationale is that the charge must necessarily be floating and not attach to individual assets because otherwise the business would be paralysed. A specific charge would necessitate the giving of express consent by the secured creditor to each individual disposition by the company. Thus, the author states that, in the case of a specific charge, the "property whether present or future can never thereafter by unilateral act of the assignor cease to be subject to the charge" (p 69).

The English courts in the early floating charge cases simply could not fathom the idea of a specific mortgage or charge over trading assets. To give the debtor power to dispose of the "secured" property was seen as contradicting the very existence of a security. It was regarded as a wholly inconsistent and impossible notion that the creditor could have a mortgage or charge if, at the same time, the debtor was free to dispose of the secured property in the course of his business. The prevailing attitude was that a security had to be "all or nothing". If the security was to be good against subsequent creditors, whether secured or unsecured, it also had to be good against purchasers in the ordinary course of business. In other words, either the security was fixed, in which case it affected all third parties, or there was no security at all. Hence the argument that the necessary result of a fixed security would be to stop or paralyse the business. The existence of the security interest meant that persons receiving goods or money from the debtor company in the course of its business could justifiably be called upon to account to the secured creditor. By virtue of his fixed security the latter would, strictly speaking, be entitled to have all the company's assets applied to satisfy his claim. Indeed, it was even argued that a fixed charge would necessarily result in the company being unable to use the secured creditor's initial advance—the advance would remain "the creditor's money". Accordingly, the courts concluded that, since the parties' obvious intention was that the business should be continued, the charge had to "float" and not attach to individual assets until steps were taken to enforce the security.

The above analysis missed the whole point of a security over trading assets. *Of course* the business is intended to continue. *Of course* persons dealing with the company in the ordinary course of its business must take clear title. Only by continuing the business will the debtor be able to repay the creditor. However, it does not follow that, in order to achieve these aims, there can be no charge immediately affecting the company's assets. An equally feasible alternative is that the security is vested but, by agreement, is liable to be divested in certain events. In none of the early floating charge cases did the court attempt to explain why an express consent contained in the security agreement to dealings in the ordinary course of business could not be operative. Very much part and parcel of the "all or nothing" approach was the notion that a fixed security would necessitate the giving of consent prior to particular dispositions by the company of the secured property.

The argument that a charge over trading assets must necessarily "float" because otherwise the business of the company would be paralysed is a complete non-sequitur. As a matter of principle there is nothing incongruous about a mortgage of trading assets. There is no reason why parties cannot agree upon a charge which will attach to present and after-acquired property and remain attached *until entry into defined types of transactions*. Had it not been for the "all or nothing" mental block experienced by the courts in the early cases, such a security might have become the norm in the Commonwealth countries. Lenders and their advisers would not have been faced with the task of inventing devices designed to render the floating charge a more satisfactory security. Subsequent generations of commercial lawyers would have been spared the agony of grappling with the concepts of "crystallisation", "automatic crystallisation" and now Dr Gough's refinement of "automatic partial crystallisation", not to mention the complicated body of law governing the effect of restrictive clauses in floating charges.

Chapter 6 is concerned with the topic of crystallisation of the floating charge—"the process of conversion of the security from being floating in character into being specific or fixed." The author's most interesting (and probably most important) conclusion is that an appropriately worded automatic crystallisation clause is effective. It is well known that the major shortcoming of the "traditional" or "true" form of floating charge as a security device is that, since it does not attach to particular assets until crystallisation, usually the appointment of a receiver or winding-up of the company, the holder of a floating charge may lose priority to intervening secured creditors and unsecured judgment creditors levying execution. Accordingly, commercial lawyers have for some time sought to overcome the floating charge's vulnerability in these respects by providing for crystallisation to occur automatically upon the occurrence of specified events, for example, the company attempting to charge its property without consent or judgment creditors attempting to levy execution. Although this device was approved by Speight J in *Re Manurewa Transport Ltd* [1971] NZLR 909, lingering doubts remained because automatic crystallisation could give rise to a number of practical problems. For example, crystallisation could occur without the knowledge of the floating charge holder and the company continue to trade when, strictly speaking, its trading power had ceased. Or, as the author points out (at p 102):

> Although the company legally may not be entitled to do anything, yet factually the creditor might remain supine and not intervene to dispatch what business remains to be done by taking possession himself or by appointing a receiver, in which case the business theoretically is in total suspension.

