Privy Council Appeal No 87 of 2006

Beverley Levy *Appellant*

v.

Ken Sales & Marketing Ltd *Respondent*

FROM

THE COURT OF APPEAL OF JAMAICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

Delivered the 24th January 2008

Present at the hearing:-

Lord Scott of Foscote
Lord Walker of Gestingthorpe
Lord Carswell
Lord Neuberger of Abbotsbury
Sir Paul Kennedy

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*[Delivered by **Lord Scott of Foscote**]*

The History

1. The appellant, Mrs Beverley Levy, is the wife of Mr Earl Levy. Mr Levy was, until the sale in September 2006 in circumstances that will be later described, the owner of land in Port Antonio, Jamaica known as Trident Villas and Hotel ("the Trident land"). The Trident land consisted of six parcels each of which was registered at the Land Registry under a separate title. In respect of each parcel Mr Levy was registered as owner. A number

of mortgages securing loans to Mr Levy from various corporate lenders were registered against one or other of the registered titles.

2. In addition to his indebtedness secured by the various mortgages, Mr Levy owed a considerable sum of money to the respondent, Ken Sales & Marketing Ltd ("Ken Sales") in respect of goods sold and delivered. This debt was unsecured. Ken Sales sued for recovery of the debt and on 20 December 2000 obtained judgment against Mr Levy for $30 million odd and interest. The action in which the judgment was obtained was No. 1996 K-062. Payment was not forthcoming so Ken Sales commenced execution proceedings against the Trident land and on 23 October 2001 Anderson J made an order (1) directing the sale of the Trident land, (2) directing an enquiry as to the respective interests in the Trident land of Mr Levy and any other persons, (3) directing that the purchase money from the sale be applied in payment of the judgment debt and (4) directing that pending the sale the Trident land "do stand charged with such payments".

3. The order for sale was made pursuant to Section 134 of the Registration of Titles Act. Section 134 provides, so far as relevant, as follows-

> "No execution registered prior to or after the commencement of this Act shall bind, charge or affect any land...but the Registrar, on being served with a copy of any writ or order of sale issued out of a court of competent jurisdiction, or of any judgment decree or order of such court...shall, after marking upon such copy the time of such service, enter the same in the Register Book; and after any land...so specified shall have been sold under any such writ, judgment, decree or order, the Registrar shall on receiving a certificate of the sale thereof...enter such certificate in the Register Book; and on such entry being made the purchaser shall become the transferee, and be deemed the proprietor of such land...:
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> Provided always that until such service as aforesaid no sale or transfer under any such writ or order shall be valid against a purchaser for valuable consideration, notwithstanding such writ or order had been actually issued at the time of the purchase, and notwithstanding the purchaser had actual or constructive notice of the issuing of such writ or order....
>
> Every such writ or order shall cease to bind, charge or effect any land...specified as aforesaid unless a certificate of the sale under such writ [or order] shall be left for entry upon the register within three months from the day on which such copy was served, or such longer time as the court shall direct."

4. Finite extensions of time for the sale of the Trident land were granted by the court until, finally, on 14 November 2002 time was extended "until sale of the land". The propriety and efficiacy of an indefinite extension of time is one the issues raised in this appeal.

5. In the meantime, however, Ken Sales had commenced a new action, action K-009 of 2001, against Mr Levy based, apparently, on the same debt for which judgment had been obtained in K-062. How this was possible has not been properly explained but need not be pursued for, on 24 July 2002, Ken Sales obtained a judgment, accepted to be a valid judgment, for $56 million and interest. This new judgment must have satisfied the judgment obtained under action K-062 and have required fresh execution proceedings against the Trident land to be commenced. That is, indeed, what happened, and on 15 January 2003 McIntosh J made an order in terms identical to those of the order Anderson J had made in the now spent action K-062. On 17 January 2003 the McIntosh J order was noted on the Register against the titles of the six parcels and on 14 May 2003 an extension of six months from 11 April 2003 for completion of the sale was granted. The efficacy for section 134 purposes of a retrospective extension of time is in issue but in any event the six-month extension came to an end on 10 October 2003 and no application for a further extension was made for some fifteen months. According to section 134, therefore, the order for sale made by McIntosh J on 15 January 2003 ceased to bind the Trident land, at latest, on 11 October 2003. An application for a further extension of time for sale of the Trident land under the McIntosh J order was eventually made on 17 January 2005.

