GLENDALE (ATLANTIC) LTD. v. GENTLEMAN et al.

Nova Scotia Supreme Court, Appeal Division, Coffin, Cooper and Macdonald, JJ.A.
May 10, 1977.

Robert G. Belliveau, for appellant.
Robert G. MacKeigan, for respondents.

COFFIN, J.A. (dissenting):—This is an appeal from the decision of Morrison, J., in which he held that the respondents, W.J.B. Gentleman, receiver and manager of Nova Mobile Homes Limited, and the Bank of Montreal, were entitled under the terms of a floating charge to recover two mobile homes which had been repossessed by the appellant, the vendor of the units. The repossession was accomplished pursuant to a clause in the invoice under which they were sold to Nova Mobile Homes Limited.

The clause was worded as follows:

> Title to the above-described merchandise remains vested with the Seller until payment has been received by the Seller in collected funds, in accordance with the terms and conditions as stated on the reverse side of this form.

On the reverse side of the form of invoice were "terms and conditions of sale" under which title to the two mobile homes was to remain vested in the appellant until payment of the entire purchase price.

The floating charge appears in a debenture dated December 28, 1972, executed by Nova Mobile Homes Limited in favour of the Bank of Montreal, cl. 5 of which is as follows:

CHARGING PROVISIONS

5. As security for the principal sum and interest and all other moneys from time to time payable hereunder and the performance of the obligations of Nova herein contained, Nova hereby grants, bargains, sells, releases, conveys, mortgages and assigns and charges unto the Bank:

(a) As and by way of a first floating charge, the undertaking and goodwill of Nova and all of its personal assets for the time being, both present and future of whatsoever nature and kind and wheresoever situate, including but not to restrict the generality of the foregoing, all the present and future rents, revenues, incomes and sources of money, mortgages, franchises, contracts, negotiable or non-negotiable, stocks, shares, bonds, securities and accounts receivable, mobile homes and trailers, saving and excepting any real property now owned or hereafter acquired by Nova provided that the floating charge hereby created shall not in any way hinder or prevent Nova until the security hereby constituted shall have become enforceable and the Bank shall have determined to enforce the same from giving security to its bankers under The Bank Act of such floating charge in the ordinary course of its business and for the purpose of carrying on the same.

The relevant facts are set out in the decision of the trial Judge.

The appellant, who manufactured mobile homes in Sussex, New Brunswick, had supplied units to Nova Mobile Homes Limited who sold them both in Nova Scotia and New Brunswick. I believe in actual fact the New Brunswick units were delivered to a company called Nova Mobile Homes Saint John, Limited and those for Nova Scotia to Nova Mobile Homes Limited, but nothing really turns on that fact.

The units in question are identified by serial numbers 6468 and 5889. The first was sold to Nova Mobile Homes Limited on or about June 28, 1974, for $11,050 and the second, on July 3, 1974, for $10,400. They were repossessed by the appellant's agent on September 17, 1974. The relevant invoices both contained the clauses which I have mentioned.

The decision went by way of declaration because a recovery order had been granted to the respondent Gentleman, the units sold and a bond deposited by the respondents with the Court.

The Bank of Montreal began its dealings with Nova Mobile Homes Limited in 1968. There was evidence that in that year a group including Mr. John A. DeWinters made representations to the bank on behalf of that company, as a result of which it received a line of credit from the bank up to $35,000. The security for this credit consisted of personal guarantees of Mr. DeWinters and two other shareholders of the company — William Bustin and Simon Sneekes, along with a term deposit receipt for $21,000. The bank knew at the time that the appellant was the source of supply for Mobile.

Mr. Goldsmith, the manager of the bank at Haymarket Square Branch, Saint John, New Brunswick, said that Mr. John DeWinters told him in 1969 that Glendale had no lien interest and that "the mobile homes were sold without them taking any security". Mr. Goldsmith understood that Mr. DeWinters was vice-president of the appellant company.

The trial Judge commented on this evidence:

> There is no dispute in the evidence as to the situation which prevailed at the time, that is, that apparently the defendant company was selling their mobile homes to Nova Mobile Homes Limited without any security or lien on these homes. In the circumstances I accept Mr. Goldsmith's evidence as being accurate. I believe him when he testified that he had contacted Mr. DeWinters and had received an assurance that Glendale (Atlantic) Limited had no lien interest in the mobile homes being sold to Nova Mobile Homes Limited.

Mr. Goldsmith said that in 1969 there was a floating charge debenture, securing credit of $75,000 and it was at that time he had the conversation with Mr. John DeWinters. He made his inquiries from Mr. DeWinters because of a memorandum which he had received from the credit manager on December 1, 1969.

He acknowledged on cross-examination that his memory of the conversation with Mr. DeWinters was based on his reply to the questionnaire he had received and that when he had the conversation, the bank had already obtained a debenture.

In discussing the security, Mr. Goldsmith's evidence was that one of the terms on which the bank operating credit was granted was that Nova Mobile Homes Limited was to maintain units on their lots which were covered by the debenture and that the total value of these was to be 25% in excess of the bank's loans at all times.

The trial Judge said that until 1973, "it is quite clear that the defendant company claimed no proprietary interest in the homes that they sold to Nova Mobile Homes Limited".

It was in November, 1973, that the appellant's invoice forms were changed to include the terms and conditions as to title which I have mentioned.

On the matter of checking, Anthony A. Goldsmith said on cross-examination that Nova supplied the bank with a list of the units on the respective lots each month and then the bank verified the actual units against the list provided.

The trial Judge was satisfied that "there was a valid conditional sales contract in existence between the defendant company and Nova Mobile Homes Limited" and that there was default in payment thereunder for the two mobile homes in question.

He then reached three very important conclusions:

1. The bank became a creditor before each conditional sales contract was entered into between Glendale and Nova and did not become a creditor at a time subsequent to the completion of the

transaction. It was not a creditor within the meaning of s. 2 or s. 3 of the *Conditional Sales Act*, R.S.N.S. 1967, c. 48.

2. The debenture holder was not a subsequent mortgagee within the meaning of either of the sections.

3. After referring to the activities of Mr. John DeWinters in 1969 and the evidence of Mr. Goldsmith, the trial Judge expressed himself as being satisfied that Mr. Goldsmith had talked with Mr. DeWinters and that Mr. DeWinters was speaking at that time on behalf of the appellant company and that Mr. Goldsmith was advised by Mr. DeWinters that the appellant "maintained no lien of any kind" over the homes sold to Nova Mobile Homes Limited". He also referred to the memorandum, ex. 2, of December 15, 1969, which Mr. Goldsmith sent to his superior in Halifax, and went on to say that it was clear from the evidence that the bank placed great reliance on the assertion of Mr. DeWinters that the appellant had no lien interest over the homes in question. He also remarked on the fact that the bank each month conducted a check of the inventory to ensure that there was sufficient security on the lots to cover the amount of the debenture.

The trial Judge was impressed with the fact that the appellant illustrated its interest in Nova in September, 1974, when its representatives approached the bank with the idea that they would allow a certain number of homes on the lot in order to gain further financing from the bank. He felt that the appellant was deeply involved in Nova and was familiar with its operation as Nova was one of its largest customers.

After reviewing these facts and concluding that the appellant had a special knowledge of the affairs of Nova and must have been aware of the assurance given to the bank, the trial Judge stated that in his opinion:

> ... the conduct of the defendant company when it failed to notify the Bank of Montreal that it was changing the terms and conditions of its sales amounts to conduct constituting misrepresentation.

He expressed the view that the respondents were using the estoppel theory as "a shield and not as a sword", and from all these things, he concluded that the appellant should be estopped from setting up the conditional sales contracts as against the respondents.

The respondent's notice of contention raised two additional grounds on which in the respondent's submission the judgment of the learned trial Judge should be upheld:

(1) There was no valid conditional sales contract existing at the relevant time between the appellant and Nova Mobile Homes Limited, pursuant to which the appellant was entitled to take possession of the mobile Homes in question.

(2) If there were existing conditional sale contracts, they were void as against the respondents.

As to ground number (1), the trial Judge introduced his reasoning by saying:

> I am satisfied from the evidence that the two mobile homes in question were delivered to Nova Mobile Homes Limited by the defendant company in June and July of 1974.

The relevant invoices contained the clause, which I have quoted early in these reasons, providing that the property shall remain vested in the seller until the entire purchase price is paid.

The trial Judge posed this question: "Did Nova by its conduct accept the terms and conditions as put forth by the defendant company on its invoices?"

