[2021 Gib LR 282]

BARCLAYS BANK PLC and REGISTRAR OF COMPANIES v. GUY

IN THE MATTER OF TEN ACRE LIMITED

SUPREME COURT (Yeats, J.): June 16th, 2021

2021/GSC/16

Companies—registration of charges—extension of time—alleged non-disclosure of matters concerning validity of charge not material—on application pursuant to Companies Act 1930, s.134, court's function not to determine validity of charge

The applicant applied to intervene in an action, to set aside an order and to set aside a legal charge.

In 2005, Schofield, C.J. made an order that Barclays Bank had 21 days to register at Companies House a legal charge between Lexi Holdings plc, Ten Acre Ltd. ("TAL") and Barclays ("the 2005 order"). The charge, which was executed in England, related to four plots of land in England which were registered to TAL and had been put up as security for Lexi's and/or TAL's borrowings with Barclays. As TAL was registered in Gibraltar, the charge should have been registered at Companies House within 21 days of its execution pursuant to s.128 of the Companies Act 1930 ("the Act"). It was not so registered, which led to Barclays applying for an extension of time and obtaining the 2005 order.

In 2018, Mr. Guy filed an application to intervene in the action, to set aside the 2005 order and to set aside the charge. He was the previous owner of the Ten Acre land. He alleged that in 2004 he had been defrauded by the principal behind Lexi (a Mr. Luqman) and that the Ten Acre land was in effect stolen from him. In anticipation of the sale of the land to Mr. Luqman, he had signed a document known as a TR1 form (which was used in England to transfer property). In June 2004, he was informed that the sale had fallen through but then Mr. Luqman deceitfully procured the signed TR1 form and used it to register the title to the Ten Acre land in the name of TAL. In March 2005, Lexi, TAL and Barclays executed the charge. It was an all moneys charge. The charge was registered at the English Land Registry in March 2005. In March 2005, Mr. Guy filed a unilateral notice with the Land Registry (a unilateral notice notified persons

searching the register that a third party claimed an interest in the land). That was done by submitting a form RX1.

In 2007, Barclays issued proceedings against Mr. Guy in England. It was granted a declaration that it was entitled to sell the Ten Acre land pursuant to the charge.

Mr. Guy alleged that he should have been notified of Barclays' application to extend time for registration of the charge and that if the Chief Justice had been aware of the matters which had gone on in England the extension would not have been granted. He submitted that (a) there had been a fundamental defect in the 2005 order as he had not been served; (b) in any event, there had been material non-disclosure by Barclays; and (c) as a result, the 2005 order was void.

Barclays opposed the application to intervene and filed an application to strike out. Both applications were heard together.

Section 134 of the Companies Act 1930 provided:

> "134. The court, on being satisfied that the omission to register a charge within the time required by this Act, or that the omission or misstatement of any particular with respect to any such charge or in a memorandum of satisfaction, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or misstatement shall be rectified."

Held, dismissing the applications:

(1) Ordinarily, applications pursuant to s.134 of the Act were made without notice save in cases where the application was made by a chargee when service should be effected on the company itself. The failure to serve Mr. Guy was not a fundamental defect in the proceedings (para. 47).

(2) Schofield, C.J. would have had to consider three distinct matters in the 2005 application: first, whether one or more of the five factors contained in s.134 of the Act applied; secondly, if one of the factors was made out, whether to exercise his discretion to extend the time for registration; and thirdly, if he decided to extend the time for registration, whether to impose any terms and conditions. If Barclays had made the disclosure that Mr. Guy claimed it should have made, it would not have made a difference to the outcome of the 2005 application. The matters which Mr. Guy alleged should have been disclosed related to the validity of the charge. It would not have been the court's function to determine the validity of the charge. Schofield, C.J.'s exercise of discretion in 2005 would have been limited to determining whether the late registration of the charge caused any unfair advantage to a party, not whether the charge itself prejudiced any other person. The next question for the court in 2005 would have been to determine

whether it was just and expedient to impose any terms or conditions on the registration. The court imposed three conditions: a 21-day time limit; that an office copy of the order be delivered to the Registrar of Companies; and the *Joplin* provision—the order was without prejudice to the rights of any person acquired between the date of the creation of the legal charge and the date of its actual registration. Whether Mr. Guy acquired rights against TAL (in the period between the creation of the charge and its actual registration at Companies House) was not a matter for the present court. The 2005 order provided that if a person had acquired such rights, the charge was subject to those rights. If Mr. Guy was correct, he would be protected by the 2005 order and there would be nothing to prevent him from relying on the *Joplin* provision in any proceedings where it might be relevant. In the circumstances, the non-disclosure was not material to the application and there was no good reason to set aside the 2005 order. It followed that the application to intervene and to set aside the charge also failed (paras. 56–64).

Cases cited:
(1) *Ashpurton Estates Ltd.*, *In re*, [1983] 1 Ch. 110, considered.
(2) *Barclays Bank plc* v. *Stuart Landon Ltd.*, [2001] EWCA Civ 140; [2001] 2 BCLC 316, considered.
(3) *Craig* v. *Kanssen*, [1943] 1 K.B. 256; [1943] 1 All E.R. 108, considered.
(4) *Cunard Steamship Co. Ltd.*, *In re*, [1908] W.N. 160, referred to.
(5) *Denton* v. *TH White Ltd.*, [2014] EWCA Civ 906; [2014] 1 W.L.R. 3926; [2015] 1 All E.R. 880; [2014] 4 Costs L.R. 752; [2014] BLR 547; [2014] C.P. Rep. 40; (2014), 143 Con LR 1, considered.
(6) *Heathstar Properties Ltd.*, *Re*, [1966] 1 W.L.R. 993, considered.
(7) *MIG Trust Ltd.*, *In re*, [1933] 1 Ch. 542, considered.
(8) *R.* v. *Registrar of Companies, ex p. Central Bank of India*, [1986] Q.B. 1114, referred to.
(9) *Sterritt* v. *Allied Irish Banks Ltd.*, [2013] NICh 6, considered.

Legislation construed:
Companies Act 1930, s.128: The relevant terms of this section are set out at para. 29.
s.129: The relevant terms of this section are set out at para. 29.
s.134: The relevant terms of this section are set out at para. 29.

The intervenor/applicant appeared in person, assisted by *V. Gregory* as his *McKenzie* friend;
F. Vasquez, *Q.C.*, *R. Triay* and *J. Baglietto* (instructed by Triay Lawyers) for Barclays Bank plc;
D. Faria, Assistant Registrar of Companies, for the Registrar of Companies.

1 **YEATS, J.:** On October 12th, 2005, Schofield, C.J. made an order ("the 2005 order") that Barclays Bank plc ("Barclays") have 21 days to register at Companies House a legal charge ("the charge") dated March 8th, 2005

made between Lexi Holdings plc ("Lexi"), Ten Acre Ltd. ("TAL") and Barclays. The charge, which was executed in England, related to four plots of land in Ten Acre Lane in Manchester ("the Ten Acre land") which were registered to TAL and had been put up as security for Lexi's and/or TAL's borrowings with Barclays. As TAL was a company registered in Gibraltar, the charge should have been registered at Companies House within 21 days of its execution pursuant to s.128 of the then Companies Ordinance 1930 (re-styled as the "Companies Act 1930" by the Gibraltar Laws (General Amendment) (No. 1) Act 2007, and hereinafter referred to as "the Act"). It was not so registered, and this led to Barclays applying for an extension of time pursuant to s.134 of the Act and obtaining the 2005 order.