6. In the meantime, however, a number of relevant things had happened. First, there had been developments regarding the mortgages affecting the Trident land.

   (1) A mortgage, No. 905674, granted by Mr Levy in favour of Capital and Credit Merchant Bank to secure a $315,000 loan, had been registered against one of the six registered parcels that comprised the Trident land. On 27 February 2002 the secured debt was repaid to the Bank, as a letter of 31 March 2002 from the Bank confirms. The registration of the mortgage on the Land Register was discharged by the Bank on 1 March 2002. However, the appellant, Mrs Levy, has contended that it was she who repaid the Bank and that she is consequently entitled by subrogation to the benefit of the Bank's security. On 3 October 2003 she lodged a caveat (No. 1256961) against the parcel in question to protect her

interests. There is an outstanding issue about this between Mrs Levy and Ken Sales.

(2) Mrs Levy claims, also, that on 30 October 1998 she lent her husband US$150,000 secured by a mortgage of that date over one of the six parcels. This mortgage has never been registered at the Land Registry but a caveat lodged by Mrs Levy to protect her interest was entered on the Register on 6 June 2002 against the parcel, registered in Vol.552, Folio 32. Mrs Levy's claims in this regard are not accepted by Ken Sales. This is another issue between them.

(3) Mortgage No. 1167102 in favour of Half Moon Bay Ltd to secure US$861,880 was registered on 15 November 2001 against one of the Trident land parcels. A company associated with Mr and Mrs Levy, Pelican Securities Ltd, ("Pelican") claims to be the transferee of this mortgage. This, too, is not accepted by Ken Sales. It is convenient to note here that on 1 June 2005 Mr Levy gave Pelican "for value received" a promissory note for payment of US$1.2 million and interest thereon and charged the Trident land with payment. A caveat was on the same day lodged by Pelican against the several registered titles of the parcels constituting the Trident land to protect Pelican's interests.

(4) Another company associated with Mr and Mrs Levy, Percy Junor Ltd, claims to be owed US$325,000 by Mr Levy and to have a charge over a number of the Trident land parcels to secure payment. A caveat lodged by the company to protect this alleged charge was entered on the register on 6 June 2002. Ken Sales does not accept this claim.

7. Second, a Report dated 23 October 2003, prepared by the Registrar pursuant to the direction in paragraph 2 of McIntosh J's order of 15 January 2003 for enquiries to be made to determine the extent of the interests of Mr Levy and any other persons in the Trident land, was produced. The Report noted, *inter alia*, the various caveats affecting the Trident land to which reference has been made.

8. Thirdly, and perhaps as a consequence of the Registrar's Report, Ken Sales commenced proceedings (action 243) against Mrs Levy and Pelican for declarations that its (Ken Sales') equitable charge over the Trident lands pursuant to the order for sale made by McIntosh J ranked in priority to any equitable interest claimed by either Mrs Levy or Pelican. The action was called on for hearing before Dukharan J on 27 July 2004. But neither Mrs Levy nor Pelican appeared, neither were represented, and

the judge made the priority declarations as asked. It appears, however, that the attorney who had been instructed by Mr Levy and Pelican to represent them at the hearing in order to present their case and resist the making of the declarations sought had been absent due to some misunderstanding about when the case would be heard. Be that as it may, the order of Dukharan J was drawn up and served on Mrs Levy and Pelican on 30 July 2004 (Mrs Levy) and 4 August 2004 (Pelican). The order must have come to their attorney's attention very soon thereafter. But no application to have the order, in effect a default order, set aside was made until 1 April 2005 when Harris J dismissed the application to set aside made on that date by Mrs Levy and Pelican. Harris J did so on two grounds; first, because, she held, their attorney had not shown a good reason for not being present in court when the case was called on and, second, because they had delayed for so long, some eight months, before making the application to have the order set aside. Mrs Levy and Pelican have appealed against that dismissal but the Court of Appeal have adjourned the appeal pending the outcome of this appeal to the Board.