As a result, doubts arise as to the rights of third parties dealing bona fide with the company. It is the ill-defined and possibly inconvenient consequences of automatic crystallisation that have led many writers to suggest that the holder of a floating charge should be required to intervene before crystallisation can occur.

The author suggests a solution to the difficulties—his concept of "automatic partial crystallisation". He states (at pp 103-104):

> A creditor may not merely obtain in his security a provision that upon an agreed event the management trading power of the company comes to an end as a whole, but that it should cease only with regard to particular specific assets in certain agreed events. For instance, a security might provide that in the event of the company attempting to charge specific property or execution being levied on particular assets, the trading power will cease with regard to only those assets so threatened by the subsequent charging or execution (although remain extant in respect of the rest of the assets subject to the floating security but not so threatened) so that as regards those particular, threatened assets the charge shall automatically crystallise.

Thus, the creditor can get the best of both worlds by utilising this notion of "automatic partial crystallisation". His priority position is boosted to the extent outlined (see pp 104-105), yet the inconvenience of calling a halt to the company's trading power with respect to all its assets is avoided. An appropriately drafted floating charge becomes in substance a specific charge over trading assets (see p 106).

I agree entirely with the author's conclusion. He has solved the problems associated with recognition of automatic crystallisation. However, it must be stated that difficulties were experienced in following some parts of the analysis in this chapter. For example, early on it is stated, without qualification, that (at p 89)

> a creditor cannot cause the charge to crystallise with regard to some assets of the company but not others: if the creditor wishes to bring about crystallisation, he may do so but, once having decided to do so, he causes the charge to crystallise in respect of all the assets subject to the charge, or at least of the whole of the class of assets of which the particular items in question form a part.

There is no cross-reference to the discussion 15 pages later (at p 104) which reveals that an express provision to the contrary in the parties' contract is effective.

Chapter 7 discusses and explains the nature and scope of the trading power of a company which has subjected its assets to a floating charge. The author's most important conclusion is that, on the basis of the authorities, "any transaction which is not ultra vires the company may be treated as being within the ordinary course of the company's business, provided that under such a transaction the company does not cease to be a going concern" (p 114).

Chapter 8 (entitled "The 'Implied Consent' Conundrum") examines further the conceptual nature of the floating charge and considers the suggestion that a dealer can give a specific equitable mortgage or charge over his stock-in-trade as an alternative to a floating charge. This chapter is the most demanding and difficult in the book. Consistently with his earlier acceptance of the judicial rationale of the floating charge, the author concludes that the specific charge is not available as an alternative. In particular, he disagrees with the view that, in the case of a specific charge, it is possible to explain the dealer's power to dispose of the stock in the ordinary course of business on the basis of an express or implied consent given in advance by the secured creditor.

As indicated earlier in relation to chapter 5, I cannot agree with the author's conclusion that it is not possible to have a specific charge over trading assets. His basic assumption that (at p 123)

> a specific security, which causes a specific proprietary interest in each individual item of chattel stock to vest in the assignee, would bring about the paralysis of the business since the express consent by the creditor required for the relinquishment of his proprietary interest would be necessary to each individual sale (or other disposition) by the dealer

is insupportable. Later (at p 128), it is suggested that a general advance consent cannot be given in respect of future property "since the financing creditor still himself has no proprietary interest . . . to relinquish by consent." This is unconvincing. Why is consent required after the creation of the proprietary interest? Why must the financing creditor acquire his interest before he can effectively consent to its relinquishment in certain circumstances after it is acquired? There is no reason in principle why he cannot say to the dealer something like—"In relation to your future stock-in-trade, I do not have a proprietary interest. However, when that stock-in-trade is acquired, it shall become subject to this security, in which case you may dispose of it in, and only in, the following circumstances . . ."