He concluded that it did and came to that conclusion by following the test set out by Ritchie, J., in *Saint John Tug Boat Co. Ltd. v. Irving Refinery Ltd.* (1964), 46 D.L.R. (2d) 1 at pp. 6-7, [1964] S.C.R, 614 at pp. 621-2, 49 M.P.R. 284. I quote from pp. 6-7 D.L.R., p. 621 S.C.R.:

> The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfilment of the contract, is made the subject of comment in *Anson's Law of Contract*, 21st ed., p. 28, where it is said:
>
> > "The test of such a contract is an objective and not a subjective one; that is to say, the intention which the law will attribute to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind. So if *A* allows *B* to work for him under such circumstances that no reasonable man would suppose that *B* meant to do the work for nothing, *A* will be liable to pay for it. The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, constitutes the acceptance."

Ritchie, J., continued at pp. 7-8 D.L.R., p. 622 S.C.R.:

> Like the learned trial Judge, however, I would adopt the following excerpt from *Smith's Leading Cases*, 13th ed., vol. 1, at p. 156, where it is said:
>
> > "But if a person knows that the consideration is being rendered for his benefit with an expectation that he will pay for it, then if he acquiesces in its being done, taking the benefit of it when done, he will be taken impliedly to have requested its being done: and that will import a promise to pay for it."

The trial Judge remarked that there was no question that a number of homes were delivered to Nova Mobile Homes Limited between November 9, 1973 and June 28, 1974, and that:

> There is also considerable evidence that no one representing Nova Mobile Homes Limited at any time objected to the form of invoice or to the fact that these units were being delivered.

From this evidence he felt that it could be inferred with reason that Nova Mobile Homes Limited accepted these homes, "sold them and paid for many of them upon sale".

John Alexander Park, who was general manager of Glendale in Sussex from October, 1973, until the latter part of June or early July, 1974, was questioned about the attitude of Nova:

> Q. To this date, to your knowledge, has Nova or anyone from Nova ever rejected or objected to the terms of the invoices?
>
> A. They were never rejected no.

There was evidence on which the trial Judge could arrive at the conclusion which he did and I would reject the first ground in the notice of contention.

(2) As to the second ground in the notice of contention, the trial Judge relied on the decision of Lieff, J. in *J. R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd. et al.* (1968), 70 D.L.R. (2d) 26, [1968] 2 O.R. 532.

In that case having concluded that a "subsequent mortgagee" under the *Conditional Sales Act* (Ontario) included the holder of a debenture in the nature of a floating charge, he said at p. 35:

> The crux of the matter is whether the debenture holders relied on the apparent ownership of Embassy Motors Ltd. in the motor vehicles, in taking a floating charge as security for the advancement of moneys. I think the term "subsequent mortgagees" applies only to those who may have acted subsequently in reliance upon such apparent ownership. There clearly was no such reliance in the case at bar and therefore I find that the debenture holders cannot be said to be "subsequent mortgagees" within the spirit of s. 2(1) of the *Conditional Sales Act*.

Section 2(1) of the Ontario Act, R.S.O. 1960, c. 61, referred to "a subsequent purchaser or mortgagee claiming from or under the purchaser, without notice, in good faith and for valuable consideration ...".

The trial Judge said that although the bank may have "acted subsequently", in reliance upon "apparent ownership of the mobile homes", the question before him went to its rights under the debenture and the bank neither entered into the debenture nor made advances thereunder following delivery of the mobile homes and invoices in June and July of 1974. In the result he could not find that the bank as the debenture holder was a "subsequent mortgagee" within the meaning of s. 2 and s. 3 of the Act.

In my opinion, Lieff, J., reached the correct result, although I am not in disagreement with the treatment by my brother Macdonald of the effect of crystallization.

Accordingly, I agree that the conclusion of the trial Judge that the bank was not a "subsequent mortgagee" is correct.

The trial Judge found that the Bank of Montreal was not a creditor for the purposes of s. 2 or s. 3 of the *Conditional Sales Act* of Nova Scotia. He set out these sections in detail in his decision. On this point I agree with the trial Judge and with the reasoning of my brother Macdonald.

The second ground of the notice of contention therefore fails.

I now turn to the question of estoppel on which the trial Judge found in favour of the respondents. It is from this finding that the appellant appeals.

The appellant has urged that the principle of estoppel has no application here.

The argument is that there was no misrepresentation of facts here on which the bank acted to its detriment and the reasoning of Duff, J., in *Blackwoods Ltd. v. Canadian Northern R. Co.* (1910), 44 S.C.R. 92 at p. 102, applies.

The Blackwoods owned property adjoining the line of the Canadian Northern and the question was whether the Board of Railway Commissioners had power to extend a railway siding from an existing spur which had been constructed on the Blackwood land.

In support of the person who was to benefit from the construction was a letter signed by Blackwoods to certain people, which said [at p. 93]:

> "With reference to your application for right-of-way over our land, on the C.N.R. spur, we are perfectly willing to grant this."

Duff, J., said at pp. 102-3:

> I am unable to agree with the Chief Commissioner that the legal effect of these findings of fact is such as to preclude the Blackwoods from opposing the application. ...
>
> The argument on this assumption is that this letter contains representations that the Blackwoods will not insist on their legal rights in respect of this spur and that these representations they are bound to make good to the person who acted on the faith of them. Now, that contention can only be sustained upon one of two views respecting the construction of the letter. One of these alternatives is that the letter contains some misrepresentation as to some state of facts alleged to exist at the time it was written upon which Mr. Sutherland acted. If such be the construction of the letter then equitites in Mr. Sutherland's favour might arise. But where is the representation of fact? The only representation of fact actually existing relates to the then existing state of the Blackwoods's intentions. Nobody suggests that there is any misrepresentation here—that is to say, nobody suggests that the Blackwoods in writing the letter did not sincerely express the state of their minds in the matter—that in other words, they were committing a very stupid and motiveless fraud.

The principle to be followed in estoppel cases was set out by Ritchie, J., in *John Burrows Ltd. v. Subsurface Surveys Ltd. et al.* (1968), 68 D.L.R. (2d) 354 at pp. 360-61, [1968] S.C.R. 607:

> It seems clear to me that this type of equitable defence can not be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.
>
> It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes

> would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.

Of course in that case there was an acceleration clause and the conduct alleged to have created the estoppel was merely the acceptance of instalments paid after the tenth day of the month by the person entitled. The wording of the document was [at p. 356]:

> "In default of payment of any interest payment or instalment for a period of ten (10) days after the same became due the whole amount payable under this note is to become immediately due."

I accept the position that estoppel cannot be founded on a mere representation of intention.

In *Razansoff v. Brounstein Bros.*, [1924] 2 D.L.R. 1170, McKay, J.A., said p. 1172 after quoting the rule that:

> "In order to found an estoppel a representation must be of an existing fact, not of a mere intention."

continued:

> During the argument of the appeal I was under the impression that, in conjunction with the promise to return the note, there was something in the evidence from which could be gathered a statement of fact to the effect that the note was paid or satisfied, but after carefully going over the evidence several times, I cannot find anything that would lead me to that conclusion. There was nothing said or done by respondent that would lead the appellants to the belief that the note was paid, or otherwise satisfied.
>
> The promise to return the note, then, was a mere statement of an intention to do something in the future, which is not sufficient.

The same view was expressed by Mathers, C.J.K.B., in *Ross v. Benjaminson Construction Co.*, [1927] 2 D.L.R. 830 at pp. 832-3, [1927] 1 W.W.R. 985.

He compared the case before him with *Piggott v. Stratton* (1859), 1 De G.F. & J. 33, 45 E.R. 271, where the vendor of property told the purchaser of a portion thereof that the vendor's 999-year lease contained a restrictive covenant which prevented him building so as to obstruct the purchaser's view. The vendor did build in just such a manner, although when he did so he had surrendered the original lease and taken a new one which contained no such restrictive clause.

Mathers, C.J.K.B., at p. 833, said of *Piggott and Stratton*:

> It was held that the representation which he made to the plaintiff was not a mere representation of intention with respect to what he might build in the future, but was a representation of an existing fact, to wit, that he was bound by a covenant covering the whole period of the plaintiff's lease not to build so as to obstruct the latter's sea view.

In *Hamilton Gear & Machine Co. v. Lewis Bros. Ltd.*, [1924] 3 D.L.R. 367, Mulock, C.J.Ex., at p. 372, referred to a letter by the defendants in which they admitted having given the order for 8,000 pairs of gears and pinions and alleged the existence of a contract whereby the plaintiffs were bound. The comment of the Chief Jus-

tice was: "Evidently they considered that the plaintiffs, by their conduct, had accepted the defendants' offer of January 9."