9. The fourth matter, following the expiry on 10 October 2003 of the six month extension for sale of the Trident land (see para.5 above), that happened was that successful negotiations for the sale of the Trident land to a Mr Chin took place. Both Ken Sales and Mr Levy, or representatives of them, were involved in the negotiations. The negotiations having prospered an order was made on 10 December 2004 by Pusey J. The judge approved the offer to purchase the Trident land that Mr Chin had made, ordered that the land be sold to Mr Chin accordingly, directed Ms Carol Davis, attorney for Ken Sales, to have carriage of the sale and directed the net proceeds of sale to be paid into a joint account in the names of Ken Sales' and Mr Levy's respective attorneys. This order for sale was not registered. A copy was not served on the Registrar. It did not, therefore, bind the land. For section 134 purposes it was irrelevant.

10. An attempt to revive the effect of McIntosh J's order of 15 January 2003 was made by the application of 17 January 2005 referred to at the end of paragraph 5 above. The application was made by Ken Sales *ex parte* and came before Campbell J on 19 January 2005. The application asked for an extension of time to complete the sale ordered by McIntosh J "until completion of the sale of the lands or in the alternative for six months from the date hereof". Bearing in mind that only a month or so earlier Pusey J had approved and directed the sale of the Trident land to Mr Chin it seems obvious that the six month alternative was an intended long-stop, the expectation being that the sale to Mr Chin would be

completed well before the expiration of the six months. This must explain why, in the order of 19 January 2005 made by Campbell J, the six month long-stop was omitted and the extension granted was expressed to be simply "until completion of the sale of the lands".

The proceedings leading to this appeal

11. The particular proceedings which have led to this appeal to the Board commenced with an application of 1 June 2005 made by Mrs Levy in action K-009 as "an interested party" for an order setting aside the order of Campbell J of 19 January 2005

> "... whereby it was ordered that the time for leaving with the Registrar of Titles Certificates of Titles for entry on the Register pursuant to Orders for Sale in the Suit herein by this Honourable Court on 15th January 2003 be extended until completion..."

12. The application was heard by Pusey J and on 3 February 2005 he ordered that Campbell J's *ex parte* order of 19 January 2005 be set aside and that there be no dealings with any of the Trident land until further order of the Court. On 21 June 2005 Pusey J gave Ken Sales leave to appeal and Notice of Appeal was given on 29 June. The main grounds of appeal were, first, that Mrs Levy had had no *locus standi* to make the application and, secondly, that Pusey J had erred in holding that the application before Campbell J ought to have been made *inter partes*. A respondent's notice on behalf of Ken Sales sought to support the setting aside of Campbell J's order on a number of additional grounds including, in particular, an attack on the validity of an extension of time granted after the original order for sale and charging order had become spent.

13. The appeal came before Smith, Cooke and McCalla JJA in the Court of Appeal. The appeal was allowed. Smith JA agreed with the grounds given by Cooke and McCalla JJA for concluding that Mrs Levy had had no *locus standi* to have applied to set aside Campbell J's order. Cooke JA, however, examined the effect of the order of McIntosh J in the light of section 134 and concluded that the charging order made in paragraph 4 of McIntosh J's order "... had an existence only for the period allowed for the sale" (Record p.70). He held (Record p.73) that Campbell J's order

> "... did not have as part of that order anything to do with charging the land. It was to extend the time for the certificate of sale to be

> left with the Registrar of Titles 'until completion of the sale of lands'".

He then said

> "... since the order of Campbell J did not make any order charging the land, I fail to appreciate how [Mrs Levy] can have any standing on this issue which is pertinent only to the sale of land."

But he went on to say

> "Besides, even if it could be said (erroneously in my view) that the order of Campbell J necessarily amounted to a charging order, [Mrs Levy] would not be an 'interested person'. I reject the submission that because she had an 'equitable interest' in the land she was an 'interested person'"

McCalla JA expressed agreement that Mrs Levy had had no standing to apply to have Campbell J's order set aside and agreed that on that ground the appeal should be allowed. Leave to Mrs Levy to appeal to the Privy Council was given by the Judicial Committee on 7 April 2006.