The author also suggests that a general advance consent is "incompatible" with the existence of a specific proprietary interest in the financing creditor. "In such a case, there has been no appropriation of identified or ascertained property to the security assignment, so that there can legally be no specific security" (p 129). Again, this simply does not follow. An advance consent means that, by the parties' agreement, the financing creditor's security will be divested in certain circumstances, not that it never vests at all. The author's argument falls along with the "all or nothing" approach upon which it is based.

However, my major difficulty with chapter 8 stems not from the above fundamental disagreement with the author's conclusion, but from an apparent contradiction in the course of his analysis. It is stated that (at p 129):

> conceptually speaking, a specific security with an implied licence is an impossibility. It is conceptually impossible to postulate the existence of a specific security and yet at the same time permit the debtor or assignor, without need for express consent from the creditor or assignee with regard to specific property, to dispose of such specific property in the ordinary course of business. In such a case, there has been no appropriation of identified or ascertained property to the security assignment, so that there can legally be no specific security. . . . It is inconsistent . . . to postulate the existence of a specific security over future property (still unascertained) with an implied consent or licence by the creditor given to the debtor to appropriate the property when ascertained to purposes other than that of the security and otherwise inconsistent with the existence of the security. Moreover, it can be seen that this is so even with regard to present property where there is an implied licence to appropriate the property in such a manner (eg by sale by the debtor to purchasers in the ordinary course of business). In such a case the security must be floating, since where such a licence exists the mere present ownership or subsequent acquisition of property by the debtor (which in other circumstances might be capable of being sufficient) can then no longer in fact be sufficient to constitute the final and irrevocable appropriation necessary to create a specific charge. Such a putative "implied licence" or "implied consent" security, whatever name the parties themselves might care to give to it, cannot be a specific security but is a floating security.

Yet, four pages later, the author suggests that a specific security *is* conceptually possible (pp 132-133):

> No doubt, it would have been quite possible for the courts instead of developing the concept of the floating security, to have developed a different security, viz, a security being in concept a specific security with an implied consent by the creditor to the debtor to sell or otherwise apply its trading assets in the ordinary course of business. Such a security might not have permitted the consent to be interpreted as extending to subsequent security assignments. Such a security might have created an equitable proprietary interest in the holder capable without more of being asserted in priority against subsequent chargees and execution creditors. For such a development to have taken place, historically, contractual documents containing language more explicit and more appropriate to achieve such a result would have had to have been brought before the courts for interpretation. Conceptually, such a security would have meant that the designation of property as the subject-matter of the security would have constituted appropriation, but instead of the appropriation being then final and irrevocable it would have been only conditional and revocable so long as the debtor made no "reappropriation" within the terms of the consent implied in the particular disposition. In other words, the proprietary title would have vested but be subject to divestment. The charge would have attached but then be liable to being lifted or displaced. The creditor would acquire a proprietary interest to gain priority in time (apart from any loss of priority through the workings of estoppel or other priority rule against him) except as against certain specified and agreed types of assignee. . .

And further:

> Given the approval of equity to present assignments or contracts for assignment of future property . . ., there seems to be no reason why, provided that the future property is in fact subsequently acquired by the debtor, it should not be possible for parties to a security contract by sufficiently clear expression of contractual intention to create such an "implied consent" (whether defined as specific or floating) security. . .

I agree entirely with the above statements. Unfortunately, they appear to contradict the author's earlier analysis.

Probably all the author intended to suggest was that, having plumped for the "floating" charge, it is no longer open to the courts to recognise the specific security over trading assets coupled with a licence to deal. There are strong arguments against this conclusion also.

