

Sun Tai Cheung Credits Limited

Appellant

v.

The Attorney General

Respondent

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 21ST MAY 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD FRASER OF TULLYBELTON
LORD TEMPLEMAN
LORD GRIFFITHS
LORD GOFF OF CHIEVELEY

[Majority Judgment delivered by Lord Templeman]

By an agreement in writing dated 11th December 1981 Advance Finance Limited ("Advance") agreed to repay on demand any advance made by the Applicant, Sun Hung Kai Bank Limited ("the Bank"), together with interest at a rate to be determined by the Bank from time to time on the monthly balances outstanding from time to time. On 4th January 1984 the outstanding balance due to the Bank was HK\$1,000,000. On 5th January 1984 the Bank orally agreed not to insist on repayment of the outstanding balance until the end of February 1984 and Advance agreed to sub-mortgage to the Bank a number of unspecified properties to secure repayment. On 5th January 1984 Advance deposited with the Bank, for the purpose of preparing the sub-mortgage, the title deeds of certain properties held on Crown leases which had been mortgaged to Advance. On two subsequent occasions, namely 11th and 13th January Advance deposited with the Bank the title deeds of additional properties for the same purpose. Each deposit of title deeds automatically charged Advance's interest in the mortgaged property to the Bank as equitable sub-mortgagee to secure repayment of the sum of HK\$1,000,000 and interest pursuant to the oral agreement between the parties. See *Keys v. Williams* (1838) 3 Y & C Ex. 55 at 61 and Halsbury's Laws of England 4th Edition Volume 32 para. 430.

By section 80 of the Companies Ordinance Cap. 32 each charge by way of sub-mortgage created by the deposit of title deeds would be void against the liquidator and any creditor of Advance:-

- "(1) ... unless the prescribed particulars of the charge, together with the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the Registrar for registration in manner required by this Ordinance within 5 weeks after the date of its creation ..."

By section 83 of the Ordinance:-

- "(1) The Registrar of Companies shall keep, with respect to each company, a register in the prescribed form of all the charges requiring registration ... and shall, on payment of the prescribed fee, enter in the register with respect to such charges the following particulars -

(a) ...

(b) ...

- (i) if the charge is a charge created by the company, the date of its creation, ...; and
- (ii) the amount secured by the charge; and
- (iii) short particulars of the property charged; and
- (iv) the persons entitled to the charge.

- (2) The Registrar shall give a certificate under his hand of the registration of any charge registered ... stating the amount thereby secured, and the certificate shall be conclusive evidence that the requirements ... as to registration have been complied with."

By section 2 of the Companies Ordinance the particulars pursuant to section 80 and the forms pursuant to section 83 were directed to be prescribed by the Governor in Council. By paragraph 2 of the Companies (Forms) Order 1933 as amended the Governor in Council prescribed that:-

"The forms contained in the Schedule, with such variations and additions as the circumstances of the particular case may require, shall be used for the purposes of the Ordinance and the

particulars contained therein are hereby prescribed as the particulars required under the Ordinance."

Form IV of the Schedule expressed to be made pursuant to section 80 requires so far as material the following particulars:-

Column 1 - "Date and description of the instrument creating or evidencing the mortgage or charge."

Column 2 - "Amount secured by the mortgage or charge."

Column 3 - "Short particulars of the property mortgaged or charged."

Column 4 - "Names, addresses, and descriptions of the mortgagees or persons entitled to the charge."

Form VI of the Schedule is the prescribed form of the Register of Charges to be kept by the Registrar in respect of each company pursuant to section 83 of the Ordinance. So far as material, Form VI requires the following particulars:-

Column 1 - "Date of registration."

Column 2 - "Date of creation of each mortgage or charge and description thereof."

Column 4 - "Short particulars of the property mortgaged or charged."

Column 5 - "Names of the mortgagees or persons entitled to the charge."

On 18th January 1984 Advance went into liquidation but this did not prevent the Bank from applying to register the charges created by the deposit of title deeds made on 5th, 11th and 13th January. On 19th January 1984 the Bank submitted one Form IV in relation to all the properties whose title deeds had been deposited by Advance. Column 1 of Form IV was correctly headed "Date and description of the instrument creating or evidencing the mortgage or charge" and under that heading there was supplied the following cryptic and baffling statement:-

"Bundle of letters dated 5th January 1983, 6th January 1982, 15th April 1983, 5th November 1983, 19th January 1982, 11th January 1984, 13th January 1984 and 13th January 1984."