The Issues

14. Since the hearing before the Court of Appeal the sale of the Trident land to TLC International (Jamaica) Ltd, a nominee of Mr Chin, has been completed. The net proceeds of sale have been placed in a joint account as directed by the order dated 10 December 2004 of Pusey J (see para.8 above). The sale was not, however, completed as a sale by execution in the manner contemplated by section 134. A sale by way of execution pursuant to section 134 is completed by a certificate of sale prepared by the person having conduct of the sale and lodged with the Registrar. The certificate takes the place of a transfer of the land by the registered owner and, on registration of the certificate, the transfer to the purchaser is effected. In the case of the Trident land, however, Mr Levy, the registered owner, cooperated in the arrangements for the sale and signed a transfer to the purchasing company. The transfer was lodged with the Registrar and duly registered. As, presumably, a belt and braces exercise, Ms Carol Davis, Ken Sales' attorney, who had been given the carriage of the sale under the order of Pusey J of 10 December 2004, completed and lodged with the Registrar a Certificate of Sale recording that the Trident

land had been sold pursuant to the 15 January 2005 order of McIntosh J. The Certificate was, however, unnecessary. The sale, in the end, had not been a section 134 sale.

15. Their Lordships find it difficult to see what, if any, live issues (other, of course, than costs) now turn on the question whether Mrs Levy had *locus standi* to apply to have the Campbell J order set aside, and, if she did, whether the order should be set aside. The pot of gold, so to speak, now consists of the purchase money in the joint account. There are disputed claims to that money by Ken Sales on the one hand and by Mrs Levy and Pelican, and, presumably by Percy Junor Ltd, on the other. The resolution of these claims will depend on who can establish proprietary claims and whose proprietary claims are entitled to priority. Subject to possible claims by Percy Junor Ltd, a company not, so far as their Lordships are aware, party to any proceedings yet instituted, the issues that arise all fall within the scope of the priority proceedings brought by Ken Sales against Mrs Levy and Pelican which led to the default order made by Dukharan J on 27 July 2004. The order of that date, while it stands, binds Mrs Levy and Pelican. The order is still under appeal but, if it stands, Ken Sales can claim an equitable interest in the proceeds of sale in priority to any equitable interest that Mrs Levy or Pelican can claim. If it does not stand, the proprietary and priority issues raised by Ken Sales' application in action 243 must be tried in the High Court with evidence and argument in the usual way. The question is what, if any, difference Campbell J's order can make.

16. For the appellant, Mrs Levy, Mr Knox QC said that he understood Ken Sales to be seeking to assert a proprietary interest in the proceeds of sale based upon the charging order that McIntosh J had included in the 15 January 2003 order, as extended by the Campbell J order. If the Campbell J order is set aside there will be no basis on which Ken Sales can claim a proprietary interest in the Trident land, and thus in the proceeds of sale, in priority to Mrs Levy's proprietary interests. So, their Lordships understand, the argument runs. Accordingly it seems to their Lordships that the following issues need to be addressed

(1) Did Mrs Levy have *locus standi* to apply to have the Campbell J order set aside?

(2) Did the charging order made by McIntosh J continue in effect after 10 October 2003?

(3) Was it open to Campbell J to make an order extending with retrospective effect the proprietary consequences of the order for sale made by McIntosh J?

Section 134 and charging orders

17. It is common ground that a mere order for sale of land under section 134 does not vest in the judgment creditor who has applied for the order any interest in the land. An interest in land is acquired when the Registrar, having been served with a copy of the order of sale, enters the order in the Register Book. The interest acquired by the judgment creditor at that point is an equitable interest subject to other interests already on the Register. But the final paragraph of section 134 provides that the order for sale ceases "to bind, charge or affect" the land unless a certificate of sale, i.e. the completion of a sale pursuant to the order, is lodged with the Registrar within three months from the day on which the copy of the order of sale was served on the Registrar "or such longer time as the court shall direct". The purpose of this time provision is not in doubt. Its purpose is to prevent title to land being burdened by orders for sale that are not acted upon. A creditor who wants execution against land of the debtor must pursue his remedy with diligence. If the creditor does not do so the order of sale will cease to bind the land and the creditor will lose his priority. He will become simply an unsecured creditor. The order of sale will remain and the land in question may still be sold under the order of sale but other proprietary interests that have been registered will have priority. That being so, it is impossible, in their Lordships' opinion, to accept that a retrospective extension of time can be directed by the court. In their Lordships' opinion, therefore, Campbell J had no power on 19 January 2005 to extend time with retrospective effect so as to continue the proprietary effect of the McIntosh J order of sale that, at latest, had ceased to bind the Trident land on 10 October 2003. If the order for sale made by Pusey J on 10 December 2004 had been registered, that would have become the effective section 134 order and the three months could have been extended by Campbell J on 19 January 2005. But the Pusey J order was not registered, so that does not help.