First, fixed equitable mortgages of after-acquired stock-in-trade were sanctioned by the courts prior to the enactment of the restrictive provisions of the Bills of Sale/Chattels Transfer legislation. Thus, it was held in *Joseph* v *Lyons* (1884) 15 QBD 280, following the principle in *Holroyd* v *Marshall* (1862) 10 HLC 191, that a mortgagee of present and future stock-in-trade obtained an equitable interest in the future stock when brought on to the debtor's premises. (See also *Driver* v *Pitt* (1870) Mac 812.) The author is forced to argue that this conclusion was wrong.

Secondly, it has never been doubted that livestock mortgages granted by farmers may confer a fixed security interest in present and future stock, despite the farmer's authority to dispose of that stock in the course of his business.

Thirdly, so far as New Zealand is concerned, the Chattels Transfer Amendment Act 1974 has sanctioned the granting of instruments by way of security (chattel mortgages) of stock-in-trade by unincorporated dealers. There are no apparent reasons why the same form of security should not be available to companies.

Fourthly, and most importantly, there are no binding authorities precluding the courts from upholding a specific security. About the only hurdle is posed by the House of Lords decision in *Illingworth* v *Houldsworth* [1904] AC 355. It can be overcome, however, on the ground that the language used in the security agreement in question did not manifest clearly enough an intention to create a specific security. The author himself impliedly acknowledges that the contractual documents brought before the courts were never sufficiently explicit to convey an intention to create a specific security. If that is so, one may ask—why isn't the question still open? Why, to use his language, is a specific security now "conceptually impossible"?

It is interesting to contrast here the author's previous discussion of automatic crystallisation clauses. Despite the "long line of dicta" which suggests that active intervention on the part of the security holder is necessary in order to cause crystallisation, he is prepared to accept the validity and effectiveness of such clauses. He does so on the ground that automatic crystallisation is entirely consistent with general principles of contract and property law. A similar argument from principle in relation to specific securities over trading assets is rejected in the face of arguably less weighty authority. The only difference between the two situations is that, in the case of automatic crystallisation, there happens to be a recent New Zealand Supreme Court decision recognising the concept.

The final chapters in Part II are rather less controversial. Chapter 9 contains an admirable explanation of the origins and legal effect of the use of restrictive clauses in floating charges. Chapter 10 ("Priority Situations") deals with the priority of a floating charge in situations other than where a third party claims a proprietary interest arising by way of a specific assignment from the company, eg an unsecured creditor levying execution or claiming a right of set-off and a secured creditor claiming under a subsequent floating charge.

Chapter 11 ("Stock-in-trade Financing") compares the floating charge with other security devices available for financing dealers' stock-in-trade. It is argued convincingly that the often alleged weaknesses of the floating charge from the security point of view are either exaggerated or can be easily overcome by way of an automatic partial crystallisation clause.

It must be mentioned, however, that the author's conclusions in chapter 11 in relation to the important topic of security over proceeds are open to serious question. For example, with regard to specific securities over stock-in-trade (whether arising under a mortgage, charge, consignment plan or stocking plan arrangement), it is argued that the dealer is a fiduciary for the purposes of the equitable tracing rules. As a matter of law, the secured creditor's proprietary interest is transferred to the proceeds. Accordingly, it is suggested that express proceeds clauses are strictly unnecessary. The debtor's duty to account specifically for the proceeds "flows from legal doctrine in any event without need for agreement to achieve it" (p 180; see also p 185). This conclusion is based on the decision of the English Court of Appeal in *Aluminium Industrie Vaassen B V* v *Romalpa Aluminium Ltd* [1976] 1 WLR 676. However, the implications of that case are grossly exaggerated. There the creditor's right to trace into the proceeds of sale did not simply stem from the retention of the security interest in the goods supplied. The debtor was found to be a fiduciary because the court was able to spell out an implied agreement to account specifically for proceeds from the very special (and complicated) terms of the contract in question. Had it not been for these special terms, it is certain that at least two of the judges (Roskill and Megaw LJJ), and probably all three, would have come to a different conclusion. The *Romalpa* case is quite consistent with the hitherto accepted view that, in relation to authorised dispositions of secured property, the creditor's equitable tracing right is dependent upon whether the parties expressly or impliedly agreed that the debtor was to account *in specie* for the proceeds. (See Goode, "The Right to Trace and its Impact in Commercial Transactions" (1976) 92 LQR 528, 534.) In many "financing dealer" situations it will be impossible to imply an agreement to account. Indeed, where stock is held for sale pursuant to a conditional sale agreement, it will commonly be quite plain that the relation between dealer and financier with regard to proceeds is to be that of debtor and creditor. The agreement will expressly provide that resale accelerates liability to pay the purchase price. In many other situations the parties' "understanding" and course of practice will not involve the dealer keeping proceeds separate and accounting *in specie* for them. The inconvenience is simply too great. The dealer will be free to deal with proceeds as he pleases by paying wages, trade creditors, overheads etc.