Copies of the letters bearing those dates accompanied the form. Columns 2, 3 and 4 of Form IV were correctly set out. Against column 2 the amount secured by the mortgage was said to be "To secure a million dollars and interest". In column 3 there were given particulars of the properties comprised in all the deposited title deeds. In column 4 the name and address of the registered office of the Bank were set out.

The Registrar was unable to register any charge in favour of the Bank because Form IV as supplied by the Bank did not specify either the date or the description of the mortgage or charge sought to be registered. The Bank failed to amend Form IV within the time limit prescribed by section 80.

In these proceedings the Bank sought and obtained from Hunter J. an order on 3rd April 1985 directing the Registrar to register "a company charge, details of which, in the prescribed form, were delivered to the Registrar on 19th January 1984 pursuant to section 80 of the Companies Ordinance". On 23rd December 1985 the Court of Appeal (Sir Alan Huggins V-P., Cons and Fuad J.J.A.) allowed the appeal of the Registrar and discharged the order made by Hunter J. The Bank has since assigned to the appellant, Sun Tai Cheung Credits Limited, all the rights and interests of the Bank in the loan of HK\$1,000,000 and interest owed by Advance and in the securities resulting from the deposits of title deeds. The appellant now appeals to Her Majesty in Council to restore the order made by Hunter J.

On behalf of the appellant, Mr. Sykes, in the course of a persuasive and cogent argument, pointed out that column 1 of Form IV in terms requires and only requires "The date and description of the instrument creating or evidencing the mortgage or charge". In the present case there was no such instrument. The Bank provided the only particulars which were prescribed in the circumstances, namely, the particulars required by columns 2, 3 and 4 of Form IV and, it was submitted, the Registrar should have registered those particulars and should have certified that the requirements as to registration had been complied with. There was no need for the Bank to say anything under the heading of column 1 and the references which were in fact there made to certain letters, were intended to be helpful, and should have been disregarded except insofar as they enabled the Registrar to deduce that it was not appropriate for the date and description of any instrument to be given.

Their Lordships are unable to accept this argument. A mortgagee is only entitled to registration if the prescribed particulars of a charge are delivered to, or received by, the Registrar within five weeks after the date of creation of the charge. A mortgagee must prove his right to be registered by giving the date of the charge and thus demonstrating that the five week time limit imposed by section 80 has not expired. This is particularly important because if the Registrar, unaware of the date of the charge and therefore unaware that the five week period has expired, gives a certificate under section 83(2) the certificate is nevertheless conclusive evidence that

the requirements as to registration have been complied with. If the date of the charge is not given to the Registrar, then the Registrar will be unable to complete his register and in particular column 2 of his register.

When a charge is created by an instrument the date of the instrument will be the date of the charge. Column 1 of Form IV will describe and date the instrument and therefore the charge. The original instrument must be supplied to the Registrar who will be in a position to check the date before effecting registration and issuing a certificate. When a charge is evidenced by an instrument and column 1 of Form IV gives the date of the instrument, the Registrar will be entitled to assume, unless column 1 of Form IV or the original instrument indicates the contrary, that the charge and the instrument were contemporaneous. If the charge was in fact created outside the five week time limit set by section 80, the mortgagee would not be entitled to apply for registration. A mortgagee who knowingly applied for and obtained a certificate under section 83 falsely affirming or implying in column 1 in Form IV that his charge was created within the time limit would be liable to have his certificate set aside by the Court on the grounds of fraud. Where there is no instrument the mortgagee must still demonstrate his right to be registered. For this purpose he must show how the charge was created and when it was created and how it comes about that a charge was created without an instrument. There is no difficulty. In the present case the Bank could and should have applied in column 1 of Form IV to register a "Charge created by deposit of title deeds on 5th January 1984 pursuant to an oral agreement" in respect of those properties comprised in the title deeds deposited on 5th January 1984. Similar application should have been made with regard to properties charged by deposit of title deeds on 11th and 13th January. The applications could have been combined into one form. The Registrar would then have known the date of creation of each charge within the time limit and that there was no instrument for him to inspect.

