IN THE SUPREME COURT OF JUCICATURE OF JAMAICA

IN EQUITY

SUIT NO. E. 294 OF 1990

IN THE MATTER OF THE REGISTRATION OF TITLES ACT

AND

IN THE MATTER OF THE COMPANIES ACT

BETWEEN	GEON CONTRACTORS AND ASSOCIATES LIMITED	PLAINTIFF
AND	NATIONAL COMMERCIAL BANK JAMAICA LIMITED	FIRST DEFENDANT
AND	GILLIAN HOLDINGS LIMITED	SECOND DEFENDANT

Dr. Lloyd Barnett and Alton Morgan instructed by Alton E. Morgan & Company for Plaintiff.

Michael Hylton and P. Goulson instructed by Myers Fletcher & Gordon for First Defendant.

Alexander Cools Lartique instructed by Messrs. Nunes, Scholefield, Deleon & Company for Second Defendant.

Heard: April 25 and 26, July 31, 1991

LANGRIN, J.

This is an application on Originating Summons for determination of two legal questions: The first question is stated as follows:-

Whether under the provisions of the Registration of Titles Act, the bank having registered its mortgage to secure the monies mentioned in the mortgage stamped to cover One million, One Hundred Thousand Dollars ($1,100,000.00) with interest is entitled to priority for advances of further principal over the plaintiff who purchased the mortgage properties from the registered proprietor, lodged a caveat for the protection of its interests and obtained a judgment for the Specific Performance of its contract of purchase before the Bank registered such further advances?

A summary of the facts maybe outlined as follows:-

On November 6, 1989 teh Second Defendant gave a guarantee to the First Defendant in the sum of $1.45 Million Dollars. On that same day the first defendant granted a mortgage to the second defendant on the original amount of $1.1 Million Dollars. It may be useful to set out in full the endorsement on the title in respect of this mortgage:-

"Mortgage No. 600294 registered in duplicat 28th day of November, 1989 to National Commercial Bank Jamaica Limited at the Atrium,

32 Trafalgar Road, Saint Andrew to secure the monies mentioned in the mortgage stamped to cover One Million, One Hundred Thousand Dollars ($1,100,000.00) with interest. By this and another registered at Vol. 1101 Folio 869."

On November 27, 1989 the mortgage was registered at the office of the Registrar of Companies. The second defendant, entered into a contract with the plaintiff on March 6, 1990 to transfer the property subject to the mortgage for a consideration of One Million, One Hundred Thousand Dollars ($1,100,000.00).

On March 27, 1990 a caveat was lodged by the plaintiff in protection of its equitable interest under the contract. An order was made by the Court on July 10, 1990 for the caveat to remain in force. A judgment was given in favour of the plaintiff against the second defendant for Specific Performance of its agreement. A copy of this judgment was served on the First Defendant and a request made by the Plaintiff for a statement of account in order to discharge such amounts as secured by the mortgage. Following this request by the Plaintiff it then transpired that the sum required by the First Defendant to discharge the mortgage was far in excess of One Million, One hundred Thousand Dollars ($1,100,000.00) reflecting the sum stated on the guarantee.

After an exchange of letters between Attorneys for the Plaintiff and the second defendant there came the letter dated 26th September, 1990 from Mr. Shoucair, Legal Officer of the Bank to Mr. Morgan, Plaintiff's Attorney which states inter alia:-

> "You may or may not know that our mortgage # 600294 secures a Guarantee from Gillian Holdings Limited, dated November 6, 1989, a copy of which is enclosed.
>
> By Clause 2(f) of the mortgage it is provided, inter alia that the mortgage "shall be a continuing security covering all indebtedness from the mortgagor to the Bank. The said clause 2(f) permits the bank to upstamp the mortgage at any time, covering any sum or sums by which the said mortgage indebtedness may exceed the original amount. It is therefore the Bank's intention to so upstamp the mortgage."

There was in fact a guarantee document dated November 6, 1989 executed by the

second defendant in favour of the first defendant which guaranteed debts of Cowan's Amusement Limited for a sum not exceeding $1,450,000.00 plus interest.