The author rounds out his discussion of the floating charge in chapter 12 ("The Floating Charge Today"). His major conclusion is that the floating charge, as originally conceived in the latter part of the nineteenth century, has now been replaced, with the advent of automatic crystallisation clauses, by a new, springing kind of security—a security which is more specific than floating. It is a "springing" security because (p 199)

> no proprietary interest can arise immediately but upon the occurrence of any future event which might in any way threaten the security interest (and which event itself identifies and ascertains the property the subject-matter of the security) immediately a proprietary interest arises.

Thus, a proprietary interest may spring into existence in relation to the whole or threatened part of the company's assets in accordance with the parties' agreement upon the occurrence of defined events. As the author explains, the new "springing" security is conceptually different from the suggested specific security which he earlier rejected, although they both have basically the same effect. Under a specific security a proprietary interest would arise "merely by virtue of the ownership or acquisition of property by the company" yet be divested when authorised dispositions occurred.

Registration of Company Charges

Parts III-VIII which occupy just over half the length of the book call for rather less comment and debate. The author explains in comprehensive fashion the systems of registration of company charges under the Companies Act and other Acts, the effects of registration and non-registration, and the relevant priority rules. I particularly admired the excellent discussion in chapter 14 of the various forms of security encompassed by the term "charge" and the historical development of the equitable charge over chattels. The lucid discussion in chapter 24 of the practice and rules governing extension of time for registration and the effect of such extension on priorities is also worthy of special mention.

There are, however, some inaccuracies and omissions which should be recorded.

It does not seem to be mentioned anywhere in the text that the time period for registration under the Companies Act in New Zealand is now 30 days, not 21 days as in England.

In the course of his discussion in chapter 18 of registration under the Companies Act of chattel securities granted by companies, the author cites *Carncross* v *Wilson's Motor Supplies Ltd* [1924] NZLR 327 as authority for the following propositions (p 287):

> The fact that a mortgage or charge over chattels, if given by an individual, might be void irrespective of whether registration has been effected or not (eg where a registered bill of sale is void as regards future goods which it might purport to include within its scope on the grounds that the holder is not the true owner thereof or that the goods might not be properly specified in the schedule to the bill of sale) does not render such a mortgage or charge where given by a company not registrable under section 95 [s 102 (NZ)] on the grounds that by virtue of the wording of section 95 (2) (c) it is not a document which "would require registration as a bill of sale".

In fact, *Carncross* decided exactly the opposite. It was held that the then New Zealand equivalent of s 95 (2) (c) did *not* apply to a security over future goods which would have been void if executed by an individual.

In chapter 25, the author discusses s 4 (2) of the Chattels Transfer Act 1924 which provides that "all persons shall be deemed to have notice of a security granted wholly or partly upon chattels by a company registered under the Companies Act 1955 . . . and of the contents of such security, so far as it relates to chattels, immediately upon the registration of such security in manner provided by the said Companies Act 1955." He concludes (at pp 357-358):

> The absurd result, as is confirmed in the case of *Re Manurewa Transport Ltd,* of this provision is that a subsequent specific charge over chattels and, say, book debts takes priority over a registered floating charge with a restrictive clause in respect of the book debts but not in respect of the chattels.