2 On September 13th, 2018, Mr. Trevor Guy filed an application to intervene in the action, to set aside the 2005 order and to set aside the charge. Mr. Guy was the previous registered owner of the Ten Acre land. His case is that on or about June 2004 he was defrauded by the principal behind Lexi, one Shaid Luqman, and that the Ten Acre land was in effect stolen from him. He complains that he should have been notified of Barclays' application to extend time for the registration of the charge and, more importantly, if the learned Chief Justice had been aware of the matters which were going on in England at the time, the extension would not have been granted. Barclays opposes Mr. Guy's application to intervene, and on December 10th, 2018 filed its own application for a strike out. By order of Butler, J. dated January 21st, 2019 both applications were listed for trial together. Hearing dates in 2019 and 2020 were vacated for various reasons and the matter eventually came for hearing before me on March 16th–18th, 2021. At Mr. Guy's request, the hearing was conducted remotely by video link.

3 In the early stages of Mr. Guy's involvement in the proceedings in this court, he was acting as a litigant in person. He then came to instruct solicitors Hillmans Law and the late Mr. Simon Stafford-Michael as counsel. (Mr. Stafford-Michael in fact prepared written submissions for one of the vacated hearings that was to have taken place on March 26th, 2020.) However, Mr. Guy reverted to acting in person in the weeks prior to this final hearing. (Sadly, Mr. Stafford-Michael passed away in February 2021 but by that stage he was no longer instructed.)

4 Mr. Guy filed a bundle of submissions and documents on February 13th, 2021. The submissions included wide-ranging allegations of wrongdoing by others. I have read the contents of this bundle but will only address in this judgment such matters as I consider to be relevant and arguable. I will not deal with every aspersion made by Mr. Guy. For example, at p.2 of this bundle, and repeated at various other tabs, Mr. Guy postulates whether Schofield, C.J. was even in court on October 12th, 2005 to hear Barclays' application or whether the court registrar had authority to sign the 2005

order. Raising points such as these was not helpful and only served to distract the court from the real and arguable issues which were being made. I would also observe that a lot of the material in the bundle related to Mr. Guy's reasons for disputing decisions taken by courts and authorities in England over which this court has no control.

5 Mr. Guy was assisted at the hearing by a *McKenzie* friend, Ms. Victoria Gregory, who prepared a summary of the principal points made by Mr. Guy on the first day and then assisted Mr. Guy in preparing a written response to the submissions made by Mr. Freddie Vasquez, Q.C. who appeared for Barclays.

6 Furthermore, to the extent that I considered that they could assist Mr. Guy's case, I have also had regard to the written submissions filed by Mr. Stafford-Michael, even though these were not expressly relied on by Mr. Guy at the hearing.

Background

7 Whilst the matter at hand in effect concerns the relatively simple question of whether or not an extension of time for the registration of a charge should have been granted by this court in 2005, the dispute over the Ten Acre land has a lengthy history in England. There have been numerous claims, applications and hearings in the High Court and Court of Appeal in that jurisdiction since 2006. Indeed, according to Mr. Guy, the litigation there is far from over. To date, Mr. Guy's attempts to recover the Ten Acre land have been unsuccessful.

8 In support of his application to this court, Mr. Guy has filed five witness statements and numerous documents. His fourth witness statement, which is dated October 9th, 2019 and which was prepared with the assistance of his solicitors and/or counsel, explains Mr. Guy's involvement with the Ten Acre land. Mr. Guy is from a North Yorkshire farming family. He, however, got involved in property development some 40 years ago. In particular, he was in the business of acquiring land which was affected by planning or environmental issues, resolving those issues, and then selling the land on at a profit. He was introduced to Mr. Luqman in around 2002. Mr. Luqman had set up Pearl Holdings (Europe) Ltd. (which later changed its name to Lexi and which for convenience I shall refer to throughout as Lexi) a company which offered short-term lending. In turn, Lexi was funded by a consortium of lenders which included Barclays, Lloyds TSB and Halifax Bank of Scotland. After being introduced to Mr. Luqman, Mr. Guy began funding the purchase of lands via loans provided by Lexi.

9 In particular, between October 2003 and March 2004, Mr. Guy acquired, in tranches, the Ten Acre land. It had been a difficult deal which had begun in 1998. Once all parts of the land were consolidated, it became,

according to Mr. Guy, "a prime piece of development land in the centre of Manchester." At paras. 11 and 12 of his fourth witness statement, Mr. Guy then says the following:

> "[11] I had numerous offers around the end of 2003/early 2004 to buy the land but the best deal was from the reputable house builders Redrow Homes for £17 million, conditional on planning, for a mixed residential scheme. There was a huge level of interest around this deal. It was therefore around this time that [Mr. Luqman] offered to buy the land from me for £10 million which would involve discharging my existing borrowing for the purchases, forgiveness of some other borrowings and a cash balance payment. I felt indebted to do (the) deal with [Lexi and Mr. Luqman] as they helped me finance the deal in the first place and stuck with me whilst the deal was put together. Also, [Lexi] had the funds available now, which was a good incentive.
>
> [12] I did not know until much later that [Mr. Luqman] was in fact a fraudster and would eventually steal my land by transferring the land without my knowledge or consent at an inflated price of £15 million, without paying me the full consideration and then charging the land back to Barclays to secure all the borrowing by [Lexi]. This led to this whole sorry state of affairs where I have been fighting [Mr. Luqman] for 2 years and then Barclays Bank for over 11 years. It has ruined my life."

10 Mr. Guy's case is that in anticipation of the sale of the land to Mr. Luqman, he signed a document known as a TR1 form and handed it to his solicitors. (A TR1 form is a document used in England to transfer property from one party to another and which is then lodged with the Land Registry.) However, in June 2004, he was informed that the sale had fallen through. Unbeknown to Mr. Guy, Mr. Luqman then deceitfully procured the signed TR1 form and used it to register the title to the Ten Acre land in the name of TAL, a company that he controlled. The TR1 was dated June 22nd, 2004 and was registered at the Land Registry on July 30th, 2004.

11 On March 8th, 2005, Lexi, TAL and Barclays executed the charge. The Ten Acre land was charged by TAL as security for Lexi's and/or TAL's borrowings with Barclays. It was an all moneys charge. On March 11th, 2005, the parties entered into a deed of priority whereby the charge was granted priority over an earlier charge on the land which had been made by TAL in favour of Lexi. The charge was sent to Companies House in England by Barclays' English solicitors. It was returned on March 15th, 2005. The charge was then registered at the English Land Registry on March 23rd, 2005.

12 On March 24th, 2005, Mr. Guy filed a unilateral notice with the Land Registry. A unilateral notice notifies persons searching the register that a

third party claims to have an interest in the land. It is done by submitting a form referred to as a UN1. Furthermore, on April 13th, 2005, an application was made by Mr. Guy's solicitors for the registration of a restriction against the land. The restriction, contained in a form RX1, stated as follows:

> "RESTRICTION. No disposition of the registered estate by the proprietor of the registered estate or by the proprietor of any registered charge is to be registered without [Mr. Guy's] written consent."

