IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2002 CL T00031

BETWEEN	**TRADE BOARD LIMITED**	**CLAIMANT**
A N D	**GRAINS JAMAICA LIMITED**	**DEFENDANT**
AND	**THE PEPPERSOURCE LIMITED**	**APPLICANT/ INTERVENOR**
AND	**CRG LEE CORPORATION**	**INTERESTED PARTY**

Enforcement of Judgment- Charging Order – Debenture holder – Whether judgment creditor ranks in priority – Whether Judgment Creditor complied with Section 134 of the Registration of Titles Act – Whether application to Extend Time must be granted before time expired – Whether Debenture spent when loan repaid although costs not paid.

Nicole Foster Pusey Q.C. and Harrington McDermott instructed by the Director of State Proceedings for Claimant

Dr. Lloyd Barnett and Anna Gracie instructed by Rattray, Patterson, Rattray for the Intervenor.

John Vassell Q.C. and Emile Leiba instructed by Dunn Cox for the interested Third party.

Heard: **12th September 2013 & 1st November 2013**

CORAM: **JUSTICE DAVID BATTS**

[1] By a Notice of Application dated the 22nd July 2010 the Intervenor (Peppersource Ltd.) seeks the following orders:

> 1. A declaration of priority with respect to the proceeds of sale of the land comprised in certificate of Title registered at Volume 1077 Folio 392 owned by Grains Jamaica Ltd. (the Defendant); and
>
> 2. An Order for disclosure of all monies received on account of the sale of the land comprised in Certificate of Title registered at Volume 1077 Folio 392 in the Register Book of Titles by the Trade Board Limited, (the Claimant), its employees, servants and/or agents.

The application was heard in Chambers however, as the issue may be of general interest to persons in the world of commerce I have asked the parties to attend before me for delivery of the judgment in open court.

[2] The application it is hoped will be the final in a long series of applications and procedural steps since the commencement of legal action against Grains Jamaica Ltd. in the 1990's. A partial chronology of which is to be found in the affidavit of Symone Mayhew dated 8th October 2002 and which is complemented by two affidavits of Anna Gracie dated the 19th May 2008 and 2nd May 2013.

[3] I do not find it necessary to go into the details of that history suffice it to say, at this juncture property has been sold and the proceeds are held in escrow. The proceeds relevant to my consideration, and this is an agreed position between the parties, are the proceeds of sale of real estate. The interested party (CRG Lee Corporation) holds a debenture which charged the fixed assets of the Defendant judgment debtor. The Claimant is the judgment creditor at whose instance the property was sold. The Intervenor (Peppersource Ltd.) is also a judgment creditor but in another suit.

[4] It seems to be the consensus among the parties appearing before me that paragraph (2) of the Notice of Application was no longer to be pursued. Indeed the Intervenor/Applicant indicated as much at Para 2 of their submissions:

> "The second aspect of the application has already been dealt with in an affidavit sworn by Harrington McDermott on the 4th July 2012."

[5] Dr. Barnett, the intervenors' lead counsel, further shortened the proceedings by reducing the issues for my consideration. Counsel as is to be expected candidly indicated that the only issue was one of priorities between the parties and there was no

dispute about the Claimant's judgment debt or the existence of the debenture. Dr. Barnett submitted that the other parties lost priority for the following reasons:

a. In the case of the Claimant priority was lost because of a failure to comply with Section 134 of the Registration of Titles Act. Dr. Barnet submitted that it is not sufficient for an Order for Sale to be lodged at the Registrar of Titles; the Order will cease to bind the land unless either a Certificate of Sale is lodged within 3 months or an Order extending time is submitted "prior to expiration of the time." Dr. Barnett contends that the Claimant failed to do either and hence lost priority to the Intervenor/Applicant, notwithstanding that the Intervenor's judgment was last in time. He relied upon ***Beverley Levy v. Ken Sales & Marketing Ltd. (2008)*** UKPC 6 (14 January 2008) in support of the submission.

b. In the case of the Interested party Dr. Barnett submitted that upon the loan (that is principal and interest) being repaid, the Debenture was spent. The instrument cannot in the circumstances of this case be used as a basis to recover consultancy fees, expenses or costs associated with the Debenture. Dr. Barnett cited no authority for this proposition but submitted that to hold otherwise would negate the purpose of S. 93 of the Companies Act which is intended to give notice to the world of the company's liabilities.

[6] The Solicitor General who represented the Claimant indicated that she was caught by surprise as the oral submissions differed somewhat from the written arguments filed by the Intervenor. Time was requested to do a search for any relevant Orders extending time. The Crown was therefore allowed until 2:00 p.m. to locate such documents. The submissions of Mr. John Vassell Q.C. were therefore taken.