After quoting other correspondence, Chief Justice Mulock said at p. 373:

> It is, I think, clear from this correspondence that the plaintiffs accepted in writing the defendants' order of January 9, 1920, and I also find that delivery by the plaintiffs to the defendants in pursuance of the said order of a substantial portion of the goods so ordered was conduct equivalent to acceptance in writing of the order, whereby the plaintiffs became bound by the contract thus created to deliver the remainder of the goods contracted for (that is, the 8,000 pairs of gears and pinions).

At p. 375 he said:

> Having thus approbated, the defendants are not entitled to reprobate, the contract: *Bonner-Worth Co. v. Geddes Bros.* (1921), 64 D.L.R. 257, 50 O.L.R. 196.

The headnote reads as follows:

> A party who has affirmed the existence of a contract subsequent to an alleged breach and dealt with the subject matter of the contract as owners, cannot afterwards repudiate the contract either on the ground of the alleged breach, or on the ground that the subject matter dealt with, was not in accordance with the contract.

Acknowledging all that has been said by the authorities — that a mere expression of intention is not enough, that indulgence alone does not support an estoppel, it appears to me that there was evidence before the trial Judge to support his conclusions. Mr. DeWinters, as vice-president of Glendale, when seeking financing of mobile purchases stated as far back as 1969 that Glendale maintained no lien over the homes sold to Mobile Homes Limited. It is true that Mr. Goldsmith's evidence, as the trial Judge found, was not precise, and he admitted that his testimony was based on the letter which he wrote on December 15, 1969, to the senior vice-president of Atlantic Provinces Division of the Bank of Montreal.

In addition to Mr. DeWinters' statement, there was the evidence of the check made each month on the lots of Nova. The trial Judge took all these things into consideration. Finally, he said this:

> It seems to me that knowing that the Bank of Montreal had advanced its credit to Nova Mobile Homes Limited on the basis of the assurance that the defendant company held no liens on the mobile homes, then the defendant company should have given notice to the Bank of Montreal that it was changing its procedure and commencing to sell by way of conditional sales contract. The statement made by Mr. DeWinter in 1969 as to the fact that no liens were being maintained on the units was a true representation. However, in my opinion, the conduct of the defendant company when it failed to notify the Bank of Montreal that it was changing the terms and conditions of its sales amounts to conduct constituting misrepresentation.

He concluded that the conduct of Glendale was such as to convey a false impression to the Bank of Montreal which induced the plaintiff to advance moneys and continue to advance credit to Nova Mobile Homes Limited. This, he said, amounted to conduct constituting misrepresentation.

In *Evenden v. Guildford City Association Football Club Ltd.*, [1975] 3 All E.R. 269, there was an agreement that the service of the groundsman in question should be regarded as unbroken even though there was a technical change of employers.

On dismissal because of redundancy, his claim for redundancy payments under the relevant statute was resisted on the ground that he could only claim payments while in the employ of the last employer.

Lord Denning, M.R., said at p. 273 that the doctrine of promissory estoppel "applies whenever a representation is made, whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act on it and he does act on it". Of course the evidence in the *Evenden* case was stronger than that before us because there there was an actual document to support the undertaking, but the principle remains.

In *Moorgate Mercantile Co. Ltd. v. Twitchings*, [1975] All E.R. 314, Lord Denning, M.R., said at p. 323:

> Estoppel is not a rule of evidence. It is not a cause of action. It is a principle of justice and of equity. It comes to this. When a man, by his words or conduct, has led another to believe in a particular state of affairs, he will not be allowed to go back on it when it would be unjust or inequitable for him to do so.

Cheshire and Fifoot's *Law of Contract*, 6th ed., p. 212, says:

> The particular aspect of this doctrine that seems relevant in the present context is estoppel by misrepresentation, which operates when a man gives to another a false impression of some fact as the result of his own language or conduct.

After quoting these remarks from Cheshire and Fifoot, the trial Judge said that the misrepresentation could be,

> ... by conduct as well as by language. ... Whether by intent or otherwise, the fact that the circumstances had changed so substantially was not conveyed to the Bank of Montreal which continued to act in reliance upon the representation that the defendant company maintained no lien interest in the homes sold to Nova Mobile Homes Limited.

Some indication of the reliance placed on Mr. John DeWinters appears in the redirect examination of Mr. Goldsmith:

Q. I take it from your answers to the questions, my learned friend put to you that John DeWinter, or that you had many discussions with John DeWinter concerning the operations of this account?

A. Over the years, I spoke to him several times, on the phone and I met him several times in St. John.

Q. You treated him as a principal of the company as well as an officer of Glendale?

A. I was always under that understanding.

Q. But was he working for Glendale at that time?

A. Yes.

After consideration of the evidence, the trial Judge was of opinion that the conduct of the appellant showed that it was aware of the transaction between Nova and the Bank of Montreal, "with

particular reference to the terms of the debenture". He found as a fact that the defendant company had changed the terms of its invoices without notification to the bank. There was no registration of the documents in the Registry of Deeds in Nova Scotia. In the result, he concluded that the appellant should be estopped from setting up the conditional sales contracts as against the respondent.

In my view there was evidence before him under the authorities on which he could reach this conclusion.

It is therefore my opinion that the appeal should be dismissed with costs.

COOPER, J.A.:—This is an appeal from the decision and order of Mr. Justice Morrision whereby the respondents, plaintiffs in the action, were declared to be entitled to possession of two mobile homes, serial numbers 6468 and 5889, which had been previously seized and disposed of under an interlocutory recovery order by the respondent, W. J. B. Gentleman as receiver and manager of Nova Mobile Homes Limited ("Nova"), appointed by the respondent, Bank of Montreal ("the Bank") under the provisions of a debenture dated December 28, 1972, made by Nova to secure, by way of a first floating charge on all the personal assets of Nova, including mobile homes, repayment to the Bank of amounts of money advanced by the Bank of Nova up to $150,000.

The facts and circumstances giving rise to the action have been set out by Mr. Justice Morrison in his decision. I must, however, refer to such of the facts as are necessary to an appreciation of the issues before us.

Nova was incorporated under the laws of New Brunswick. Its head office was in Saint John and it carried on the business of selling mobile homes in Nova Scotia from premises in or in the vicinity of Dartmouth. Its major supplier of the mobile homes was the appellant, Glendale (Atlantic) Limited ("Glendale"), which had manufacturing facilities at Sussex, New Brunswick.

Nova in 1968 arranged a line of credit of $35,000 with the Bank through its Haymarket Square Branch in Saint John. The manager of the branch was Mr. Anthony A. Goldsmith. The security taken by the Bank was a term deposit of $21,000 and a personal guarantee of those who Mr. Goldsmith understood were the three shareholders of Nova, among whom was Mr. John DeWinters. It also appears that the Bank had taken a debenture as security dated July 11, 1969.

By letter dated December 1, 1969, the assistant credit manager of the Bank, Atlantic Provinces Division, informed Mr. Goldsmith that the Bank was deferring any renewal of the credit to Nova pending information on and clarification of certain matters. In that

letter reference is made to the fact that "a Floating Debenture over stock has been obtained in lieu of chattel mortgage security ..." and it is further stated:

> We are most concerned that at year end $84,411. is apparently owing to Mobile Homes Limited. It is assumed that the suppliers maintain a lien interest over units prior to payment reducing our debenture security accordingly ...

Mr. Goldsmith replied to the inquiries addressed to him by letter dated December 15, 1969. He enclosed a copy of the debenture and stated with respect to it that control was being exercised as follows. Glendale supplied the Bank with the serial number of each trailer sold to Nova and the Bank was provided by Nova each month with a list of size and serial numbers of the trailers on hand. The Bank through a branch in Dartmouth inspected the parking lot and verified the stock on hand. There then appears in the letter the following sentence:

> The Vice-President of Glendale Mobile Homes, Eastern Division, confirmed that his company has no lien interest over the units sold to Nova Mobile Homes Ltd.

It is common ground that the reference to Glendale Mobile Homes was to the appellant.