The main contention of the first defendant is that it held one mortgage which covered all sums due and owing from time to time and that being so the guarantee of $1.45 Million Dollars which it had in its possession at the time it executed the mortgage was a substantial part of the mortgage indebtedness.

For purposes of clarity let me set out the relevant clauses in the mortgage instrument on which the first defendant seeks support:-

"2. It is Hereby Agreed and Declared

(a) It shall be lawful for but not obligatory on the Bank to advance and pay all sums of money necessary for the purpose of remedying any breach or breaches of covenant or obligation statutory or otherwise imposed on the Mortgagor or implied by law under the provisions of this Mortgage and .....

(b) This security shall be a continuing security and shall avail the Bank in respect of all present and future indebtedness of the Mortgagor on any accounts whatever and is in addition to any security which would be implied or arise in the ordinary course from the business relations between the mortgagor and the Bank and shall be deemed to continue notwithstanding any payments from time to time made by the mortgagor or any settlement of account or other thing whatsoever.

(c) This security shall not be affected by nor affect any other security which the Bank may now or hereafter hold from the mortgagor and the Bank shall be at liberty to realise its securities in such order and manner and to apply and appropriate any monies at any time or times paid by or on behalf of the mortgagor .....

(d) The Bank shall not be under any obligation to afford or continue credit or facilities to the mortgagor to any aggregate sum in excess of such limit and extent as the Bank may in its absolute discretion from time to time think fit and the Bank may at any

time or times require the reduction or discharge of the mortgage indebtedness and the mortgagor shall be bound to comply immediately with every such requisition or demand.

(f) This mortgage shall be impressed in the first instance with stamp duty covering an aggregate mortgage indebtedness in the amount stated as Original Amount in the Schedule hereto but the Bank shall be and it is hereby empowered at any time or times hereafter (without any further licence or consent of the mortgagor and whether before or after sale of the mortgaged security or any part thereof) to impress additional stamp duty hereon covering any sum or sums by which the said mortgage indebtedness may exceed the Original Amount, it being the intent of these presents that until its discharge, the mortgage hereby created shall be a continuing security covering all indebtedness from the mortgagor to the Bank."

(The underlining is mine.)

It is abundantly clear from these clauses that the aggregate mortgage indebtedness is the sum of One Million, One Hundred Thousand Dollars ($1,100,000.00) despite the guarantee instrument which is a separate security from the mortgage.

However, it is essentially these clauses on which the first defendant has pinned its right to make further advances to increase the original indebtedness between itself and the second defendant.

The question which arises for examination is whether by making further advances the mortgagee is entitled to add those advances on the original sums in such a way as to squeeze out intervening equitable interests.

The right to tack was available to a legal mortgagee who made a further advance subsequent to the original loan provided he had no notice of any intervening mortgage. He was allowed to recover the second advance in priority to any intervening encumbrance. This question arises commonly in banking where a mortgage was made to secure an overdraft which might be increased as further cheques are cashed.

The doctrine of tacking does not apply to mortgages under the Act and since Jamaica has adopted the Torrens System of land registration it is important to observe that many of the commentaries on the Land Title Torrens System disclose that tacking and consolidation have no place under that system. See Kerr, The australian Land Title Torrens System in N.S.W. p. 357

Section 103 of the Registration of Titles Act expressly provides that the proprietor of any land under the operation of the Act may mortgage or charge same by using the form set out in the Eight or Ninth Schedule to the Act. The form requires that the principal sum should be stated.

However, section 172 of the Act provides for modification of the forms in the Schedules. The section reads as follows:-

"172. The forms contained in the several schedules AND the forms for the time being in force under this Act, may be modified or altered in expression to suit the circumstances of every case; and any variation from such forms respectively in any respect not being matter of substance shall not affect their validity or regularity."

Section 5 of the Interpretation Act, provides that whenever forms are prescribed in any Act slight deviation therefrom, not affecting the substance or calculated to mislead shall not invalidate them. It is clearly stated in Section 105 that it is only when a mortgage or charge is registered in accordance with the provisions of the Act that it has the effect of a security.