7. Mr. Vassell also claimed surprise but elected to proceed with his response to Dr. Barnett. He adopted the written submissions filed on the 10th January 2013 and 4th September 2013. Mr. Vassell referred to the terms of the Debenture and submitted that Section 93 of the Companies Act was clear. It stated that which was to be filed. Anyone he submitted, who referred to the document would be aware fees, costs, and expenses were secured. These by their nature could not be exactly specified but were discoverable by reasonable enquiry. Mr. Vassell

submitted that the question before the court, when regard is had to Dr. Barnett's submission, was –

a. Whether an obligation to pay a liability owing from time to time is valid and

b. Can such an obligation be validly secured by a debenture charging land?

An affirmative answer, submitted Mr. Vassell was appropriate to both questions and therefore the application must fail. Mr. Vassell submitted further that the Registrar had given a certificate which was conclusive as to the satisfaction of Section 93 requirements and that this could not now be challenged.

[8] The Solicitor General, in her submissions after the adjournment conceded that Dr. Barnett's construction of Section 134 of the Registration of Titles Act was correct. There was a 3 month window in which either a transfer was to be lodged or time extended. She submitted that in the relevant period, the Claimant did apply for an extension of time. The court did not however fix the date for the hearing within that relevant period. That is, the Order extending time dated 7th January 2003 was consequent upon an application filed on the 31st December 2002. It was submitted that the application having been filed before the expiry of the 3 month period that statutory requirement had been complied with. The Solicitor General made a further, perhaps more profound, submission. This was that whatever may have occurred in the past, the relevant Certificate of Sale was filed during a valid 3 month period. When the Certificate of Sale was issued the Registrar of Titles needed to be satisfied that a 3 month period had been extended. In this case, submitted the Crown's representative, the Transfer was registered on the 21st January 2008 and the Order extending time made on 31st January 2008. The Certificate of sale was therefore registered within a period of extension granted by the Court. The Crown also relied on the Ken Sales case cited by Dr. Barnett. It was submitted that as no other property interests had been registered between the time the Order for Sale was registered and the

time the transfer was registered, the Claimant had not lost its priority. The Crown did not challenge the priority of the interested third party, Debenture holder.

[9] At the close of submissions the court adjourned to consider its decision. Having done so I have for the reasons stated below come to the conclusion that Dr. Barnett's submissions must fail.

[10] Section 134 of the Registration of Titles Act is as follows:

> ***"S. 134. No execution registered prior to or after the commencement of this Act shall bind, charge or affect any land or any lease, mortgage or charge, but the Registrar, on being served with a copy of any Writ or Order of Sale issued out of any court of competent jurisdiction, or of any judgment, decree or Order of such court, accompanied by a statement signed by any party interested or his attorney, solicitor or agent, specifying the land, lease mortgage or charge sought to be affected thereby, shall, after marking upon such copy the time of such service, enter the same in the Register Book; and after any land, lease, mortgage or charge, 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 in such one of the Forms A, B or C in the Twelfth Schedule hereto as the case requires (which certificate shall have the same effect as a transfer made by the proprietor), 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, lease, mortgage or charge:***
>
> ***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 purchase, and notwithstanding the purchasr had actual or constructive notice of the issuing of such writ or order.***
>
> ***Upon production to the Registrar of sufficient evidence of the satisfaction of any writ or order a copy whereof shall have been served as aforesaid, he shall make an entry in the Register Book of a memorandum to that effect, and on such entry being made such Writ or Order shall be deemed to be satisfied.***

> ***Every such Writ or Order shall cease to bind, charge or affect any land, lease, mortgage or charge, specified as aforesaid, unless a certificate of the sale under such Writ shall be left for entry upon the register <u>within three months from the day on which such copy was served or such longer time as the court shall direct.”</u> (Emphasis added).”***

The words I have highlighted are the fodder for Dr. Barnett’s submission.

[11] It is, I think important, to note that Parliament did not use the word ‘extended’, in relation to time nor did they say that an application to extend time must be made prior to the expiration of the 3 month period. Rather the legislature conferred on the court a power to direct (i.e. declare or state) such period by which the writ or order can continue to bind charge or affect any land, lease, mortgage or charge. So that even if the 3 month period expired with no Certificate of Sale having been lodged, the Registrar would be at liberty to register the sale provided an Order from the Court, directing a longer time by which it may be lodged, was also served on the Registrar.

[13] Any other construction would result in a judgment creditor being unable to register a sale made pursuant to a valid judgment debt and Order for sale, merely because 3 months elapsed since the Order was lodged with the Registrar and he had not applied within that 3 month period for an extension.