It is true that Form IV does not expressly refer to charges which are not created or evidenced by an instrument but section 80 requires registration of a charge created by deposit of title deeds. Paragraph 2 of the Companies (Forms) Order directs that Form IV shall be used "with such variations and additions as the circumstances of the particular case may require". Where a charge is effected by deposit of title deeds the circumstances of the case require obvious variations and additions to the Form. Mr. Sykes submitted that the Order could only prescribe particulars and could not lawfully allow variations

and additions. But in the opinion of the Board both the Ordinance and the Companies (Forms) Order rightly allow provision for the unusual and the unforeseen. Mr. Sykes also submitted that paragraph 2 of the Companies (Forms) Order authorised variations and additions to Form IV but did not authorise variations and additions to the particulars required by Form IV. But it would be pedantic and unnecessary to make express provision for a mere alteration of form; it was necessary to make provision for different circumstances which necessitated different particulars. Mr. Sykes submitted that on the literal wording of the heading to column 1 of Form IV there was no need for the Bank to give any particulars thereunder. But a mortgagee is not entitled to registration unless he demonstrates that his charge was created within the five week period limited by section 80 and demonstrates that there is no instrument to be delivered to the Registrar. Indeed the Bank attempted to give particulars under the column 1 of Form IV but succeeded in doing so only in a manner which was unintelligible and inaccurate. The Bank was astute enough to obtain security in the form of a deposit of title deeds on 5th, 11th and 13th January 1984 pursuant to an oral agreement made on 5th January and there was no difficulty in the Bank making this clear in column 1 of Form IV.

Mr. Sykes submitted in the alternative that, if particulars were required under column 1 of Form IV of the date and description of the charge, those particulars were furnished because the Registrar could have deduced from the copy letters which accompanied Form IV and which were mentioned in column 1 of Form IV that the Bank were applying to register charges by way of sub-mortgage created by deposit of title deeds made pursuant to an antecedent oral agreement. The Registrar could also have deduced the actual dates of the deposits of title deeds. But in fact the letters were far from clear and the Registrar made no such deductions and asked questions of the Bank which could and should have resulted in the Bank amending column 1 of Form IV and proving their right to registration before the five week time limit expired. No such amendment was made. Their Lordships consider that an applicant for registration of a charge must indicate in Form IV the particulars he requires to be registered. The particulars supplied by the applicant under section 80 should be capable of being reproduced in the register maintained by the Registrar under section 83, subject to any amendment or addition to the particulars supplied by the applicant which the Registrar in his discretion, as a result of perusing any original instrument creating or evidencing the charge or for any other reason, considers to be appropriate. Form IV as submitted by the applicant may be amended if the Registrar is not satisfied with

the particulars supplied. The Registrar is not bound to require amendment of Form IV if the Registrar is satisfied that the applicant is entitled to registration and if the particulars supplied are, in the opinion of the Registrar, sufficient to enable him to complete his register in accordance with the provisions of section 83 of the Ordinance.

In *Reg. v. Registrar of Companies Ex parte Central Bank of India* [1986] 1 Q.B. 1114 the Registrar registered a charge where, as Dillon L.J. said at page 1179, the form had been "ineptly filled in but where all the information necessary to constitute the prescribed particulars was, by the use of a little commonsense on the part of the Registrar, ascertainable from the form read with the other documents supplied". Nevertheless it is for the applicant to provide the prescribed particulars in the form and if he fails to do so the Registrar is entitled to reject the application unless the Registrar is able and willing to complete his register and to issue a certificate on the basis of the information available to him. In the present case column 1 of Form IV as supplied by the Bank gave no particulars and the Registrar was not bound to analyse and understand all the letters mentioned in the Form and then to draft the necessary particulars himself.