Although the control procedure outlined by Mr. Goldsmith may have existed as of December 15, 1969, his testimony at the trial is clear that in doing the monthly audit as to the number of mobile homes on Nova's lots the Bank relied entirely on the listings obtained from Nova. I quote Mr. Goldsmith's evidence:

Q. In all your audits, did you obtain a listing from Nova Mobile Homes Ltd.?

A. Yes.

Q. And, these were used to, what was done after the sheets were obtained?

A. We verified the retail value, or the wholesale value of the mobile homes. Which we were informed were the bank's security to support the loan for the company.

Q. What was that last part, that you?

A. We verified the wholesale value of the mobile homes, which we were told by the company were held under bank's debenture for security. On the loans.

Q. I will just make sure I have it right, you verified the value of the homes, which you understood were covered by? The Bank of Montreal security?

A. Right.

The learned trial Judge said with respect to this matter:

> By way of checking the inventory on the lots of Nova Mobile Homes Limited representatives of the Bank of Montreal would visit Nova Mobile Homes Limited at their retail sales outlets and obtain a list of mobile homes then in possession of Nova Mobile Homes Limited. Then this list would be checked against mobile homes which were actually on the lot. The bank was aware of the fact that some of the mobile homes were being financed through Borg-Warner and also by I.A.C. The list would show which homes were to be financed by these two companies. The bank representatives would then satisfy themselves that there were sufficient mobile homes on the lot the valuation of which homes

would exceed by 25% the total value of the debenture. This check was maintained monthly. The list obtained by the bank would show the serial numbers and the location of the various units.

The information as to possible lien interest quoted above was obtained orally by Goldsmith from Mr. John DeWinters who Goldsmith believed was vice-president of Glendale. In any event, he was the person Goldsmith got in touch with when the Bank had any transaction with Glendale. In cross-examiantion Goldsmith could not recall where he had spoken to DeWinters nor the day. The only thing in his memory was that he replied to a question "from our Vice-President [in the letter of December 1st to which I have referred] and I put this in my letter". He went on to say "I was specifically speaking to him" and that he would not have quoted what DeWinters had said unless he had actually called DeWinters. I quote further from Goldsmith's cross-examination:

Q. No, but what I am saying to you, or suggesting to you, is that you have no, no recollection of the conversation, other than the fact that there is a report of December 15th. [in] which you indicate there was a conversation?

A. That is correct.

Q. So, that this document, is all that exists as far as you are concerned, there is nothing in your memory recalling the conversation? Is that correct?

A. Not, not a [sic] personal details of the actual telephone conversation itself.

Until November, 1973, Glendale invoiced to Nova the units not being financed through Borg-Warner or Industrial Acceptance Corporation (I.A.C.) on an ordinary form giving no indication of any reservation of title in Glendale. But in that month Glendale changed its form of invoice to Nova on such homes. The specific changes included the following words on the face of the invoice:

> Title to the above-described merchandise remains vested with the Seller until payment has been received by the Seller in collected funds, in accordance with the terms and conditions as stated on the reverse side of this form.

On the back of the invoice were printed "Terms and Conditions of Sale", which read in part:

In addition to the provisions set forth on the face hereof, it is further agreed:

(1) The property described on the face hereof shall at all times be and remain personally and the title to said property shall remain vested in Seller or assigns until the entire purchase price thereof shall have been paid.

(2) Time is of the essence of this agreement, and in the event Buyer defaults in payment, Seller or assigns may elect (A) to declare the entire sum remaining unpaid hereunder immediately due and payable and sue therefore [sic], or (B) to repossess said property without notice, demand or legal process. In the latter event, Buyer agrees to permit repossession and removal of said property without legal process of law and to pay all expenses of collection or removal of said property including reasonable attorney's fees. Any payments made by Buyer prior to repossession of the property shall be retained by Seller or assigns as and for rental and depreciation of said property.

. . . . .

(4) All of the terms set forth on the face hereof including price, delivery information, model, colour, serial number and payment, shall be deemed to be accepted by Buyer unless BUYER shall notify Seller or assigns to the contrary in writing three (3) days after Buyer's receipt of the property.

The first invoice of the new type to Nova was dated December 21, 1973; there having been no sales to Nova between November 12th, when the new form seems to have been adopted, until December 21st. There was no objection made by Nova to Glendale to the new form of invoice nor apparently did the Bank become aware of the vital change as to reservation of property and title. Glendale made no registration under the *Conditional Sales Act*, R.S.N.S. 1967, c. 48.

On September 11, 1974, it was discovered, when an audit was made of Nova's mobile homes in attempting to verify the number of homes which were secured under the debenture, that there was a shortfall of security. The credit manager of the Bank was informed and as a result Goldsmith told the president of Nova, Mr. Bustin, that the Bank required more security. He was given five days to comply with this request and on September 18, 1974, payment in full of Nova's loans was demanded by the Bank. On September 19, 1974, the Bank appointed the respondent, Mr. Gentleman, as its receiver under the terms of the debenture and by which he had power to take possession of, *inter alia*, the two mobile homes in question and to sell them as agent for Nova.

In the meantime, on September 17, 1974, Glendale in reliance upon the terms of its invoices repossessed the two mobile homes from premises of Nova without any objection being made by Nova. The repossession was effected by Mr. Douglas Williams as agent of Glendale. Mr. Gentleman, upon discovering the repossession, attempted to have the two mobile homes turned over to him but Mr. Williams refused to do so until he had obtained proof of the ownership of the two units.

Subsequently, Mr. Gentleman obtained a recovery order and both units were seized under it by the Sheriff of Halifax County. They were thereafter disposed of and a bond lodged with the Court in substitution therefor.

Mr. Justice Morrison came to these conclusions: (1) that the mobile homes in question were sold by Glendale to Nova under conditional sales contracts binding upon Nova; (2) those contracts were not void as against the Bank, which he found was not a subsequent mortgagee or creditor under s. 2 or 3 of the *Conditional Sales Act*, and (3) that Glendale was estopped from setting up the conditional sale contracts as against the Bank. He disposed of the case, as expressed in the order giving effect to his decision, by a declaration that the plaintiffs, respondents here, were entitled to possession of

mobile homes bearing serial numbers 6468 and 5889, "previously seized and disposed of under an Interlocutory Recovery Order by the Plaintiff W. J. B. Gentleman, Receiver and Manager, of Nova Mobile Homes Limited". The result follows that the Bank was entitled to the money realized upon sale of the mobile homes and to the release of its bond.

The issue raised by Glendale in its notice of appeal is whether the learned trial Judge was correct in finding in the circumstances of this case that the respondents could rely on the doctrine of estoppel. The respondents by notice of contention have raised two further issues, (1) was the learned trial Judge correct in holding that there were valid conditional sales contracts between Glendale and Nova with regard to the two units in question and, if so, was he correct in holding that those contracts were still in existence between Glendale and Nova on September 17, 1974, and (2) if there were existing conditional sales contracts, was the learned trial Judge correct in holding that the contracts were not void as against the respondents?

I now direct my attention to the first of the two issues raised in the notice of contention. As pointed out by the trial Judge there was nothing in the evidence to indicate a written acceptance by Nova of the terms and conditions of sale contained in the invoices adopted by Glendale commencing in November, 1973. Nova, however, made no objection to the new form of invoice by which title to the mobile homes supplied by Glendale, and including those for the two units here in question, was reserved in Glendale until payment. Nova accepted and paid for units on the basis of the new or revised form of invoice. The trial Judge also pointed out that Mr. Charles Crosby, the Controller of Nova, testified that he was aware of the terms of the invoice in 1973, shortly after they had been included in or added to the invoices previously in use, and also indicated that the invoices would be sent to Nova's head office in Saint John. Mr. Crosby did not offer any objection when Glendale's agent repossessed the mobile homes and indeed gave full co-operation to the agent at that time.

Mr. Justice Morrison found that Nova by its conduct had accepted the terms and conditions as set out by Glendale on its invoices. I am respectfully in agreement with this finding based as it was on *Saint John Tug Boat Co. Ltd. v. Irving Refinery Ltd.* (1964), 46 D.L.R. (2d), 1, [1964] S.C.R. 614, 49 M.P.R. 284, Supreme Court of Canada. The trial Judge quoted at some length from Mr. Justice Ritchie's judgment in that case. I need not repeat the whole of that quotation but it reads in part — at pp. 6-7 D.L.R., p. 621 S.C.R.:

> The test of whether conduct, unaccompanied by any verbal or written undertaking, can constitute an acceptance of an offer so as to bind the acceptor to the fulfilment of the contract, is made the subject of comment in *Anson's Law of Contract*, 21st ed., p. 28, where it is said:

> "The test of such a contract is an objective and not a subjective one, that is to say, the intention which the law will attribute to a man is always that which his conduct bears when reasonably construed, and not that which was present in his own mind. So if *A* allows *B* to work for him under such circumstances that no reasonable man would suppose that *B* meant to do the work for nothing, *A* will be liable to pay for it. The doing of the work is the offer; the permission to do it, or the acquiescence in its being done, contitutes the acceptance."