13 Barclays' case is that no consideration was given as to whether the charge also needed to also be registered at Companies House here. However, on June 8th, 2005 a meeting took place where Barclays was advised that they should seek an opinion from a lawyer in Gibraltar regarding TAL's capacity to enter into the charge. As a result of that, a firm of Gibraltar solicitors advised Barclays that the charge should have been registered at Companies House pursuant to s.128 of the Act. As the 21-day period provided for by s.128 had elapsed, an application by way of originating summons was filed by Barclays in this court on July 22nd, 2005. It sought an order, pursuant to s.134 of the Act, that time for registration of the charge be extended to 21 days from the date of the order. The summons was supported by an affidavit sworn on July 19th, 2005 by Mr. Simon Neilson-Clark, an English solicitor instructed by Barclays. The summons was served on the Registrar of Companies who had no objection to the late registration. It does not appear to have been served on anyone else. The matter came for a hearing before Schofield, C.J. on October 12th, 2005. He heard the matter in private and made an order for the late registration of the charge in the following terms:

> "AND THE COURT being satisfied that the omission to deliver to the Registrar of Companies the Legal Charge hereinafter mentioned was due to inadvertence and that it is just and equitable to grant relief pursuant to Section 134 of the above mentioned Ordinance ORDERS that the time for delivering to the Registrar of Companies for registration [the charge] is hereby extended to 21 days from the date of this order.
>
> . . .
>
> AND this Order is without prejudice to the rights of any person acquired between the date of the creation of the said legal charge and the date of its actual registration."

14 The charge was then registered at Companies House on October 31st, 2005.

15 Mr. Guy asserts that on or around October 2013 he found out for the first time that Barclays had made the 2005 application to this court. This was discovered when a search at Companies House was conducted on his

behalf. He then made the application to intervene some five years later on September 13th, 2018.

The case for Mr. Guy

16 As explained, Mr. Guy's application is to intervene in the proceedings, to set aside the 2005 order and to set aside the charge. In the submissions filed by Mr. Stafford-Michael, the application was brought on two bases. First, that there was a fundamental defect in the 2005 order as Mr. Guy had not been served. Secondly, that in any event there had been material non-disclosure by Barclays. As a result, it was said that the 2005 order is void. (I shall return to these specific complaints further on in this judgment.) When Mr. Guy re-assumed personal conduct of the litigation, he widened the scope of his submissions by also putting before the court issues concerning the fraud and/or wrongdoing he alleges against Mr. Luqman and others, including Barclays. The following paragraphs contain a summary of the further matters raised by Mr. Guy together with my observations on these. (I record that I have not heard any evidence on these matters and that I rely either on what is contained in the documents filed by the parties or make observations based on findings made by courts in England.)

(i) Mr. Guy disputes the genuineness of the charge and says that it is not an all moneys charge. He further says that the moneys lent by the banks had been advanced prior to the charge being entered into. I do not consider these points to be arguable and/or relevant. The courts in England have held that the charge is genuine and is an all moneys charge. As to the moneys having been advanced prior to the charge being entered into, this is indeed the case. Taking a charge over the Ten Acre land was Barclays' way of avoiding enforcement action against Lexi in respect of the moneys already advanced and not repaid.

(ii) An agreement made between Lexi and Barclays dated July 27th, 2005 and entitled "Fourth Amendment and Reinstatement Agreement" was entered into after Barclays knew that the charge had not been registered at Companies House, contrary to the requirements of the Act. This is indeed correct, but by then Barclays had filed its application to extend time for the registration of the charge.

(iii) At the time that Barclays made the application to this court in 2005, Barclays knew that Mr. Luqman was a fraudster. TAL's shareholders were Mr. Luqman and his sister and this should have alerted Barclays to the fact that TAL's ownership of the Ten Acre land was not regular. In relation to this submission, I note that the courts in England have observed that there is no evidence that Barclays knew, or should have suspected, that the Ten Acre land could have been fraudulently transferred to TAL.

(iv) That Lexi and TAL were insolvent by 2004 as Mr. Luqman had misappropriated the £120m. advanced by Barclays. It seems to me to be clear that Barclays were trying to avoid having to take enforcement action against Lexi. This was a commercial decision taken by the bank. In the event, Lexi and TAL were placed into administration in 2006.

(v) That on March 15th, 2005, the UK Companies House advised Barclays' solicitors that the charge had to be registered in Gibraltar but this was not done. It was only when a security review was carried out that a Gibraltar law firm was asked to advise on TAL's capacity to enter into the charge. Although the law firm was instructed on June 8th, 2005, it did not file the application in the Supreme Court until July 22nd, 2005. I observe first that the letter from the UK Companies House did not advise Barclays to register the charge in Gibraltar. It said that TAL was a Gibraltar company and that the details of the charge had consequently been entered on the "Slavenburg register." The letter then stated:

> "This protects the person entitled to the charge in the event of any future insolvency of the company.
>
> Please keep this letter as proof that you have presented the charge to the Registrar."

As to the timings in the making of the application, whilst the application could perhaps have been filed earlier, there is nothing in that delay which caused any prejudice.

(vi) Mr. Guy also referred to a letter dated April 13th, 2005 from the Land Registry to TAL, sent to its Manchester business address, informing TAL of the restriction entered into by Mr. Guy. The letter states:

> "The applicants believe Trevor Guy is entitled to be registered proprietor and that the transfer from Trevor Guy to yourselves was completed without his authority."

Be that as it may, this letter was sent to TAL and not to Barclays.

(vii) The fact that the charge was not registered in Companies House until after the 2005 order has never been referred to in any of the legal proceedings in England. This may be, but perhaps can be explained by reference to the purpose of a registration of a charge at Companies House (which I will deal with later on in this judgment). In any event, this is not a matter which strictly impacts on the application being made here. What Barclays discloses in proceedings in courts in England is a matter for those courts to deal with.

(viii) The validity of the transfer of the Ten Acre land has never been determined by a court. Barclays simply obtained a declaration that the charge was valid and they were entitled to sell the land as a result. Mr. Guy

attempted to litigate the validity of the transfer in proceedings he issued against TAL in 2006. Those proceedings were stayed on TAL's administrator's application. Again, this is not a matter which I consider is relevant to the application being made.

17 Mr. Guy's case in summary is therefore the following: that had he participated at the hearing before Schofield, C.J. in October 2005, or had all the facts been put before the judge, the 2005 order would not have been made. Mr. Vasquez's reply is simply that such a contention is misguided and does not accord with the nature and purpose of the scheme in place for registering charges entered into by companies.

18 Although Mr. Vasquez focused his submissions on matters of law, he did refer to some factual matters. For example, he contended that Mr. Guy was not the innocent party that he was making himself out to be. Even after learning that Mr. Luqman had supposedly defrauded him of the Ten Acre land, he continued dealing with him. Had he registered his complaint with the Land Registry immediately upon finding out that the land had been transferred without his consent, his UN1 notice would have ranked in priority to the charge. In reply, Mr. Guy countered by saying that there was no evidence that he was ever involved in any fraud committed by Mr. Luqman. Furthermore, Lexi and Mr. Luqman were funded by Barclays and other leading banks and therefore, he said, it was these financial institutions which "clothed him with credibility."

19 It seems to me that the matters that I should consider in this application are simply the following: first, whether there was a fundamental defect in the proceedings as a result of the failure by Barclays to serve Mr. Guy with the 2005 application. Secondly, whether there was material non-disclosure by Barclays at the time.

20 Before looking at the statutory framework and discussing the parties' respective submissions, I will set out a summary of some of the related litigation which has taken place in England and which has been specifically referred to the court by the parties. (There are numerous other decisions which I need not refer to.)