[14] It must be presumed that Parliament by giving the power to the court to direct to what date time may be extended, intended no such absurdity. Furthermore it is also to be expected that a court will have before it when application to extend time is made, current information on the debtor’s property including any intervening interests. What is clear is that any intervening interests prejudiced by an ex parte application without full disclosure, would be entitled to seek a remedy on the basis that their interest had been registered at a time when the writ or order “ceased to bind charge or affect” the land in question. No irreparable

prejudice or unfairness should therefore result from the construction I have placed upon Section 134.

[15] Applying the above to the facts of this case it is clear that the Order for sale dated the 3rd day of October 2002 made in Suit CL 2002 T – 031 was entered on the title on the 10th October 2002. The Transfer pursuant to that Order was registered on the 21st January 2008. No intervening interest was registered in the period. A certificate of Sale dated 13th December 2007 was filed at the Supreme Court of Jamaica on the 27th March 2007. On the 31st January 2008 the Honourable Mr. Justice Jones made an Order in the following terms-

> "The validity of the Certificate of Sale issued by the Registrar of the Supreme Court (pursuant to Section 134 of the Registration of Titles Act) and dated the 13th December 2007 be extended to March 31 2008."

[16] The Order although curiously worded has the effect of directing the Registrar to extend the time for lodging the Certificate of Sale until the 31st March 2008. This it seems is a sufficient answer to the Intervenor's submissions. It is however worth noting that on the 7th January 2003 the Honourable Miss Justice C. McDonald (Ag). (as she then was) made the following Order,

> "The 3 month period set out in section 134 of the Registration of Titles Act be extended to 6 months in relation to the Order dated the 3rd October 2002 regarding land registered at Volume 1077 Folio 392 of the Registration Book of Titles."

The Formal Order reflects on its face that it was made pursuant to a Summons for Extension of Time dated the 31st day of December 2002. This means the application for extension was filed prior to the expiration of the 3 month period. It is my view, that the court has jurisdiction to direct an extension of the 3 month period pursuant to Section 134 and that such direction may be given whether or not the application is made within that 3 month period and whether or not the 3 month period has expired at the time the application is heard. It is not disputed

that the Interested party obtained judgment and commenced execution prior to the intervenor and therefore was first in time.

[17] As regards Dr. Barnett's submission with respect to the Debenture holder, the court firstly had regard to some relevant terms of the Debenture. The Debenture describes the Facility thus,

> **"Any and all credit facilities extended to the borrowers by the lender from time to time shall be a first lien to the debenture, mortgage of Accounts Receivable and the Promissory Note dated August 31, 1999 in the amount of One Million Seven Hundred Fifty Thousand United States Dollars (US $1,750,000) in favour of CRG <u>until the said Loan is paid in full."</u> (Emphasis mine)**

Dr. Barnett's submission is that once the Loan is paid in full the first lien of the Debenture ends.

[18] The Debenture, however describes the Principal Amount thus,

> *"***Not more than One Million Seven Hundred Fifty Thousand United States Dollars (US$1,750,000) by way of a note, mortgage and this Debenture.**
>
> **This Debenture shall be impressed in the first instance with Stamp Duty covering an aggregate indebtedness of the sum of One Million Seven Hundred Fifty Thousand United States Dollars (US$1,750,000) but the lender shall be empowered at any time or times hereafter (without further license or consent of the Borrowers) to impress additional stamp duty hereon covering any sum or sums by which the said indebtedness may exceed the sum abovementioned, its being the intent of these presents that this security shall cover the indebtedness of the Borrowers to the Lender of any aggregate amount which may exist; provided however, that failure on the part of the Lender to impress additional stamp duties shall not reduce or otherwise limit Lender's security or its rights or remedies against Borrowers."**

[19] At Clauses 1 and 2 of the Debenture the following appears:

> **"<u>Acknowledgement of Indebtedness</u>**
> **1. The Borrowers hereby, jointly and severally, acknowledge themselves indebted and bind themselves to pay to the Lender on or before the 31st December 1999:**
>
> **a. The above stated principal amount ("the Principal amount") in United States dollars; plus**
>
> **b. Such other amounts in United States dollars as may be owed by any of the Borrowers to the Lender under the terms of this debenture or under the letter of commitment or under any other agreement from time to time made between the lender and any of the borrowers in relation to the facility; plus**
>
> **c. Interest in United States Dollars on the amounts described in Clauses (a) and (b), ("Interest") on the amounts outstanding from day to day, at the rate specified above, such interest to be compounded monthly in arrears.**
>
> **2. For greater certainty, <u>the amount secured under this Debenture shall be deemed to include</u> all interest, compound interest, receivership fees, costs of seizure and realization, and legal fees relating to collection and realization, all levies, taxes and liens that must be paid, satisfied or otherwise discharged in order to seize or realize the assets subject to this Debenture and all other costs, fees and amounts payable under the terms of this Debenture (and any renewal or extension thereof), in addition to the Principal Amounts advanced (all of which are collectively described in this Debenture as "costs"). (Emphasis added)**