Unfortunately, this overlooks that in New Zealand "chattels" in the Chattels Transfer Act includes "book debts".

Chapter 27 deals with "Land Charges" and includes a discussion of *Re Mountain View Property Holdings Ltd* [1972] NZLR 1. This case held, inter alia, that failure to register with the Registrar of Companies particulars of land mortgages registered under the Land Transfer Act did not render the mortgages void against the mortgagor's liquidator under s 103 of the Companies Act. The author argues that the result is the same even where a mortgage is not registered under the Land Transfer Act, but notes (at p 391):

> Unfortunately, some doubt arises from a certain ambiguity in the judgment of Wild CJ . . . who after acknowledging that the avoidance provision (s 103 (NZ)) does not apply to company land charges (being a class of charge registrable under another Act and for the registration of which another registration system is provided), then apparently stated that if a particular land mortgage was left unregistered (ie under the Land Transfer Act 1952) it might be void against the liquidator and any creditor under s 103 (NZ), so long as it remained unregistered in fact and notwithstanding that it is of a class of charge registrable under another Act.

However, Wild CJ did *not* suggest that a land mortgage which was not registered under the Land Transfer Act might be void under s 103. The suggestion was that (p 10)

> until registration they [the land mortgages] were not, of course, effectual to pass any estate or interest in the land, or to render it liable as security (s 41, Land Transfer Act 1952).

In other words, it is the non-registration under the *Land Transfer Act* which avoids the security (or, more accurately, prevents one from coming into existence). There is no "ambiguity" in Wild CJ's judgment. The *real* point to be made here is that his Honour is clearly wrong in his interpretation of s 41. It is well settled that an unregistered mortgage of land confers on the mortgagee an equitable proprietary interest. (See *Barry* v *Heider* (1914) 19 CLR 197; *Great West Permanent Loan Co* v *Friesen* [1925] AC 208; *Premier Group Ltd* v *Lidgard* [1970] NZLR 280.) It is an equitable mortgage and therefore entitled to priority over the liquidator and unsecured creditors.

A major omission occurs during the author's discussion in chapter 30 of priorities in relation to future advances (at pp 402-403). He fails to advert to s 4 (3) of the Chattels Transfer Act 1924 and s 2 (2) of the Property Law Amendment Act 1975. These provisions have the effect that the problems discussed do not arise in New Zealand.

As with the earlier parts, some of the author's conclusions in Parts III-VIII are distinctly debatable. The following are those considered worthy of brief mention here.

First, the author suggests that the securities encompassed by the term "charge" include the pledge (pp 214 and 282). For reasons explained by the present writer elsewhere ("The Concept of 'Charge' in the Law of Chattel Securities" (1976) 8 VUWLR 283), this is difficult to accept. It is surprising that the author takes a different view, especially since he acknowledges that his supporting authority is slender.

Secondly, it is argued (at p 235) that the case of *Re Connolly Bros Ltd (No 2)* [1912] 2 Ch 25 is unsound in principle and ought to be overruled. Acceptance of this view would mean that in New Zealand (where registration gives notice of a restrictive clause in a floating charge so far as it relates to chattels) a floating charge would have priority over a subsequent "purchase money" chattel mortgage (see p 235, n 20). It is difficult to see a court reaching such a conclusion. The discussion here would have benefited from a reference to Pennington (*Company Law* (3rd ed 1973) 374-375) and the policy argument he puts forward in favour of conferring priority on the purchase money security.

Thirdly, although the author's analysis of the consequences of not registering charges under the Companies Act is generally most instructive, the difficulties caused by the fact that no "priority point" is expressly stipulated in the Act's avoidance provision (in NZ, s 103) are somewhat exaggerated. It is difficult, for example, to go along with the suggestion that it *may* be possible for an unregistered secured creditor who enforces his security to retain the proceeds of his enforcement and thus gain priority over a subsequent registered secured creditor who took without notice (see pp 335-341). Take the following example:

> A Ltd mortgages the company car to B. The mortgage is unregistered. Subsequently A Ltd further mortgages the car to C who registers properly under the Companies Act.