18. For the same reasons, in their Lordships' opinion, an extension of time for an indefinite period is inconsistent with the evident intention of section 134. An extension until the completion of sale or for six months, whichever be the shorter period, would plainly be acceptable. An extension without that long-stop would not.

19. It was argued on behalf of Ken Sales that the duration of the charging order made by McIntosh J was not subject to the three month time limit imposed by the last paragraph of section 134. That argument cannot be accepted. There appears to have been no statutory power for courts in Jamaica to make charging orders until the recent enactment of legislation enabling courts to do. That legislation came into effect on 25 March 2003. Neither the charging order made by Anderson J on 23 October 2001 in action K-062 nor the charging order made by McIntosh J on 15 January 2003 can draw support from that enactment. The Civil Procedure Rules 2002, which came into effect on 1 January 2003, contain Rules relating to the making of charging orders but while Rules can regulate the exercise of an existing jurisdiction they cannot by themselves confer jurisdiction. Nonetheless their Lordships have been given to understand that it had for many years prior to 25 March 2003 been the practice in Jamaica for courts, when making a section 134 order for sale for the purpose of execution against a debtor's land, to complement the order by the addition of a charging order. The evidence of Anderson J's order and McIntosh J's order satisfies their Lordships that that was so. But the absence of any clear statutory authority for the practice persuades their Lordships that the charging order must be read as an adjunct to the proprietary effect of the execution order for sale and cannot be given a life of its own divorced from that proprietary effect. Accordingly, in their Lordships' opinion, if the proprietary effect of an execution order for sale becomes spent by reason of the last paragraph of section 134, a charging order made prior to 25 March 2003 must become spent at the same time. Any other conclusion would, moreover, allow a somewhat questionable practice to circumvent the statutory intention evident in that last paragraph.

20. Accordingly their Lordships are satisfied that the extension of time granted by Campbell J on 19 January 2005 was erroneous in law.

Locus standi

21. Mrs Levy was a caveator claiming equitable interests in the Trident land. An application, the intention of which was to obtain an order that would, it was thought (erroneously in their Lordships' opinion), assist Ken Sales in asserting a proprietary interest in the Trident land and its proceeds of sale that would enjoy priority over any proprietary interest that Mrs Levy might succeed in establishing, was, in their Lordships' opinion, an application in which Mrs Levy had an obvious interest in opposing. It is arguable that she should have applied to be joined as a

party to action K-009 but that is a matter of procedure and not of substance.

22. Their Lordships' attention has been drawn to Rule 48.6 in Part 48 of the Civil Procedure Rules 2002 which deals with charging orders and defines the "interested persons" who have an interest in charging order proceedings and may make objections to the making of a charging order as including "any person who owns the land to be charged jointly with the judgment debtor". It was suggested that Mrs Levy, a person who claims an equitable interest under various mortgages, does not fall within the definition last cited. The Rule does not apply to the present case for reasons already expressed but in any event their Lordships disagree with the proposition. A person with an arguable case for being the owner of an equitable interest in land must, their Lordships think, be in general a member of the class of persons entitled to object to the making of a charging order. Their Lordships, if it were necessary to do so, would incline to give a wide construction to the words "any person who owns the land ..." in Rule 48.6(2)(a).

Conclusion

23. For the reasons given their Lordships would answer the questions posed in paragraph 15 above as follows

(1) Mrs Levy did have *locus standi* to make the application to Campbell J

(2) The charging order made by McIntosh J did not continue in effect after 10 October 2003

(3) It was not open to Campbell J on 19 January 2005 to extend retrospectively or for an indefinite future period the proprietary consequences of the order for sale made by McIntosh J on 15 January 2003.

24. Their Lordships will therefore humbly advise Her Majesty that this appeal should be allowed. Their Lordships will make an order that Ken Sales pay the costs of the appeal to the Board and the costs in the courts below. Ken Sales may apply within 21 days for some other order as to costs to be made but subject thereto, the costs order referred to will become final.