The litigation in England

21 In August 2007, Barclays issued proceedings against Mr. Guy. It sought a declaration that it was entitled to sell the Ten Acre land pursuant to the charge. On January 16th, 2008, Terence Mowschenson, Q.C., sitting as a deputy High Court Judge, granted Barclays' application for summary judgment and made the declaration ([2008] EWHC 893 (Ch)). The claim for a declaration had been contested by Mr. Guy on the basis that the charge was not a genuine legal document and that the transfer of the Ten Acre land to TAL was fraudulently procured. This, Mr. Guy asserted, meant that the

charge was invalid or ineffective. The following points were made by Judge Mowschenson in his judgment:

(i) The judge considered Mr. Guy's contentions as to why the charge was not a genuine document and said the following (*ibid.*, at para. 13):

> "In my opinion none of these matters suggest that the charge is not a genuine document, and I was afforded the facility of inspecting the original, and nothing on that suggests that there was anything untoward about it."

(ii) That the transfer to TAL of the Ten Acre land was voidable and not void.

(iii) That at the time the Ten Acre land was charged to Barclays, TAL was the registered proprietor. Registration meant that the legal estate to the land was vested in TAL.

(iv) The judge said (*ibid.*, at para. 25):

> "In effect, regrettably, Mr Guy knowingly signed a document which he knew could have the effect of transferring the property to Ten Acre. As at the time the charge was granted the voidable transfer had not been set aside and the register had not been rectified as against Ten Acre."

(v) Significantly, the judge then said (*ibid.*, at para. 26):

> "I note that if [Mr. Guy] had registered a unilateral notice against the title as soon as he had discovered the transfer had taken place the charge, if it was taken, would have been subject to [Mr. Guy's] right to rectify as against [TAL]. [Mr. Guy's] evidence is that in fact he held off registering such a notice once he discovered that things might not be as they should be. He had received some money in relation to the charge [*sic*], and he was apparently content to continue to deal with Mr Luqman . . . It is noteworthy that when he addressed me this morning he did say that he was prepared to continue to deal with Mr Luqman for a while to see what was happening with the property."

(vi) The judge also considered Mr. Guy's assertion that Barclays should have been aware that the transfer of the Ten Acre land had been procured by fraud. He concluded that there was no duty to lend responsibly and that Barclays was entitled to rely on the register at the Land Registry and take the entries at face value. The judge then went further and said that even if there had been actual knowledge by Barclays that there were questions as to TAL's title to the Ten Acre land it would have made no difference. This is because he held that "actual notice of a competing claim does not outweigh the effect of the register" (*ibid.*, at para. 34).

22 Mr. Guy sought leave to appeal Judge Mowschenson's decision. On February 14th, 2008, permission to appeal (without an oral hearing) was refused by Lloyd, L.J. In his reasons the learned judge said:

> "The judge's conclusions as regards the effect of the Land Registration Act 2002 seem to me to be plainly correct. I can see no arguable basis on which it could be said that the charge to the bank could or should be set aside, even on the basis that everything alleged by Mr Guy about the circumstances of the original transfer can be proved, and even if the consequence of that were that the transfer was void, rather than voidable as the judge held. Mr Guy's position could have been protected by the entry of a notice on the register before the date of the charge. Since it was not so protected, it seems to me that the bank's rights under its registered charge are not affected by his claim to set aside the transfer."

23 The application for permission to appeal was renewed before the Court of Appeal at an oral hearing. On April 9th, 2008, permission to appeal was again refused by Lloyd, L.J. He held that there was no basis for saying that the charge was not a valid document because of the possible irregularities which were identified by Mr. Guy. He then went on to consider Mr. Guy's argument that Barclays knew or ought to have known that TAL's ownership of the Ten Acre land was suspect because of Mr. Luqman's fraudulent past. Lloyd, L.J. said the following ([2008] EWCA Civ 452, at paras. 23–25):

> "23. . . . So the question is whether Mr Guy can show an arguable case, on the evidence, for saying that Barclays Bank had actual notice or was turning a blind eye to matters that it knew, which would if it addressed them properly, have shown it that Ten Acre Limited did not have a good title to the property.
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> 24. In this respect I find it telling that Mr Guy focused strongly on the terms of the Horwath Clark Whitehill statement. That is a powerful and detailed statement as to the lack of trustworthiness of Mr Luqman and would fairly be a warning to anyone dealing with Mr Luqman or his companies that they should look at any proposed dealing with him with great care, but he cannot get any closer than that to an allegation that Barclays actually knew, or turned a blind eye to knowledge they had, that Ten Acre Limited had procured the transfer in its favour, either by forgery or by fraud.
>
> 25. I have a great deal of sympathy for Mr Guy having become a victim of Mr Luqman's misdeeds but I cannot see that he can get home on the question of notice, which is the only way, as I see it, that he could establish a case for saying that the registration of the charge was a mistake, or was the result of a mistake, such that it could be

> corrected by rectification under Schedule 4 of the 2002 Act. It is in itself striking that he was aware of circumstances by December 2004, which ultimately led him to know that something had gone wrong, that Ten Acre Limited had become the owner despite what he says as to the intended transaction having been aborted before 22 June 2004. And he did take steps to instruct solicitors to protect his rights, which could have been done if those solicitors had acted more promptly. If that had been done, then, of course, Barclays would have been on notice that there was something wrong and they would not in fact have taken the charge or if they had done it would have been subject to whatever rights Mr Guy had as protected by the unilateral notice."

24 In the meantime, and also in 2007, the administrators of Lexi had issued proceedings against Mr. Luqman and members of his family. The claims were based on Mr. Luqman's fraudulent misconduct in the running of Lexi. On July 16th, 2008, Briggs, J., in a judgment relating to the claims against two of Mr. Luqman's sisters (*Lexi Holdings* v. *Luqman* ([2008] EWHC 1639 (Ch)), made a number of findings concerning Barclays' relationship with Mr. Luqman and Lexi. These included the following: that on November 12th, 2004, Barclays were sent a "Statement of Circumstances" by Horwath Clark Whitehill ("HCW") (Lexi's former auditors) stating that they had resigned as auditors because they had discovered that Mr. Luqman was attempting to commit VAT fraud. That Mr. Luqman had tried to suppress the release of the statement of circumstances by HCW by making an application to court. Whilst those proceedings were ongoing, lending to Lexi by Barclays and the other banks increased from £50m. to £100m. That Mr. Luqman had indicated to Barclays that the source of his investments in Lexi was his father. However, by early 2005 Barclays knew that Mr. Luqman's father was a bankrupt. That Barclays knew that the purchase (or purported purchase) of the Ten Acre land had been financed by an unlawful loan from Lexi to TAL. That on January 18th, 2005, Mr. Luqman revoked his consent for KPMG (acting for Barclays) to visit Lexi's offices.

25 In the context of what Barclays may have done if Mr. Luqman's sisters had informed the bank of Mr. Luqman's previous convictions, Briggs, J. said the following (*ibid.*, at paras. 116 and 117):

> "116. It is tempting to conclude, without any in-depth analysis, that upon being informed of [Mr. Luqman's] previous convictions, Barclays would have done everything in its power to bring [Mr. Luqman] under control . . . But the hypothetical question what Barclays would have done if better informed, needs to be addressed by reference to a full appreciation of what Barclays did, or rather, failed to do, with the information which it received from HCW in mid-November 2004. In bare outline, although aware by the end of January 2005 that there were breaches of the Facility Agreement sufficient to enable it to

> demand immediate repayment and therefore to take control of Lexi, Barclays in fact chose to pursue a cooperative approach with [Mr. Luqman], the consequence of which was to leave him in unfettered and unsupervised control of Lexi's affairs until administrators were finally appointed in October 2006.
>
> 117. It might be thought at first sight surprising that a syndicate of the UK's largest clearing banks, advised in detail by corporate restructuring/insolvency experts in a pre-eminent firm of accountants should have adopted this course, when it is borne in mind that the obvious import of HCW's November letter and its enclosures was that [Mr. Luqman] had, during the whole of the process of the negotiation of the syndication of its facility, and a doubling in the lending limit, successfully concealed from Lexi's creditors, including Barclays, an auditor's statement showing that they had been purportedly dismissed after discovering an apparently serious fraud by [Mr. Luqman], and that this concealment had been achieved, to the satisfaction of a judge sitting in the High Court on an application duly notified to Lexi, by the combination of abuse of process, perjury and forgery. It may seem all the more remarkable that Barclays adopted a policy of cooperation with Shaid at a time when, after permitting a brief visit by KPMG to the company's offices, he had then terminated that permission on 18th January 2005, such that he was not fully cooperating in fact. That summary raises the most serious question whether the communication to Barclays, in addition to the very serious findings of Judge Howarth, of the fact that [Mr. Luqman] had previous convictions in the 1990s, would have made any difference . . ."