Learned Counsel for the Bank submitted that the variation of the principal sum in the instant case is not a matter of substance but one of expression.

When the mortgage instrument is examined the only sum mentioned is One Million, One Hundred Thousand Dollars ($1,100,000.00). Nowhere is there a reference to the sum of One Million, Four Hundred and Fifty Thousand Dollars ($1,450,000.00) the sum contained in the guarantee. Indeed there is no nexus between the Instrument of Guarantee and the mortgage Instrument.

In my view the statement of the principal sum in a mortgage is essential and the provision in the 8th Schedule which indicates that the principal sum should be stated is a matter of substance. In the instant case the register showed the principal sum as One Million, One Hundred Thousand Dollars ($1,100,000.00) and it is

that notification which constitutes notice to third parties in any inspection of the Certificate of Titles. Accordingly, the plaintiff when he made the contract had notice of a mortgage dated 28th November, 1989 to secure a principal sum of One Million, One Hundred Thousand Dollars ($1,100,000.00) and no other sum.

It is significant to observe that there is an entry on the title dated 3rd October, 1990 which states that mortgage No. 600294 has been upstamped to cover a further indebtedness of Three Hundred and Fifty Thousand Dollars. Such a late entry supports the conclusion that the principal sum in the mortgage registered on 28th November, 1989 was in fact One Million, One Hundred Thousand Dollars ($1,100,000.00) and not One Million, Four Hundred and Fifty Thousand Dollars ($1,450,000.00) as claimed by the Bank.

I now turn to the question of priority of competing equitable interests.

Section 71 of the Act affords a person dealing with the registered property with the protection from having any transactions set aside except in case of actual or positive fraud and also provide that such a person shall not be affected by notice of any trust or unregistered interest.

Further Section 139 of the Act provides that a person claiming any estate or interest in land under the operation of the Act or in any lease, mortgage or charge under any unregistered instrument may lodge a caveat with the Registrar forbidding the Registration of any instrument affecting such estate or interest until after notice of the intended registration be given to the intended caveator.

It is clearly established that priority between competing equities in the absence of fraud, depends on the time of the lodging of a caveat regardless of the times at which the respective equities were created. It is well settled in the case of Barclays Bank v. Administrator General (1973) 20 WIR that negligence or failure to lodge a caveat in protection of equitable interests will cede the priority to a subsequent equitable owner who does. Where there is a contest between 2 competing interests in relation to registered land, the party who first gets on the register by way of a caveat is given priority.

The additional statement made of 'power to upstamp' even if it were validly made is not a warning of a claim to priority. The most favourable construction which could be placed on that statement is that a mortgage may be added.

Consequently neither in law or in fact were there any notification or registration which would satisfy the legal requirement.

While the plaintiff had lodged a caveat on 27th March, 1990 protecting its interests under the contract the Bank had failed to do anything in respect of the additional sum of Three Hundred and Fifty Thousand Dollars ($350,000.00) secured under the guarantee.

Under the Torrens system of registration of land the plaintiff's lodging of a caveat to protect an equitable charge upon land operates as notice to all the world that the registered proprietor's title is subject to the equitable interest alleged in the caveat.

The first defendant had not been sufficiently diligent in registering its charge or in giving notice of it by filing a caveat. It had not taken the steps which would have notified the plaintiff of an additional burden on the titles. The plaintiff had acted in reliance upon the state of the register and this fact entitled its interest to priority over that of the first defendant. The subsequent registering of the first defendant's interest by upstamping the mortgage before the plaintiff lodged his transfer for registration cannot in my view render the caveat invalid.

The failure of the first defendant to state the full amount of the mortgage as One Million, Four Hundred and Fifty Thousand Dollars ($1, 450,000.00) in the entry on the title dated 26th November, 1989 or to lodge a caveat in protection of its interest are the critical factors in effecting postponement of its interest to that of the plaintiff. It can hardly be said that the plaintiff has done the Bank any wrong because it has only done what the Bank has enabled it to do. The plaintiff having purchased the property must have relied on the vendors title that there was no encumbrance other than that which was notified.