In this connection reference is frequently made to the following statement contained in the judgment of Lord Blackburn in *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at p. 607, which I adopt as a proper test under the present circumstances:

> "If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was consenting to the terms proposed by the other party, and that other party upon that belief enters into a contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

The learned trial Judge further expressed himself as being satisfied on the evidence that the two mobile homes were never paid for by Nova and in my opinion he was not in error in this respect. I therefore think that Mr. Justice Morrison was correct in holding that there were valid conditional sales contracts between Glendale and Nova with regard to the mobile homes serial numbers 6468 and 5889 and in holding that those contracts were still in existence between Glendale and Nova on September 17, 1974.

I deal next with the issue raised by Glendale in its notice of appeal (leaving the second ground raised in the notice of contention for later consideration). Was the learned trial Judge correct in finding that the respondents could rely on the doctrine of estoppel? Mr. Justice Morrison found that Glendale was estopped from setting up the conditional sales contracts relating to the two mobile homes in question as against the respondents. I respectfully have much difficulty in understanding the reasoning by which this conclusion was reached. If I understand it correctly the learned trial Judge attached importance to the fact that at the time the first debenture was entered into in 1969 Glendale was aware that the Bank had some interest in the financing of Nova; Glendale had "a very intimate knowledge" of Nova's affairs. This was clear because John DeWinters appeared before the Bank in 1969 as one of Nova's shareholders and at the time he was in charge of Glendale's operations in the New Brunswick area (he later became vice-president of Glendale).

It was against this background that Mr. Goldsmith called Mr. DeWinters in 1969 to inquire whether or not Glendale maintained any lien on the mobile homes that it sold to Nova. As I have mentioned above the call to DeWinters was made as a result of the letter dated December 1, 1969, from the assistant credit manager of the Bank's Atlantic Provinces Division and in which the writer

said, "It is assumed that the suppliers "maintain a lien interest over units prior to payment ...". The representation on which the estoppel was founded then was made by DeWinters and I repeat it:

> The Vice-President of Glendale Mobile Homes, Eastern Division, confirmed that his company has no lien interest over the units sold to Nova Mobile Homes Ltd.

Counsel for Glendale contended that the statement said to constitute the representation of Glendale made through DeWinters was inadmissible as being hearsay. It was the record of a conversation, the circumstances of which the witness Goldsmith could not recall. On the other hand under s. 22 of the *Evidence Act*, R.S.N.S. 1967, c. 94, business records are admissible in evidence and by s-s. (4) the circumstances of the keeping of any records, including the lack of personal knowledge of the witness testifying as to such records, may be shown to affect the weight of any evidence tendered pursuant to the section, but such circumstances do not affect its admissibility. I will assume, but, in view of what I say later, without deciding, that the learned trial Judge was not in error in admitting this evidence.

Estoppel by representation may be called in aid not as founding a cause of action but as precluding a person from asserting a version of one set of facts which is in conflict with the version previously put forward by him — see Spencer Bower and Turner, *Estoppel by Representation*, 2nd ed., at p. 77. The representation first made must be a clear and unambiguous representation of fact — with the intention that the person to whom it is made is to act upon it. If the representation turns out to be untrue and if that person does act upon it to his prejudice, the representor is prevented or estopped from denying its truth, "He cannot, as it were, give himself the lie and leave the other party to take the consequences" — see Cheshire and Fifoot's *Law of Contract*, 8th ed., p. 85. I also refer to Spencer Bower and Turner, *supra*, at p. 5:

> Lord Birkenhead succinctly stated the essentials of the doctrine in *Maclaine v. Gatty* [[1921] 1 A.C. 376, at p. 386, H.L.] as follows:
>
> > "Where A. has by his words or conduct justified B. in believing that a certain state of facts exists, and B. has acted upon such belief to his prejudice, A. is not permitted to affirm against B. that a different state of facts existed at the same time. Whether one reads the case of *Pickard v. Sears* [(1837), 6 Ad. & El. 469], or the later classic authorities which have illustrated this topic, one will not, I think, greatly vary or extend this simple definition of the doctrine."

In my opinion the representation made by Mr. DeWinters to the Bank is not such as to raise the doctrine of estoppel. It was not untrue at the time it was made. Indeed I may say parenthetically that it remained true until December, 1973, and thus through further extensions of credit and after the debenture of December 28, 1972, had been entered into. The Bank did not act upon the representa-

tion; indeed, why would it? The representation was merely a confirmation of what Mr. Goldsmith understood the situation to be.

I think, with respect, that the learned trial Judge fell into error in interpreting the representation not as being one relating to an existing fact only but as being also an assurance as to the future. It is pointed out by the author of Spencer Bower and Turner, *supra*, at p. 6, that where the representation on which an estoppel is founded is not one as to an existing matter of fact, but an assurance as to future conduct, the matter falls within what has been termed promissory estoppel which, in its modern form at least, has its genesis in *Central London Property Trust, Ltd. v. High Trees House, Ltd.*, [1947] 1 K.B. 130. I think it impossible to read the representation here as containing any assurance or promise as to the future. It was related to and *confirmed* an existing fact. Indeed, it would be very strange if Mr. DeWinters who at that time was not, on the record before us, an officer of Glendale would take it upon himself to undertake on behalf of Glendale that the practice of selling mobile homes without reservation of a lien interest would be continued indefinitely into the future.

In any event we must read the *High Trees* case in the light of what has been said concerning it by the Supreme Court of Canada. In *John Burrows Ltd. v. Subsurface Surveys Ltd. et al.* (1968), 68 D.L.R. (2d) 354, [1968] S.C.R. 607, Mr. Justice Ritchie in delivering the unanimous judgment of that Court had this to say at pp. 359-60:

> Since the decision of the present Lord Denning in the case of *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130, there has been a great deal of discussion, both academic and judicial, on the question of whether that decision extended the doctrine of estoppel beyond the limits which had been theretofore fixed, but in this Court in the case of *Conwest Exploration Co. Ltd. et al. v. Letain*, 41 D.L.R. (2d) 198 at pp. 206-7, [1964] S.C.R. 20, Judson, J., speaking for the majority of the Court, expressed the view that Lord Denning's statement had not done anything more than restate the principle expressed by Lord Cairns in *Hughes v. Metropolitan R. Co.* (1877), 2 App. Case. 439 at p. 448, in the following terms:
>
> > "... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results — certain penalties or legal forfeiture — afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties."

The parties here had not entered into "definite and distinct terms involving certain legal results" and it followed that there were not, and could not be, "a course of negotiation" such as is referred to in the *Hughes* case. In the result I am satisfied that there

cannot here be an estoppel of the *High Trees* nature as discussed in the *John Burrows Ltd.* case.

There is one other point with respect to the trial Judge's application of the doctrine or principle of estoppel which has troubled me. As I have said above estoppel is not available as a cause of action — see *Combe v. Combe*, [1951] 2 K.B. 215. It is rather a matter of defence — a shield and not a sword as it has been said on many occasions. It seems to me, with respect, that the Bank has used it as a sword. Its action was one for a declaration. The Bank appears to have based its claim upon estoppel rather than meeting the competing claim of Glendale to possession of the two mobile units by the use of estoppel. On that ground alone it is my opinion that the Bank must fail in so far as estoppel is concerned.

I have now to consider the second issue raised by the notice of contention, namely, was Mr. Justice Morrison correct in holding that the conditional sales contracts were not void as against the respondents? The answer to this question depends upon the meaning of the words "as against the creditors of the buyer" and "subsequent . . . mortgagees in good faith for a valuable consideration" as these words appear in s. 3 of the *Conditional Sales Act, supra.* That section has been quoted in full in the reasons for judgment of my brother Macdonald.