(The co-operative approach described by the judge included taking the charge over the Ten Acre land which was registered to TAL.)

26 In the event, Briggs, J. dismissed the principal claims against Mr. Luqman's sisters. The Court of Appeal, however, upheld the appeal by Lexi's administrators—but that did not affect the judge's findings regarding Barclays that I have set out above.

27 In July 2009, and relying on Briggs, J.'s findings, Mr. Guy sought to renew his application for permission to appeal against Judge Mowschenson's judgment. (He also relied on legal developments relating to how the land register could be rectified.) Lloyd, L.J. again refused permission. Insofar as the factual matters raised by Briggs, J. were concerned, he said the following in his written reasons:

> "Turning to the facts, it is said that the material referred to by Briggs J in his [judgment], with the benefit of evidence from a senior employee of Barclays, shows that Mr Guy might be able to show that Barclays had actual or (more likely) constructive notice of the defect

> in the title of Ten Acre Ltd to the land, before it took its charge. I have read with care the parts of the judgment which are said to be relevant. The judge was very critical of Barclays' attitude to [Mr. Luqman] and of its handling of the Lexi Holdings account. He does refer, from time to time, to Ten Acre Ltd and to the security which it offered to the bank. He refers to the fact that Lexi had made a loan to Ten Acre Ltd in breach of section 330 of the Companies Act 1985, and that the bank knew of this (paragraph 135). By itself that is of no particular relevance. He referred to the property as a possible security also at paragraph 144 and at paragraph 146(7) and (9) and paragraph 149. In paragraph 146(9) he speaks of a 'copper-bottomed security over Ten Acre's property'. That is entirely inconsistent with the idea that his judgment provides any basis for saying that the Ten Acre security was, as was known (or should have been known) to Barclays to be, defective because Ten Acre had acquired its title to the land by forgery or fraud."

The judge then continued:

> ". . . it seems to me that there is nothing which is sufficient even to raise an inference that Barclays knew or suspected that there was anything wrong with the title to the Ten Acre land."

28 Mr. Guy was then allowed to renew, before a three-judge Court of Appeal, his application to seek a reconsideration of the previous refusals to grant him permission to appeal Judge Mowschenson's judgment. In a judgment dated December 8th, 2010 ([2010] EWCA Civ 1396), Lord Neuberger, M.R. dismissed Mr. Guy's application, holding that it was not a case which warranted reconsideration. Interestingly, before the full court Mr. Guy did not actually pursue the argument that Briggs, J.'s findings about Barclays were relevant. Lord Neuberger remarked as follows (*ibid.*, at para. 10):

> "10. In support of his application, Mr Guy initially appeared to be relying on evidence which had come to light since April 2008, and which, he suggested, indicated that the Bank should have appreciated that TAL was not, or may not have been, entitled to be the registered proprietor of the land. However, that contention was realistically not pursued before us by Mr Nicholas Stewart QC, who appeared with Mr William Evans and Mr Russell Stone for Mr Guy."

The statutory framework

29 The relevant sections of the Act are ss. 128, 129 and 134. These provide as follows:

> "128. (1) Subject to the provisions of this Part, every charge created after the commencement of this Act by a company registered in Gibraltar

and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge, together with the instrument (if any) by which the charge is created or evidenced, are delivered to or received by the Registrar for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable.

(2) This section applies to,—

. . .

(d) a charge on land, wherever situate, or any interest therein;

. . .

129. (1) It shall be the duty of a company to send to the Registrar for registration the particulars of every charge created by the company and of the issues of debentures of a series, requiring registration under section 128, but registration of any such charge may be effected on the application of any person interested therein.

. . .

(3) If any company makes default in sending to the Registrar for registration the particulars of any charge created by the company, or of the issues of debentures of a series, requiring registration, then, unless the registration has been effected on the application of some other person, the company and every director, manager or other person, who is knowingly a party to the default are guilty of offences and are each liable on summary conviction to a fine not exceeding level 2 on the standard scale for every day during which the default continues."

"134. The court, on being satisfied that the omission to register a charge within the time required by this Act, or that the omission or misstatement of any particular with respect to any such charge or in a memorandum of satisfaction, was accidental, or due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or misstatement shall be rectified."

As can be seen, s.128 imposes an obligation to register a charge over land created by a Gibraltar company. Registration must take place within 21 days of the creation of the charge. The obligation is on the company itself to attend to the registration. Nevertheless, a person interested in the charge can also apply for the registration (s.129). Section 134 allows the court to order the registration of a charge out of time.

30 So what are the requirements of s.134 in cases of late registration? First, the application has to be made by either the company or a person interested in the charge. (In this case it was made by Barclays who had a clear interest in the charge as chargee.) Secondly, the court needs to be satisfied of any one of the following: that the omission to register on time was accidental; or due to inadvertence; or to some other sufficient cause; or is not of a nature to prejudice the position of creditors or shareholders of the company; or that on other grounds it is just and equitable. They are all alternative and distinct possibilities. (The 2005 order need not therefore have said that the court was satisfied that there had been inadvertence and that it was just and equitable to make the order. Both findings may indeed be true in this or any other case, but they are not both required.) If the court is satisfied of one of these conditions, then it has to consider whether it exercises its discretion to order the registration. This is because the section provides that the court *may* order that time for registration be extended. It is not mandatory. The third stage is that the court needs to consider whether to impose any terms and conditions on the applicant as may be "just and expedient."

Submissions by the Registrar of Companies

31 Mr. David Faria, the Assistant Registrar of Companies, made brief oral submissions. He confirmed that when the Registrar is served with an application for an extension of time he considers whether he needs to raise any objection or make any submissions to the court. If he sees that there is an interested party that should be served, he will bring this to the court's attention.

32 As to Barclays' application in 2005, Mr. Faria said that he now considered that the affidavit by Mr. Nielsen-Clark had been "economical with the facts." He referred in particular to a letter dated April 22nd, 2004 in which solicitors Robert Muckle had written to solicitors Weightman Vizards saying, amongst other things, that a charge entered into by TAL would have to be registered at the Companies Registry in Gibraltar. I am not, however, certain that reference to this letter was relevant. Robert Muckle were acting for the Bank of Scotland and Weightman Vizards were acting for TAL. The application for an extension of time was made by Barclays who were represented by DLA Piper.

33 Mr. Faria accepted that when an application to register a charge is made on time and in accordance with s.128 of the Act, the Registrar registers it without questioning its validity. He however submitted that when an application to the court is required that the application changes its nature and important issues arise.