The author argues that it may be possible for B to gain priority over C by seizing and disposing of the car prior to intervention by C. In my view, B's security must be void against C either upon the creation of the security in favour of C or, if the registration period has not expired, at the end of the registration period. If B's security is void against C, this must mean that A Ltd has title to pass to C, so that B is liable in conversion if he seizes and disposes of the car. It is likely that a court would decide that the priority point in s 103 of the Companies Act is the point at which the challenging creditor asserts rights against the property, ie upon creation of the security or, in the case of an unsecured creditor, the levying of execution. The author is clearly correct in suggesting that the avoidance provision of s 103 is far from satisfactory. However, given that "creditor" includes "secured creditor", it is hard to imagine a court entertaining an argument that, in the above example, B could effectively gain priority over C by enforcing his security first.

The Appendices

The book concludes with four appendices. Appendix 1, which consists of a one-page note on the doctrine of "sham", will be found to be rather unenlightening. No reference is made to the trend against finding shams which is evident from recent chattel security cases, including the decisions of New Zealand's Court of Appeal in *Bateman Television Ltd* v *Coleridge Finance Co Ltd* [1969] NZLR 794 and *Paintin and Nottingham Ltd* v *Miller, Gale and Winter* [1971] NZLR 164. The latter stand in stark contrast to some of the old "sham" cases. Indeed, perhaps the most instructive exercise in this area is to compare the recent decisions of the Court of Appeal with that Court's decision 40 years earlier in *General Motors Acceptance Corporation* v *Traders' Finance Corporation* [1932] NZLR 1. The sale and conditional sale arrangements in the latter case would almost certainly not be held "shams" today.

Appendix II is another one-page note, this time on "Moneylenders Legislation in Australasia". It deals with problems caused by the provision in the moneylenders legislation which prescribes a memorandum of the loan contract (in NZ, s 8 of the Moneylenders Amendment Act 1933). Any value this appendix might have had is destroyed by the failure to note:

(a) that part of Wild C J's judgment in *Re Mountain View Property Holdings Ltd* [1972] NZLR 1 which held that s 8 of the Moneylenders Amendment Act 1933 does not apply to company borrowers, and

(b) section 2 (2) of the Property Law Amendment Act 1975, dealing with security for future advances, which operates "notwithstanding anything in s 8 of the Moneylenders Amendment Act 1933."

Appendix IV is the most valuable of the appendices. It sets out a series of specimen clauses for inclusion in the new "springing" floating security suggested by the author. These clauses deserve careful study by practitioners who accept, and wish to implement, the author's view that "automatic partial crystallisation" clauses provide the company financier with a more satisfactory security than the old or traditional form of charge. However, in my view, a reading of these clauses does not substantiate the author's earlier claim (at p 199) that a "springing" security is a less cumbersome form of security than the specific security over trading assets. Indeed, the more I studied the specimen clauses, the more convinced I became that the courts ought to recognise the specific charge coupled with a licence to deal. That very same freedom of contract which permits what is tantamount to a specific charge by the use of a series of complicated clauses providing for automatic total or partial crystallisation should also permit the creation of a charge which is immediately specific yet confers on the debtor power to dispose of trading assets in certain defined circumstances. The author's "springing" security is a "back door" specific charge. For reasons explained in more detail earlier, it is contended that the "front door" remains ajar and possible to open. It has not been slammed and bolted by the early floating charge cases. If that is so, then the true position is that, consistently with general principles of contract and property law, it is possible by use of appropriate language to create three distinct types of non-purchase money security over trading assets:

(a) the "true" or traditional floating charge,

(b) the "springing" security, and

(c) the specific mortgage or charge.

Conclusion

As suggested at the beginning of this review, Dr Gough's book represents a considerable feat of scholarship. Despite the convoluted style, the several inaccuracies and debatable conclusions, the author has produced a notable contribution to the literature in the field of secured transactions.

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