On behalf of the Registrar, Mr. Feenstra contended that in any event, the eight letters mentioned in column 1 of Form IV submitted by the Bank were instruments evidencing the Bank's charges and that the charges could not therefore be registered because the Bank failed to produce the originals. Some of the letters were written on behalf of Advance and provided evidence of the existence or possible existence of an oral agreement to sub-mortgage but such letters taken singly, or as a whole, did not set out or purport to set out the terms of the oral agreement which had been reached. One letter written on behalf of the Bank set out and therefore as against the Bank evidenced the terms of an oral agreement to grant security but this letter was not evidence of an agreement as against Advance. Their Lordships agree with the Court of Appeal of Hong Kong that the letters did not constitute or include an instrument evidencing an oral agreement between Advance and the Bank within the meaning of section 80 of the Ordinance. In *Reg. v. Registrar of Companies ex parte Central Bank of India* at pages 1174 and 1179 following *Mason v. Schuppisser* (1899) 81 L.T. 147 at 148 it was held that an "instrument" in the context of the English Statute which for present purposes is identical to the Ordinance means any "written document or documents, formal or informal, whereby rights or liabilities legal or equitable exist or are confirmed". The letters mentioned in the Form IV

supplied by the Bank do not fall within that definition.

In the result, therefore, and in agreement with the Court of Appeal of Hong Kong, their Lordships conclude that the Bank failed to provide the Registrar with the prescribed particulars and will humbly advise Her Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.

Dissenting Judgment by Lord Goff of Chieveley

I have the misfortune to find myself reaching a different conclusion in this case from that reached by the Court of Appeal and by the majority of their Lordships.

I entirely agree that, on the facts of this case, there was no instrument either creating or evidencing the charge. On that point, therefore, I need say no more; it follows, of course, that the appellants did not fail, as required by section 80(1) of the Ordinance, to deliver to the Registrar for registration in the matter required by the Ordinance "the instrument, if any, by which the charge is created or evidenced". Everything therefore depends upon the question whether "the prescribed particulars of the charge" were so delivered. In my opinion they were.

To find out what the prescribed particulars are, we have to turn to paragraph 2 of the Companies (Forms) Order 1933. This provides as follows:-

- "2. The forms contained in the Schedule, with such variations and additions as the circumstances of the particular case may require, shall be used for the purposes of the Ordinance and the particulars contained therein are hereby prescribed as the particulars required under the Ordinance."

The relevant form for present purposes is Form IV, entitled "Particulars of the mortgage or charge created by a company registered in Hong Kong". The form is plainly defective in two respects. First, it makes no provision for the date of creation of the mortgage or charge, presumably on the assumption that an instrument evidencing the mortgage or charge (which has to be delivered together with the prescribed particulars) will invariably specify the date of creation, which is not necessarily true. Second, it makes no provision for a charge created by

an oral agreement followed by a deposit of title deeds, presumably on the erroneous assumption that all mortgages and charges are either created or evidenced by an instrument. It is because the form is defective that the problem has arisen in the present case. Obviously, this problem can only arise very rarely, or it would have arisen before: no doubt this is partly because this type of charge is rare, but also because difficulties arising on the form can usually be solved by sensible enquiries by the Registrar, sensibly answered by the creditor, within the specified period.

Now any ordinary creditor wishing to comply with the requirements of Section 80(1) would obtain a copy of Form IV and would assume, on reading it, that the particulars specified at the head of columns 1-5 inclusive were the relevant prescribed particulars. Indeed, if this is not so, the form can only be described as thoroughly misleading, having regard to the heading on the form which I have already quoted. But he would, in a case such as the present, immediately find difficulty in filling in column 1, headed "Date and description of the instrument creating or evidencing the mortgage or charge". He would react to this heading in one of two possible ways. Either he would be astute enough to solve for himself one of the problems which has troubled Hunter J., the Court of Appeal and their Lordships in the present case, and conclude that there was in fact no instrument either creating or evidencing the charge, in which event he would, if he had a literal mind, enter under column 1 some such words as "There is no such instrument", leaving it to the Registrar to pursue the matter with him if necessary. Or he would think that, since the heading to column 1 presupposes that there must be an instrument, therefore he must find one and describe it in the particulars. This, which I believe to be the most likely reaction, was that of the Bank in the present case. They simply specified all the documents they could think of, describing them under column 1, and getting the date of one of them wrong. But the last thing that the creditor would be likely to do would be to get hold of a copy of the Companies Forms Order and go ferreting through it to see if there are any more prescribed particulars, which have been left out of Form IV, failure to deliver which within the specified period would lead to the catastrophic result that his charge would be void against the liquidator and any other creditor of the company.