I am satisfied that the Bank was not a subsequent mortgagee. The debenture dated December 28, 1972, created a floating charge. The Bank thereby became an equitable mortgagee prior in time to the conditional sales of the two units here in question. In *Gordon MacKay & Co., Ltd. v. Capital Trust Corp., Ltd.*, [1927] 2 D.L.R. 1150, [1927] S.C.R. 374, 8 C.B.R. 216, Supreme Court of Canada, the instrument before the Court created a floating charge. Duff, J., at p. 1157 said that he had not been able to satisfy himself that "you cannot have a floating security by way of mortgage". He referred to the description of the nature of this class of security by Lord Macnaghten in *Tailby v. Official Receiver* (1880), 13 App. Cas. 523 at p. 541, and continued:

> The instrument in question in that case seems to have been almost identical in terms with the instrument now before us; and throughout the judgment of Lord Macnaghten it is everwhere spoken of as a mortgage. And in truth the language of that judgment makes it quite clear that in the opinion of that great Judge and Master of Equity, such a document as that before us might properly be described as an equitable mortgage.

The *Gordon MacKay & Co., Ltd.* case was considered in *J. R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd. et al.* (1968), 70 D.L.R. (2d) 26 at p. 31, [1968] 2 O.R. 532, Ontario High Court, where Lieff, J., found that the defendants Herman and Hershoran, the holders of a floating charge debenutre, were not subsequent mortgagees under s. 2(1) of the *Conditional Sales Act*, R.S.O. 1960,

c. 61. In reaching that result he first found that the defendants were mortgagees. He then said that whether or not they were subsequent mortgagees would depend on what point of time their interest in the motor vehicles (the property there in question) became effective. Based upon what was said with respect of security by way of floating charge by Buckley, L.J., in *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979 at pp. 999-1000, which I need not repeat except for this — "A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it" — Lieff, J., concluded [at p. 33] that although "a floating charge does not affect any specific chattel until crystallization . . . it does affect all the chattels of the moment that the floating charge is given". I think that the reasoning of Lieff, J., is applicable in the instant case with the result that the Bank is here not a subsequent mortgagee.

I am also of the opinion that the Bank does not fall within the category of "the creditors of the buyer". The creditors intended to be protected are those who become so after conditional sales agreements are entered into and in reliance upon the apparent or ostensible ownership of the chattels because they are in the possession of the person to whom they have been sold under conditional sales agreements. A person in possession and apparent ownership of goods should not, when he is not the real owner, obtain credit to the prejudice of a person who might rely upon such assets — see *United Electric Co. Ltd. v. Watson et al.*, [1927] 1 W.W.R. 87 at p. 89.

This is not the situation here. The Bank in extending credit to Nova relied upon the floating charge created by the debenture dated December 28, 1972. The Bank's status as creditor arose on that date or at the latest in January, 1974, when the operating credit of $150,000 was renewed and a promissory note evidencing the amount was taken. The credit was related throughout to the security of the floating charge and just as the effective date for determination of whether the mortgage of the floating charge must be related to the date of the debenture so must the date when the Bank became a creditor be related to that time or, possibly, to the date of the promissory note in January, 1974. This, as I understand it, is in accord with what was decided by Lieff, J., in the *J. R. Auto Brokers* case when, at pp. 35 and 36, he deals with the meaning of creditors. I therefore reiterate that in my opinion the Bank is not protected as a "creditor of the buyer" under s. 3 of the *Conditional Sales Act*, nor under s. 2 of the Act.

Furthermore, the Bank under its floating charge was not entitled to any specific asset until crystallization on September 19, 1974. But the two mobile homes here in question had before that time been repossessed by Glendale. Nova, on September 19, 1974,

had neither title to nor possession of the units; they were therefore not then available to the Bank as assets of Nova subject to the terms of the debenture.

Finally, I reiterate that in my respectful opinion the trial Judge erred in applying the doctrine of estoppel here and hence in allowing the claim of the respondents.

I would allow the appeal with costs.

MACDONALD, J.A.:—I have had the opportunity of reading the reasons for judgment of Mr. Justice Coffin and Mr. Justice Cooper. I agree with my bretheren for the reasons they have given that there were valid conditional sales contracts between Nova and Glendale with respect to the two mobile homes in question. With respect to my brother Coffin, I find myself in agreement with Mr. Justice Cooper for the reasons he has given that the trial Judge erred in finding that the respondents could rely on the doctrine of estoppel.

With respect to the issue whether the bank, under the floating charge debenture, was a subsequent mortgagee within the provisions of the *Conditional Sales Act* of this Province, R.S.N.S. 1967, c. 48, I agree with my brother Coffin and the trial Judge that it was not. Both my brother Coffin and the trial Judge in reaching this conclusion referred to the decision of Mr. Justice Lieff in *J.R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd. et al.* (1968), 70 D.L.R. (2d) 26, 2 O.R. 532. As my reasons for arriving at the same conclusion are based on somewhat different grounds, I thought it advisable to briefly set forth my views on this aspect of the matter.

The facts have been set forth in detail in the decision of the trial Judge and in the reasons for judgment of my brethren; I shall but refer to those facts that are relevant to an appreciation of my opinion.

The dates on which certain events occurred are vital to my approach to the issue. The occurrences and dates thereof that I consider relevant are as follows:

Occurrence	*Date*
Execution of floating charge debenture. Nova to the bank	December 28, 1972
Delivery by Glendale to Nova of mobile home, serial #6468	June 28, 1974
Delivery by Glendale to Nova of mobile home, serial #5889	July 3, 1974

Repossession by Glendale of the two mobile homes	September 17, 1974
Crystallization of the floating charge debenture	September 19, 1974

In *J.R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd., supra*, Lieff, J., found that under the provisions of the *Conditional Sales Act*, then in force in Ontario, the holders of a floating charge debenture were mortgagees, but not subsequent mortgagees, with respect to unregistered conditional sales contracts. Mr. Justice Lieff's reasons for so finding were as follows [at p. 35]:

> ... I think little turns on the distinction raised by counsel as to the difference in nature of the floating charge security before and after the crystallization. That is not the important question. The crux of the matter is whether the debenture holders relied on the apparent ownership of Embassy Motors Ltd. in the motor vehicles, in taking a floating charge as security for the advancement of moneys. I think the term "subsequent mortgagees" applies only to those who may have acted subsequently in reliance upon such apparent ownership. There clearly was no such reliance in the case at bar and therefore I find that the debenture holders cannot be said to be "subsequent mortgagees" within the spirit of s.2(1) of the *Conditional Sales Act*.

Because I am of the opinion, for reasons I shall give, that the bank in the present case was not a subsequent mortgagee I do not intend to embark upon an in-depth analysis of the reasoning of Mr. Justice Lieff. For the purposes of these reasons it is sufficient for me to say that I harbour some doubt as to that portion of his decision above-quoted. To my mind, in determining priorities, there is a vital difference between a floating charge that has been crystallized and one that has not. To appreciate this distinction is to appreciate the true nature and character of a floating charge.

It has often been said that perhaps the most accurate description of a floating charge ever given was by Buckley, L.J., of the Court of Appeal in England in *Evans v. Rival Granite Quarries, Ltd.*, [1910] 2 K.B. 979, when he said (p. 999):

> A floating security is not a future security; it is a present security, which presently affects all the assets of the company expressed to be included in it. On the other hand, it is not a specific security; the holder cannot affirm that the assets are specifically mortgaged to him. The assets are mortgaged in such a way that the mortgagor can deal with them without the concurrence of the mortgagee. A floating security is not a specific mortgage of the assets, plus a licence to the mortgagor to dispose of them in the course of his business, but is a floating mortgage applying to every item comprised in the security, but not specifically affecting any item until some event occurs or some act on the part of the mortgagee is done which causes it to crystallize into a fixed security.

The Court of Appeal in the *Evans* case held that it was necessary for debenture holders, as the price of priority over judgment creditors, to take steps to crystallize. The Court said that as long as the charge remains floating the debenture holders were not entitled to withdraw any particular asset from the business. In other words,

they must choose between a specific and a floating charge for as Fletcher Moulton, L.J., said in *Evans* "a security of this kind must be either floating or fixed". This result, Buckley, L.J., agreed, flowed from the very nature of the charge as previously defined by Lord Macnaghten in *Illingworth v. Houldsworth*, [1904] A.C. 355 at p. 358:

> I should have thought there was not much difficulty in defining what a floating charge is in contrast to what is called a specific charge. A specific charge, I think, is one that without more fastens on ascertained and definite property or property capable of being ascertained and defined; a floating charge, on the other hand, is ambulatory and shifting in its nature, hovering over and so to speak floating with the property which it is intended to affect until some event occurs or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.