[20] Under the heading "Security" the Debenture states:-

> *"***2(1) As security for the performance of its obligations under this Debenture and under the letter of Commitment and any other agreement from time to time made between the lender and any of the Borrowers in relation to the Facility ('the Obligations") and payment of all Principal, Interest, or Costs thereunder, the Borrowers hereby charge the lender all the undertaking**

> **property, assets, goodwill and uncalled capital (collectively, the collateral) including without limitation, all tangible and intangible property, of the Borrowers both present and future. The charge hereby created shall be a fixed first charge on the real property of the Borrowers and a future and floating charge on all other property and assets of the Borrowers, including but not limited to, the factoring of accounts receivable and/or the rice and/or equipment to be purchased from the proceeds of the facility.**
>
> **Subject only to the Debenture Mortgage of Accounts Receivable, the Promissory Note dated August 31 1999 in the amount of One Million Seven Hundred Fifty Thousand United States Dollars (US$1,750,000) until the said loan is paid in full."**

[21] Lest there be any doubt the parties also agreed at Clause 3(2) under the heading "Continuing Security"

> ***"3(2) This debenture and the security created by it shall remain in full force and effect despite the repayment and readvance from time to time of the whole or any part of the Principal Amounts, until all amounts owed by the Borrowers to the Lenders have been paid in full and all other obligations of the Borrowers have been performed."*** (Emphasis added)

[22] It is manifest on a reading of those terms of the Debenture that the parties intended the charge to cover Principal Interest and Costs. This is not surprising, indeed the costs of recovery are a necessary incident to a charge of this nature. It would have been surprising indeed had it stated otherwise. Parliament I find did not in Section 93 of the Companies Act, intend to deprive a lender of security for his costs. The "Particulars" of the charge for the purposes of Section 93(1) are sufficiently delivered or received by the Registrar with the filing of the debenture or such other details and particulars as the Registrar may request or require. Section 93 (7) (a) to (d), be it noted apply in the case of a "series of debentures containing … any charge to the benefit of which the debenture holders of that series are entitled *pari passu*." We are not here

dealing with that situation. In any event to the extent section 93 (7) refers to the "total amount secured by the series", the context shows that it is referring to the total principal amount. Parliament has not said, and ought not to be assumed to be saying, that the total principal and total costs (of recovery) must be disclosed at the time of registration. This is because total costs of recovery will obviously not be known when the Debenture is created.

[23] These are my reasons for rejecting the carefully formulated submissions of Dr. Barnett. I should say for completeness that I also do not accept the other arguments contained in the intervenors written submissions filed on the 24th January 2013. Dr. Barnett may not have abandoned them but he made no oral submission in support. This is not surprising.

[24] The submission is made at Paragraphs 23 and 38 of the intervenor's written submission that the existence of Peppersource Ltd's interest was not brought to the attention of the court at the time of the ex parte Order made on the 24th July 2002 by the Honourable Mr. Justice Hibbert. It was also submitted that the Debenture had not been registered within the 21 day period stipulated by Section 93 of the Companies Act, and hence it was invalid as against the Intervenor.

[25] I accept as a correct statement of law the interested party's response at paragraph 9 of its written submission filed on the 4th September, 2013. The Order of Hibbert J dated 24 July 2000 extending the 21 day period for registration of the Debenture had the effect, once the Debenture was registered within the extended time, of rendering the charge *valid ab initio.* I also accept the distinctions drawn relative to the Adele Case relied upon by the Intervenor. That is Hilbert's J's decision was not made on an Ex parte application (as the company was a party). Furthermore and the intervenor being an unsecured creditor who had not issued execution on the land, had not acquired prior rights at the time of Hibbert J's Order.

[26] For the reasons stated above therefore it is hereby adjudged and declared that:

(a) The interest of CRG Lee Corporation (the Interested party) as secured by the Debenture ranks prior to those of the Trade Board Ltd. (the Claimant) and Peppersource Ltd. (the Intervenor).

(b). The interest of the Claimant (the Trade Board Ltd.) the judgment creditor in this action ranks prior to that of the Intervenor (Peppersource Ltd.)

David Batts
Puisne Judge
1st November 2013