The purpose of the registration scheme

34 Mr. Guy relied on the judgment of the Northern Irish High Court in *Sterritt* v. *Allied Irish Banks Ltd.* (9) for the proposition that priority is lost if a charge is not registered on time. There, a property development company had failed to register a mortgage in accordance with the statutory time limits. The property charged by the mortgage comprised of a number of newly built apartments. In the period between the execution of the charge and the application for an extension of time, the company had exchanged contracts with a number of purchasers of the apartments and had received deposits. This was not disclosed to the court. It was held that the registration of the mortgage was valid but that the purchasers had equitable liens over the apartments they had contracted to purchase which ranked in priority to the mortgage.

35 I do not consider that this case assists Mr. Guy. The registration itself was not set aside. In any event, I note that the judge observed that if full disclosure had been made, the Master should have insisted either on an *inter partes* hearing, a liberty to apply provision or say that the order was without prejudice to rights acquired between the date of creation of the charge and the date of registration. The latter proviso is in fact contained in the 2005 order. (Such a term is usually referred to as a *Joplin* provision in reference to one of the first cases in England where it was adopted.) Whether priority is lost or not as against other persons or entities is one thing. Whether registration should be set aside is another.

36 Mr. Vasquez referred to *Re Heathstar Properties Ltd.* (6). There the court was concerned with whether it should grant an extension of time for the registration of an equitable charge when there was a pending action disputing its validity. Plowman, J. decided that any dispute as to a charge's validity did not preclude its registration (or the grant of an extension of time when there had been inadvertence and the charge had not been registered on time). The learned judge said the following ([1966] 1 W.L.R. at 1000):

> "It was then suggested that the court could not properly perform its function under [the equivalent to s.134 of the Act] where the validity of the charge was in issue without in effect deciding that issue. Therefore, it was argued that the application should not be entertained since the proper time to decide the issue was not now, but in the action. It was pointed out that the action was between different parties

> and would be decided on additional evidence, for example, that of Simpson and Gregory. I agree that this is not the occasion for deciding the validity of the charge, but I do not accept the argument that I ought not, therefore, to adjudicate upon this summons. I think that Mr. Hunt was right when he submitted that the question of validity of the charge does not enter into the statutory pattern discernible in Part III of the Act of 1948."

The judge then referred to the equivalent to s.131(2) of the Act, which requires the Registrar to issue a certificate of registration. He said (*ibid.*):

> "Section 98(2) says nothing about the certificate being evidence of the validity of the charge. Having regard to those provisions, it seems to me that the registrar is not concerned to adjudicate upon the validity of the charge claimed. He simply registers the particulars delivered to him."

As to the equivalent section to s.134 of the Act, Plowman, J. said the following (*ibid.*, at 1000–1001):

> "There is no reference there to the court being satisfied as to the validity of the charge, and it would have been very simple to insert such a reference if it had been intended. What section [134] does is to give the court power in certain circumstances to substitute its own time-limit for the time-limit in section [128], but apart from that it leaves section [128] to operate as if the application to register had been made in time."

Mr. Vasquez also referred the court to a passage in the judgment at 1001 where the judge was discussing *In re Cunard Steamship Co. Ltd.* (4) (*ibid.*, at 1001–1002):

> "Mr. Head submitted that the question there was not whether there was a charge, but whether there was a registrable charge. He submitted that it is one thing to extend time when there is no challenge as to the nature of the charge, but quite another thing to do so where the nature of the whole transaction is in issue. That may be so, but the case does go to the extent of establishing that time can be extended under the section without deciding whether the charge is registrable, and for the reasons I have indicated, in my judgment it makes no difference in law to the power of the court to entertain an application for extension of time whether the issue is the existence of the charge or its registrability. If the case were one which the documents sought to be registered could not in any circumstances be described as a charge, the position might be different, but that is not this case."

37 Mr. Vasquez therefore submitted that any question as to the charge's validity in this case is irrelevant to the issue that had to be determined by

Schofield, C.J. in 2005. All that Mr. Guy would have been able to do in 2005 was dispute the validity of the charge but that, in accordance with the decision in *Heathstar Properties* (6), would not have made any difference to the outcome.

38 This is indeed supported by the English Court of Appeal case of *R.* v. *Registrar of Companies, ex p. Central Bank of India* (8) (which case was referred to in the judgment of the Northern Irish High Court case of *Sterritt* (9) relied on by Mr. Guy) where Slade, L.J. explained what the effect of registration of a charge was. He said (referring to the equivalent sections in the Act) ([1986] Q.B. at 1177):

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

39 The rationale distilled by these authorities is at the heart of this application. These do indeed demonstrate that it is not the function of the court, on an application to extend time under s.134 of the Act, to consider whether or not the charge is valid or whether or not there is a competing right to the property the subject of the charge. Whilst the court retains a discretion, it is exercised in other circumstances. For example, when a chargee realized that due to inadvertence a charge had not been registered but then decided not to immediately apply for late registration for tactical reasons—see *In re Ashpurton Estates Ltd.* (1). The purpose of registration is simply to provide notice to persons wishing to enter into business with

the company that someone else has an interest in its property. It gives them an opportunity to ascertain that they should not be acting to their detriment. This of course did not apply to Mr. Guy.

Failure to serve Mr. Guy with the 2005 application

40 Much was said by Mr. Guy at the hearing and in his written submissions about void orders and about the charge being void. The principles relating to void orders are well understood and I will not go into these in this judgment save to refer to the English Court of Appeal case of *Craig* v. *Kanssen* (3). In that case, there had been a failure to properly serve a party with a summons, and an order for the enforcement of a judgment made in his absence was held to be void and was set aside. Lord Greene, M.R., having referred to a number of authorities, said the following ([1943] 1 K.B. at 262):

> "Those cases appear to me to establish that a person who is affected by an order which can properly be described as a nullity is entitled *ex debito justitiae* to have it set aside. So far as procedure is concerned, it seems to me that the court in its inherent jurisdiction can set aside its own order, and that it is not necessary to appeal from it."

41 The question therefore is: was there a requirement to serve Mr. Guy with the 2005 application? If he should have been served, then the fact that he was not is a fundamental defect in the proceedings which would mean that the 2005 order is void.

42 Mr. Guy asserts that he was prejudiced by the 2005 order because the existence of the charge favoured Barclays in TAL's administration. Had it not been for the charge, Mr. Guy would have had a right to a *pari passu* distribution in the liquidation of TAL.

43 The English Court of Appeal case of *In re MIG Trust Ltd.* (7) was referred to by Mr. Vasquez. In that case, an application for an extension of time to register a charge was granted at first instance (initially the company had objected to the application but later withdrew its objection). A subsequent application by the liquidator of the company to set aside the order succeeded on the basis that at the time the initial application was made, the company was insolvent and the withdrawal of the objection constituted a fraudulent preference by the company as the company and the chargee were closely connected. The Court of Appeal disagreed and allowed the registration of the charge. The court noted the fact that the company and the chargee had common directors and that in a brief to counsel there was a reference to one of the directors acknowledging that a large number of creditors would be prejudiced if the charge was registered. The company had then simply decided not to contest the application and had not appeared at the hearing. Romer, L.J. said the following ([1933] 1 Ch. at 569):

> "It was said by Mr. Tucker that if the facts disclosed in the brief originally delivered to counsel on behalf of the company, but subsequently withdrawn, had been disclosed to Maugham J. he, in the interests of the unsecured creditors, would either have refused to make any order at all extending the time, or would have inserted words protecting the interests of the unsecured creditors, or would have adjourned the matter in order to consult their wishes, or might have made an order subject to the consent of all the unsecured creditors being obtained. In my opinion he would have done nothing of the kind. It is not the practice of the Court, when making orders under s.85 of the Companies Act, 1929, any more than it was the practice of the Court when making orders under the sections of the earlier Acts corresponding to s.85, to insert words protecting the interests of unsecured creditors." [Section 85 of the Companies Act 1929 is the equivalent to s.134 of the Act.]