In Fisher and Lightwood's *Law of Mortgage*, 8th ed., the author states at pp. 110-11:

> Mortgage debentures almost invariably create a *floating security*. Such a security is an immediate equitable charge on the assets of the company for the time being, but *it remains unattached to any particular property, and leaves the company at liberty to deal with its property in the ordinary course of its business*, as it thinks fit, *until* stopped, either by the appointment of a receiver, or by a winding up, or the happening of some agreed event when *the charge becomes fixed to the assets and effective* — or, as it is said, crystallises — *and gives the debenture holder priority over the general creditors*. So long as the security remains a floating security, the property of the company may be dealt with, and even a part thereof sold in the ordinary course of business, as if the security had not been given and any such dealing with a particular property will be binding on the debenture holders, provided that the dealing is completed before the charge ceases to be a floating security.

(My emphasis.)

It appears that once a floating charge is crystallized it becomes fixed to the assets or, to put it another way, it becomes at such time a specific mortgage.

At pp. 396-7 of Palmer's *Company Law*, 21st ed., the following appears:

> ... a floating charge is an equitable charge which does not fasten upon any specific or definite property, but is a charge upon property which may be constantly varying; it will normally be upon the whole of the company's property, including any which is subject to a fixed charge, but it can be restricted to a limited class of property, and the property which is subject to the floating charge can be dealt with by the company without consulting the holder of the charge, and may be sold, exchanged or otherwise dealt with in any way that the directors may think fit. Upon the happening of certain events, which are set out in the charging deed, the floating charge becomes fixed or, in technical terminology, it "crystallises", and thereafter the assets comprised in the charge are subject to the same restrictions as those under a specific charge. Unless otherwise agreed, a floating charge will also crystallise on the appointment of a receiver (either by the court or by a debenture holder under a power contained in the debenture) or on the commencement of winding up ...

and at pp.398-9:

Although a floating charge operates as an *immediate* and continuing charge on the property charged, nevertheless, before it crystallises the company has a free hand to deal with and dispose of the property charged in the ordinary course of its business. It may do so by way of sale, lease, exchange, specific mortgage, or otherwise, as it deems most expedient. Thus an assignment by the company of arrears of rent made before the appointment of a receiver gives the assignees a good title as against debenture holders having only a floating charge; but if the land is specifically charged by the debentures, the debenture holders can claim the rents. As to the effect of a prior mortgage of a lease on the debenture holder's interest in fixtures, it was held in *Re Roger-stone Brick Co.* that the mortgagee by assignment was entitled to the proceeds of sale of the fixed plant as against the debenture holders. By dealing with its debtors during the currency of the floating charge, the company may give them a right of set-off, but there is no mutuality, and therefore no charge has crystallised.

It should, in particular, be noted that before crystallisation of the floating charge the company has power to create legal mortgages and equitable charges in priority to the floating charge, and such priority is not affected by notice of the floating charge. In *Wheatley v. Silkstone Co.*, where the company, after creating a floating charge on its undertaking, had created a subsequent equitable charge in favour of its bankers by deposit of title deeds, North J., after referring to the authorities, said:

> "... those authorities furnish a very clear and intelligible principle to be followed. In this case I find that the debenture is intended to be a general floating security over all the property of the company, as it exists at the time when it is to be put in force; but it is not intended to prevent and has not the effect of in any way preventing the carrying on of the business in all or any of the ways in which it is carried on in the ordinary course; and, inasmuch as I find that in the ordinary course of business and for the purpose of the business this mortgage was made, it is a good mortgage upon and a good charge upon the property comprised in it, and is not subject to the claim created by the debentures."

This decision is a specially strong one, because the debentures in question were expressed to be by way of *first charge* on the undertaking; but in regard to this the learned judge said:

> "I find also that the first charge referred to in the debentures is fully satisfied by being the first charge against the general property of the company at the time when the claim under the debentures arises and can have effect given to it. There will be a declaration, therefore, that the charge of the plaintiff is prior to the debentures."

At p.404 the author states:

> Where chattels are in the company's possession under a hire-purchase agreement, under which the goods are to remain the property of the supplier, the rights of the owner prevail over a floating charge created by the company, even if the chattels become fixtures. This was decided in a case in which the hire-purchase agreement was made before the debentures were issued; but it is submitted that, even if the hire-purchase agreement were later in date than the floating charge, the debenture holders would only obtain a charge on the company's interest, which is subject to the rights of the owner of the chattel. A mortgagee who obtains a fixed legal mortgage, without notice of the terms of the hire-purchase agreement, would have a prior right to fixtures on taking possession. But this principle does not apply to an equitable charge.

In *The Law of Mortgages*, 2nd ed., by C.H.M. Waldock, the author states at pp.164-5:

> *When a floating charge crystallises it becomes a fixed charge having priority from that date.* It therefore gives debenture holders preference over the unsecured creditors, which is, of course, the essence of the security provided by a floating charge. It also prevails over execution creditors unless they have actually obtained satisfaction before the floating charge crystallises. The obtaining of a garnishee order or the seizure of goods by the sheriff under a writ of *fi. fa.* is not part of a dealing by the company in the ordinary course of business. It is a compulsory legal process directed against the company, not a dealing by the company. Consequently, a judgment creditor who has obtained a garnishee order nisi or "absolute", or who has had goods of the company seized by the sheriff, does not thereby gain priority over the debenture holders if their charge crystallises before he obtains payment. But if he does obtain payment, even though it be through the pressure of execution, before the debenture holders intervene, they cannot recover the money; and the Court will not restrain a judgment creditor from proceeding with his execution unless the debenture holders have taken steps to crystallise their security. Their security can only fasten on particular assets by crystallising and being converted from a floating to a fixed security.

(My emphasis.)

The author of the last referred to text says (p. 162) that a specific mortgage created after a floating charge has priority over the latter "such specific charge mortgage, being created under implied licence from the debenture holders, has priority over their floating charge whether or not the specific mortgagee had notice of the charge; and whether or not he holds a legal mortgage".

Had the two units been in the possession of Nova when the floating charge became a specific one upon crystallization on September 19, 1974, it appears to me to be arguable that from that date forward they were covered by such specific mortgage, which mortgage would have priority from that date. If such argument is sound then, of course, the bank having become the holder of a specific mortgage or fixed charge on September 19, 1974, would be a mortgagee subsequent to the unregistered conditional sales contract.

The foregoing, however, is not the case here. The two units were repossessed and taken out of the possession of Nova on September 17, 1974, two days before the floating charge crystallized. Thus when the floating charge settled and fastened onto the property of Nova on September 19, 1974, the two units in question, not then being in Nova's possession and to possession of which Nova was not entitled (the legal estate being in the unpaid vendor), they were not then within the reach and grasp of the crystallized floating charge and thus did not become part of the specific mortgage security. For this reason it is my opinion that the bank cannot be classified as a subsequent mortgagee within the meaning of the *Conditional Sales Act* with respect to the unregistered conditional sales contracts.

I turn now to a consideration of the issue whether the bank, as a creditor of Nova, has for such reason priority over the unregistered conditional sales contracts.

In my opinion the relevant section of the *Conditional Sales Act* of this Province is s. 3 which provides:

> 3. In the event of the permanent removal into the Province of goods of the value of fifteen dollars or over, subject to an agreement, made or executed without the Province, that the right of property or right of possession in whole or in part shall remain in the seller or bailor, notwithstanding that the actual possession of the goods passes to the buyer or bailee, then unless;
>
> (a) the agreement contains such a description of the goods, the subject of the sale or bailment, that the same may be readily and easily known and distinguished;
>
> (b) a copy thereof and of the affidavits and instruments relating thereto, proved to be a true copy by the affidavit of some person who has compared the same with the originals, is filed in the office of the proper officer of the district to which the goods and chattels are removed, within thirty days after the seller or bailor has received notice of the place to which the goods have been removed;
>
> the seller or bailor shall not be permitted to set up any right of property or right of possession in or of the goods as against the creditors of the buyer or bailee, a trustee in bankruptcy, a liquidator in winding-up proceedings, subsequent purchasers or mortgagees in good faith for a valuable consideration, whose conveyances or mortgages have been duly registered or are valid without registration, or as against judgments, executions or attachments against the buyer or bailee."

For a better understanding of my opinion on this aspect of the matter I set forth the pertinent part of s. 2(1) of the Act:

> 2(1) After possession of goods has been delivered to a buyer under a conditional sale, every provision contained therein whereby the property in the goods remains in the seller shall be void ... as against creditors of the buyer who at the time of becoming creditors have no notice of the provision and who subsequently obtained judgment, execution, or an attaching order, under which the goods, if the property of the buyer, might have been seized ...