The plaintiff was not guilty of any negligence and was perfectly justified in trusting to the security of One Million, One Hundred Thousand Dollars ($1,100,000.00) which was notified on the title without the slightest obligation to go and enquire of the Vendors or the Bank whether the full amount of the security had been notified on the title.

It is the duty of every mortgagee of land to take care to ensure that the

full extent of his security is notified on the title to avoid the likelihood of misleading third parties whom they reasonably foresee would place reliance on the register.

In light of these considerations I am of the clear view that the plaintiff is entitled to priority over the Bank. Accordingly for the reasons stated above I hold that the answer to the first question posed in the summons is in the negative.

The Second Question which remains for determination is as follows:-

Whether the said property is to be treated as a valid security for such further advances, if:-

(i) They were not registered as charges under the Companies Act within twenty-one (21) days of the Agreement to make them;

(ii) they were not so registered within twenty-one (21) days of the making of such advances, or

(iii) they were not so registered prior to the plaintiff purchasing and acquiring

obtaining a judgment for specific performance of a contract to purchase the said property from the registered proprietor.

The plaintiff seeks to rely on the fact that the charge registered at the Companies Registry pursuant to the Companies Act refers to the sum of One Million, One Hundred Thousand Dollars ($1,100,000.00).

The first defendant's case is simply that it held one mortgage which covered "all sums due and owing from time to time." The contention therefore was that its prior legal mortgage should not be defeated by the subsequent equitable rights of a purchaser.

An examination of the register of mortgages and charges of the second defendant, a copy of which is exhibited to Reynold Scott's affidavit, reveals that on 27th November, 1989 the first defendant registered a charge of One Million, One Hundred Thousand Dollars ($1,100,000.00). This charge was created on 6th November, 1989 by a mortgage of properties at Volume 1101 and Folios 869 and 870.

On the 7th March, 1990 there was registered a charge relating to all indebtedness from time to time standing to the Company's credit....." or in any

manner whatsoever".

Since there is no ambiguity in the particulars entered on the Companies Register of charges I cannot agree with Mr. Hylton's submission that there was any need to examine the mortgage document itself. However, as I indicated earlier the mortgage instrument failed to disclose a sum other than One Million One Hundred Thousand Dollars ($1,100,000.00).

Section 93(1) of the Companies Act, requires registration of charges within 21 days of the date of its creation. The section provides that the charges will be void against the liquidator or any creditor of the Company unless the prescribed particulars of the charge together with the original or a certified copy of the instrument by which the charge is created is received by the Registrar within 21 days after the creation of the charge.

The first defendant's submission that the plaintiff is not a creditor is rejected. The plaintiff having entered into a contract for sale of the said properties on 6th March, 1990 has now become creditor of the second defendant company by virtue of his contractual lien.

Where the first defendant adopted a system which is not authorised by statute or indeed by general principle and the plaintiff who took the appropriate steps not only lodged the caveat but obtained a judgment for his interest should be protected in the manner authorised by the law.

In my judgment there was no act of fraud on the part of the first defendant but its failure to register the sum of One Million, Four Hundred and Fifty Thousand Dollars ($1,450,000.00) in the register of charges within the time stipulated by the Act renders that charge void against the plaintiff. The only valid charge against the plaintiff on the register is one for One Million, One Hundred Thousand Dollars ($1,100,000.00).

Accordingly, the answer to question 2 are all in the negative.

I am grateful to Dr. Barnett and Mr. Hylton for the substantive and articulate submission presented to the Court.

Court orders as hereunder:-

There will be a declaration as follows:-

(i) That the plaintiff's interest ranks in priority to the further advances made by the Bank; and

(ii) An account of what is properly and legally due to the Bank so as to discharge the said mortgage dated 28/11/89 in the sum of $1.1 million and have the title to the said properties transferred to the plaintiff.

Costs granted to the plaintiff against the first defendant to be agreed or taxed.