44 It is said by Mr. Vasquez that Mr. Guy is, at best, an unsecured creditor of TAL. There was therefore no requirement to give him notice of the application before Schofield, C.J.

45 Mr. Vasquez also relied on *In re Ashpurton Estates Ltd.* (1) for the proposition that applications for extensions of time are ordinarily made without notice by the company or, if the application is made by the chargee, on notice only to the company. In this case, the English Court of Appeal was considering an appeal against a refusal to grant an extension of time. The application had been refused on the basis that the judge was not satisfied that the failure to register was due to inadvertence and also because by the time the application was made, the company was insolvent and its winding up was imminent. In the course of its review of the authorities, the Court of Appeal said the following ([1983] 1 Ch. at 122–123):

> "The next reported case is *In re Joplin Brewery Co. Ltd.* [1902] 1 Ch. 79, decided by Buckley J. eight months later. Ever since that case it has been the practice to insert in an order extending the time for registration some such words as: 'but that this order be without prejudice to the rights of parties acquired prior to the time when the debentures shall be actually registered.' The reason for the proviso is as valid today as it was then. Such an application would be made either *ex parte* by the chargor company, which had the statutory duty to register, or by the chargee in which case the company would be joined as the only respondent, if there were any respondent at all. It was not the practice to advertise for creditors and to make one of them a respondent. Consequently, it was necessary to protect persons whose rights would otherwise be overridden in their absence."

46 The fact that applications of this nature are made without notice was also referred to by the English Court of Appeal in *Barclays Bank plc* v. *Stuart Landon Ltd.* (2). There, Chadwick, L.J. in explaining the background to the appeal said the following ([2001] 2 BCLC 316, at paras. 7–8):

> "[7] The application for an extension of time under that provision was made by a claim form issued on 2 February 2000, supported by a witness statement of a partner in the firm of solicitors which had acted on behalf of the applicant bank. The witness statement sets out the history that I have described and explains that the failure to register the charge was due to inadvertence or accident in the solicitors' office.
>
> [8] It was that application which came before the district judge on 21 February 2000. As is usual in such a case, the application was made without notice to other parties and was dealt with on the basis of the witness statement to which I have referred. It is plain that the district judge must have been satisfied from the material before him that the failure to register was accidental or due to inadvertence, so that the first of the conditions set out in [the s.134 equivalent] was satisfied."

47 It is clear that, ordinarily, applications pursuant to s.134 of the Act are made without notice save in cases where the application is made by a chargee when service should be effected on the company itself. (In this case we do not have confirmation of whether TAL was served or not. Mr. Guy in any case pointed out that TAL was not an independent company. It was owned by Mr. Luqman and his sister. Of course, he says, that TAL would not have objected to the late registration of the charge.) In any event, in my judgment, the failure to serve Mr. Guy was not a fundamental defect in the proceedings.

Complaint about material non-disclosure by Barclays in 2005

48 The matters which Mr. Guy says should have been disclosed but were not, were set out in Mr. Stafford-Michael's written submissions as being the following: that there was a UN1 notice registered against the title to the Ten Acre land; that there was a pending RX1 restriction; that Barclays knew that Mr. Luqman was a fraudster; that TAL had purportedly purchased the Ten Acre land by means of an unlawful loan from Lexi; that there was no evidence of consideration having been paid to Mr. Guy for the transfer of the land; and that Barclays had failed to carry out any proper investigation into Lexi particularly as regards the circumstances of the acquisition by TAL of the Ten Acre land. Mr. Guy did not himself refer the court to any other matter which would not be caught by this list.

49 Before discussing the implications of Mr. Guy's complaint about non-disclosure, I should deal with the application by Mr. Guy to adduce the

additional evidence of Ms. Victoria Gregory as contained in her witness statement dated March 17th, 2021.

Additional evidence of Ms. Victoria Gregory

50 In the morning of the second day of the hearing, a witness statement by Ms. Gregory (Mr. Guy's *McKenzie* friend) was sent to the court by email. Ms. Gregory addressed the court and explained that the witness statement included important information (relating to Land Registry searches said to have been carried out by Barclays at material times) that she had previously sent to Mr. Guy's former solicitors and counsel. She had only learnt that the documents had not been filed at the end of the first day of the hearing when she communicated with Barclays' solicitors about them. Mr. Vasquez objected to the admission of the witness statement on the basis that this should have been filed in compliance with previous court orders and that, clearly, it had been filed extremely late in the day. So as not to delay the hearing, and as Mr. Vasquez considered the contents of Ms. Gregory's witness statement to be irrelevant to the issues he was proposing to deal with in submissions, I advised the parties that I would in due course consider whether I would be admitting and considering the witness statement. I in any event gave Barclays the opportunity to file a witness statement in reply within 14 days. (Consequent to that direction, Edward Wells, the Vice President of Litigation, Investigations & Enforcement at Barclays Legal filed a witness statement on March 31st, 2021.)

51 On November 20th, 2019, the parties having agreed the terms by consent, I ordered that Barclays file its evidence by December 18th, 2019 and that it produce documents showing what searches had been carried out by its solicitors DLA Piper at the Land Registry in March and April 2005. Evidence was filed by Barclays on December 18th, 2019 in accordance with the order but no documents relating to the searches were disclosed. When this was queried by Hillmans Law on May 18th, 2020 (at the time they were still acting for Mr. Guy), Messrs. Triay & Triay on behalf of Barclays, responded on May 21st, 2020 confirming that on February 7th, 2020, DLA Piper had advised them as follows:

> "We completed this exercise this morning and I could find no evidence of having obtained official copies dated March and/or April 2005 in relation to title numbers [Ten Acre land]. Further we made enquiries at the Land Registry and whilst I cannot certify the accuracy of their records, the Land Registry could find no record of DLA Piper having made enquiry of the Land Registry for title numbers [the Ten Acre land] between March and April 2005."

The consent order had in any event provided that Mr. Guy have leave to serve evidence in reply within 28 days of service of the evidence by Barclays. Ms. Gregory's witness statement should strictly have been filed

within 28 days of December 18th, 2019. In any event, Ms. Gregory's correspondence with the Land Registry came to an end in November 2020. She says she provided the information to Hillmans Law and counsel in October and November 2020. Any application to adduce this evidence could have been made well in advance of the hearing. As this evidence can only be relied on if filed in accordance with the order of November 20th, 2019, I will deal with the application as if it were an application for relief from sanctions.

52 Applications for relief from sanctions are addressed by considering the three-stage test set out by the English Court of Appeal in *Denton* v. *TH White Ltd.* (5), The three-stage test was set out in the judgment, as follows ([2014] 1 W.L.R. 3926, at para. 24):

> "A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages rule 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstances of the case, so as to enable [the court] to deal justly with the application including [factors (a) and (b)]'."

The reference to "factors (a) and (b)" is a reference to CPR 3.9(1)(a) and (b) which provide that the court's considerations should include:

> "(a) the requirements that litigation should be conducted efficiently and at proportionate cost; and
>
> (b) the interests of justice in the particular case."