In *J.R. Auto Brokers Ltd. v. Hillcrest Auto Lease Ltd. et al., supra*, Mr. Justice Lieff had before him the question of the meaning of the word "creditors" as such appeared in s. 2(1) and (3) of the *Conditional Sales Act* of Ontario, R.S.O. 1960 c. 61. Section 2(1) of that Act is similar to s. 2(1) of the Act of this Province. Section 2(3) of the Ontario Act reads as follows:

> 2(3) Where the delivery is made to a person for the purpose of resale by him in the course of business, such provision is also, as against his creditors, invalid and he shall be deemed to be the owner of the goods unless this Act has been complied with.

At pp. 35-6 of his decision Lieff, J., said:

> As to the meaning of the word "creditors" as it appears in s. 2(3) of the Act, I think the same reasoning applies. The only case referred to by counsel on this particular question was *United Electric Co., Ltd. v. Watson*, [1927] 1 W.W.R. 87. Counsel for the plaintiff has argued that the section of the *Conditional Sales Act*, R.S.B.C. 1924, c. 44, which was referred to in that case, is in substance the same as s. 2(1) and (3) of the Ontario Act. The pertinent section of the British Columbia Act then read as follows [p. 88]:
>
> "(3)(1) After possession of goods has been delivered to a buyer under a conditional sale, every provision contained therein whereby the property

> in the goods remains in the seller shall be void as against ... creditors of the buyer who at the time of becoming creditors had no notice of the provision and who subsequently obtained judgment, execution, or an attaching order, under which the goods, if the property of the buyer, might have been seized, and the buyer shall, notwithstanding such provision, be deemed as against such persons the owner of the goods, unless the requirements of this Act are complied with."

Macdonald, J., in *United Electric Co. Ltd. v. Watson*, in interpreting this section had the following to say at p. 89:

> "They had already become creditors, and *so did not become creditors at a time subsequent to the transaction having taken place.* Then it follows from the wording of the section that they could not at the time when they did become creditiors in the month of October have become aware of any 'provision' such as was stipulated in the lien agreement, that the property in the goods should not pass. It way impossible for such condition to have existed at the time when the debt was created on which they obtained judgment, because the transaction has not yet come into existence, to which such a 'provision' was applicable.
>
> "I think that the class of creditors, sought to be protected and assisted by this Act, are those who have [no] notice of the provision, in the sense that the property in the goods should not pass although possession had been given."

And a little further on the page, His Lordship added:

> "I might add that in my opinion the mischief sought to be remedied (requiring registration of lien agreements) by the amendment to the Act in 1922, was that a party in possession and apparent ownership of goods should not, when he is not the real owner, obtain credit to the prejudice of a person who might rely upon such asset."

Although the Ontario statute differs somewhat in its wording and phraseology, I think that the mischief which it seeks to avoid is identical with that for which the section of the British Columbia Act was enacted. That being so, and for the reasons stated heretofore, I must conclude that s. 2(3) of the Ontario *Conditional Sales Act* seeks to protect only those persons who became creditors after the conditional sale agreement was entered into. For only creditors subsequent to the conditional sale could have relied on a conditional purchaser's apparent ownership. Consequently, I think that the learned Senior Master has erred in this respect, as the word "creditors" was intended to apply not to all creditors of a conditional purchaser to whom goods had been delivered for the purpose of resale by him in the ordinary course of business, but just to those persons who achieve the status of creditors subsequent to the conditional sale ...

Jacob S. Ziegel in an article entitled "Uniformity of Legislation in Canada, The Conditional Sales Experience" reproduced in 39 Can. Bar Rev. 165 (1961), traces the history and labours of the conference of commissioners on uniformity of legislation in Canada with respect to conditional sales legislation. At p. 207 the author says:

> Conditional Sales Acts generally have two principal objects. One is to protect innocent third parties who may be misled into dealing with the goods or to extend credit to the conditional buyer on the strength of his ostensible ownership, by requiring registration of the agreement. The other is to protect, in a varying degree, the buyer himself against harsh and unconscionable conduct by the seller ...

Section 3(1) of the *Bills of Sale Act*, R.S.N.S. 1900, c. 142, provided that every bill of sale of personal chattels made either conditionally or absolutely had to be recorded in the office of the Registrar of Deeds. Subsection (5) of s. 3 provided:

> 3(5) and every bill of sale shall, as against purchasers and creditors only take effect and have priority from the time of filing such bill of sale.

In *Mosher v. O'Brien* (1905), 37 N.S.R. 286, a judgment of this Court, the facts were that the plaintiff held a bill of sale with respect to the purchase of a certain business, the plaintiff repossessed the assets covered by the bill of sale under the terms thereof. The Sheriff subsequently made a levy on the goods at the suit of a judgment creditor. The plaintiff successfully brought action against the Sheriff for the return of the goods. The bill of sale was attacked on the ground that it did not comply with the *Bills of Sale Act*. The judgment of the Court was given by Townshend, J., who said (pp. 291-2):

> Then as to the Bills of Sales Act I can find nothing in the evidence to show that the bill of sale does not comply with its requirements. The only suggestion was that the agreement was not truly set forth, but, in my opinion, the recital does accurately and truly contain the terms of the agreement proved. *If it were not so, the fact that the plaintiff had taken possession under the bill of sale, and was in possession at the time the sheriff made his levy, is quite sufficient, in the absence of fraud, to enable the plaintiff to maintain this action.*

(My emphasis.)

The foregoing case, *inter alia*, is referred to at p. 362 of Barron and O'Brien on *Chattel Mortgages and Bills of Sale*, 2nd ed. (1914), as authority for the following proposition in reference to the 1900 *Bills of Sale Act* of this Province:

> The mortgagee may protect himself in case the mortgage be defective under this Act, by taking possession in good faith of the mortgaged chattels, before they are levied on by the creditors of the mortgagor; and, when possession under the bill of sale is once obtained, it will be quite sufficient, in the absence of fraud, to enable the mortgagee to maintain an action for their wrongful seizure and detention.

Mosher v. O'Brien, supra, has some relevance to the point in issue in that in the present case Glendale repossessed the two mobile homes on September 17, 1974, and it was not until on or after October 8, 1974, that the respondent Gentleman obtained an interlocutory recovery order with respect to such homes.

In the present case the bank became a creditor of Nova when the floating charge debenture was executed on December 28, 1972; when the operating credit of $150,000 was renewed in January, 1974, which credit was supported not only by the floating charge but also by a promissory note in favour of the bank executed by Nova by its president, William Bustin, and when the bank permitted Nova to allow its current account to go into overdraft. Exhibits 12/P and 16/P are copies of the current account ledger kept by the

bank with respect to the account of Nova. These exhibits show Nova in an overdraft position to the extent of $44,910.95 on the dates the two mobile homes in question were sold by Glendale to Nova by way of conditional sales contracts. This overdraft was liquidated by July 31, 1974. On September 9, 1974, Nova's account was overdrawn by $51,039.77. This overdraft was covered by a credit memo in the amount of $52,000. On September 17, 1974, when Glendale repossessed the two mobile homes its account with the bank was overdrawn by $2,048.54. This overdraft was liquidated on September 18, 1974, and on September 19, 1974, when the floating charge was crystallized, Nova had a surplus in its account of $1,325.53.

In light of all of the foregoing it is my opinion that the words "creditors of the buyer" as they appear in s. 3 of the *Conditional Sales Act* of this Province mean the same class of creditors as referred to in s. 2(1) of the Act, *i.e.*, those who at the time of becoming creditors have no notice of the conditional sale contract. This class of creditors can properly be referred to as subsequent creditors in relation to the conditional sale vendor; or, as Lieff, J., expressed it in the *J.R. Auto Brokers Ltd.* case, *supra*, it restricts creditors "to those persons who achieve the status of creditors subsequent to the conditional sale".

In the present case the bank at one time was a creditor subsequent to the two relevant conditional sales contracts as a result of the bank account of Nova going into overdraft. This situation, however, was corrected by September 18, 1974. Finally, it well may be that even if the bank was a subsequent creditor of Nova it lost the protection of the *Conditional Sales Act* when Glendale repossessed the two mobile homes on September 17, 1974, prior to any action being taken by the bank.

In the result it is my opinion, for the reasons given, that the bank at the material times was neither a "subsequent mortgagee" nor a "creditor" of Nova within the meaning I subscribe to such terms in the *Conditional Sales Act* of this Province.

I would dispose of this appeal in the manner proposed by my brother Cooper.

Appeal allowed.