53 Clearly, the breach is significant. The witness statement and accompanying documentation was produced on the morning of the second day of the hearing. Why did the default occur? Ms. Gregory asserts that she was not aware that the documents had not been filed by Mr. Guy's former solicitors. However, she must have been aware that she had not herself filed a witness statement exhibiting the documents which she had procured (whether prepared by the solicitors or otherwise). If the documents are as important to Mr. Guy's case as she says they are, then either Mr. Guy or Ms. Gregory should have ensured that an application was made for permission to file an additional witness statement. This was not done.

54 The third stage is a consideration of all the circumstances of the case. In this regard, I will consider the nature of the evidence sought to be relied on. The significance of the evidence is that it purports to show that Barclays made what are known as "Official Searches with priority" at the Land Registry in relation to the Ten Acre land on various dates between February

2005 and May 2005. An "Official Search with priority" would show pending applications in the registry whereas the "Land Registry direct searches" produced by Mr. Nielsen-Clark in his affidavit do not. (The relevance being that the court would have been alerted to Mr. Guy's claims.) A number of issues arise. First, the Land Registry, in a letter dated March 18th, 2020, say that they no longer hold copies of search results from 2005 and that they are unable to say what official searches of that time would have shown. Secondly, the fact that Mr. Guy had filed a UN1 notice relating to a pending land action over the Ten Acre land was contained in the searches exhibited by Mr. Nielsen-Clark in his application in 2005. Whether a different type of search would also have included further information does not, in my judgment, materially affect the matters that I need to consider in this application.

55 In all of the circumstances, I will not be formally admitting into evidence Ms. Gregory's witness statement of March 17th, 2021.

Discussion

56 As has been discussed above, Schofield, C.J. would have had to consider three distinct matters in the application in 2005. First, he had to determine whether one or more of the five factors contained in s.134 of the Act applied. Secondly, if one of the factors was made out, he had to consider whether to exercise his discretion to extend the time for registration. Thirdly, if he decided to extend the time for registration, he had to consider whether to impose any terms and conditions.

57 I can think of no possible advantage to be gained by Barclays in 2005 (as the lender and person most interested in the security afforded by the charge) in not complying with s.128 of the Act. Barclays did immediately try to register the charge at Companies House in England and then registered it at the UK Land Registry. The fact that it was not registered in Gibraltar can only therefore have been as a result of inadvertence. On the facts as have been put before me, I cannot see that a court in 2005 could have come to any different conclusion to that arrived at by Schofield, C.J. on the question of inadvertence. Even if Mr. Guy had participated at the hearing, his complaints, even taken at their highest, would not have impacted on this particular issue—was there inadvertence by Barclays which led to the failure to register the charge on time. Mr. Guy suggested (without providing any rationale for it) that Barclays intentionally delayed applying to the court in Gibraltar for an extension of time. There is no logical reason for Barclays to do such a thing.

58 Relevant to the exercise of discretion, Mr. Nielsen-Clark made the following statement at para. 11 of his affidavit:

> "As can be seen, the omission to register the charge within the prescribed 21 day period was entirely due to inadvertence and I am not aware of any party whose interests have been prejudiced by this omission."

This statement is criticized by Mr. Guy—in particular, the second part. Strictly, however, the statement is not incorrect. Mr. Guy was not prejudiced by the failure to register the charge in the sense that he entered into business with TAL which he would not otherwise have done had he been aware of the existence of the charge. Mr. Guy was aware of the charge. He is disputing its validity and Barclays' right to dispose of the Ten Acre land as a result. Mr. Guy's rights or complaints did not change by virtue of the failure to register the charge on time here in Gibraltar. That said, he is also now complaining (as discussed below) that as a result of Barclays' failure to register the charge on time he had gained a tactical advantage, arising from his registration of the UN1 and RX1, which was undone by the 2005 order.

59 So how should this court deal with the non-disclosure by Barclays in 2005? None of the matters that Mr. Guy says should have been disclosed were referred to in the documentation filed for the 2005 application save for a reference to the UN1 notice which was contained in one of the exhibits to Mr. Nielsen-Clark's affidavit. An assumption is being made that it was not brought to the court's attention but we cannot be certain of that. There is no record available of counsel's submissions to the court. In any case, as Mr. Vasquez pointed out, there was no attempt to hide the UN1 notice. I will in any event assume that it was not specifically referred to the judge and further assume, for present purposes, that all that Mr. Guy says should have been disclosed was in Barclays' knowledge.

60 In my judgment, if this disclosure had been made it would not have made a difference to the outcome. This is because all of those matters relate to the validity of the charge. It would not have been the court's function to determine the validity of the charge. Mr. Vasquez submitted that the exercise of the discretion carried out by Schofield, C.J. would have been limited to determining whether the late registration caused any unfair advantage to a party and not whether the charge itself prejudiced any other person. I agree.

61 The next question for the court in 2005 would have been to determine whether it was just and expedient to impose any terms or conditions on the registration. The court did impose conditions. First, it imposed a 21-day time limit. This was a perfectly standard and reasonable term. Secondly, it ordered that an office copy of the order be delivered to the Registrar of Companies. Again, a standard term. Thirdly, it made the *Joplin* provision. The order was "without prejudice to the rights of any person acquired between the date of the creation of the said legal charge and the date of its actual registration."

62 At para. 32 of his written reply to Mr. Vasquez's submissions, Mr. Guy says that he is not a "putative creditor" (as he was described by Mr. Vasquez) but rather that he was a "defrauded proprietor." He then states that he is—

> "prejudiced by the [2005 order] and he is a person affected by the Joplin provision as he acquired rights against TAL by virtue of his Land Registry registrations of UN1 and RX1—discoverable to the world at large, including Barclays."

63 It seems to me that the question of whether or not he acquired rights against TAL (in the period between the creation of the charge and its actual registration at Companies House) is not a matter for this court in this application. The 2005 order provided that if a person had acquired such rights, then the charge is subject to those rights. If Mr. Guy is correct (and I make no observation on this), then he is protected by the 2005 order and there is nothing stopping him from relying on the *Joplin* provision in any proceedings where this may be relevant. I recognize of course that this ship may already have sailed as he was not aware until late 2013 of the existence of the 2005 order and proceedings in England have largely concluded—but this would be a matter for the courts and/or authorities there.

64 In the circumstances, I would hold that the non-disclosure was not material to the application and there is therefore no good reason to set aside the 2005 order. It follows that the application to intervene and to set aside the charge also fail.

65 As an observation, I would say that as a matter of good practice, Barclays (again assuming that they had the requisite knowledge) should have brought these matters to the court's attention, even if its submission would have been that they did not actually impact on the decision the court needed to take. In applications which are made *ex parte*, full and frank disclosure is always required.

Strike out application by Barclays

66 There is one final matter to deal with. As I referred to in my introduction to this judgment, on December 10th, 2018, Barclays made an application to strike out Mr. Guy's application. By order of Butler, J., dated January 21st, 2019, it was ordered that the strike out application and Mr. Guy's application be heard together. In the event, Mr. Vasquez did not deal with the strike out application at the hearing save to say that this court should award Barclays its costs of preparing that application as it was clear that Mr. Guy's application was misconceived and bound to fail.

67 Barclays' application was made on the basis that Mr. Guy's application "constitutes an abuse of process of this Court, or because it is otherwise vexatious." No submissions were made on this. I am not prepared to accede

to this request for costs without having been addressed on the merits of what was being alleged.

Conclusion

68 For the reasons set out in this judgment, Mr. Guy's applications to intervene in the action, to set aside the 2005 order, and to set aside the charge are dismissed.

Ruling accordingly.