When I turn to paragraph 2 of the Order, this entirely confirms my expectation that Form IV was intended to set out all the prescribed particulars. The last sentence of paragraph 2 reads: "... and the particulars contained therein are hereby prescribed as the particulars required under the Ordinance". As

I read that sentence, the word "therein" refers back to the opening words of the paragraph "The forms contained in the Schedule". This is, of course, exactly what one would expect; otherwise, as I have said, the form would be most misleading.

The Court of Appeal however concluded that the words "with such variations and additions as the particular case may require" must be read as qualifying the words "forms contained in the Schedule", so that the prescribed particulars become particulars contained in the forms contained in the Schedule with such variations and additions. With all respect, I do not think that can be right. I start with the fact that we are here concerned with prescribed particulars, i.e. particulars which are "written in advance" or laid down in advance as those which have to be delivered. Next, the words used are "the particulars contained therein". Not surprisingly, the past tense is used; this is because the prescribed particulars must be specified before the creditor comes to fill up the form, otherwise he will not know what particulars he has to supply. It is in the form before it is filled up, rather in the form after it is filled up, that the prescribed particulars will be found. But last, and by no means least, the construction favoured by the Court of Appeal, as I see it, puts the creditor in an impossible position. How is he to know what variations and additions the Registrar will perceive to be required by the circumstances of the particular case? Yet, the effectiveness of his charge, which may secure a very substantial sum of money and may be crucial to the future of his business, may depend entirely on his accurate assessment of that imponderable factor. The problem is well illustrated by the present case. It is, I understand, suggested that the creditor should realise that the date of creation of the charge is so required. Why should the creditor realise this, when the form does not even require the date of creation to be given when there is an instrument creating or evidencing the mortgage or charge which does not in fact specify the date of creation of the charge? Why should the creditor not rather think, having regard to the heading to column 1 in Form IV, that what is required is any relevant documentation in existence providing some evidence of the existence and terms of the charge? In reality, he cannot know; and I feel bound to say that, in my respectful opinion, the construction of paragraph 2 of the Order favoured by the Court of Appeal really undermines the whole purpose of "prescribed particulars" and the certainty which, especially in a context such as the present, such a concept is plainly intended to ensure.

To me, the proper construction to be placed on paragraph 2 is plain and simple. The first sentence

indicates (by reference to the Schedule) the forms to be used, with liberty to vary or add to such forms as the circumstances of the particular case may require; and the second sentence provides, as one would expect, that the particulars contained in the forms are the prescribed particulars. I say "as one would expect" because, as I have previously pointed out, otherwise a form such as Form IV would be woefully misleading.

I am much fortified in this conclusion by discovering that, in relation to the parallel legislation in England (as to which there is, for present purposes, no material difference), in *R. v. Registrar of Companies, Ex parte Central Bank of India* [1986] 1 Q.B. 1114, at pp. 1174-5 and 1178-9 respectively, both Slade L.J. and Dillon L.J. reached precisely the same conclusion, viz. that the prescribed particulars are those contained in the relevant form (there Form 47).

Before their Lordships, Mr. Feenstra for the respondents suggested another way of getting over the difficulty of the defects in Form IV. This was to read the heading to column 1 as including the matters which, through oversight, had been omitted from it. I am unable to accept this submission. Quite apart from the obvious difficulty of expanding, by implication, words which are stated to be prescribing certain particulars required to be given, there can be no certainty as to how the relevant words should be expanded.

It follows that, in my opinion, the Bank did in fact deliver the prescribed particulars, because, on the facts of the present case, no entry was required to be made under column 1, there being no relevant instrument. I do not consider that the fact that the Bank also described a number of immaterial documents detracts from the proposition that they did deliver the prescribed particulars. Obviously this puts the Registrar in a difficult position, because he cannot complete the relevant entry in the Register, or indeed find out whether the relevant period has expired, without making enquiries of the creditor. But that is the result of the defects of the form; and I do not think that the creditor should be punished for that. For these reasons, I, for my part, would reverse the decision of the Court of Appeal and restore the order of Hunter J.

It is plain that Form IV should be amended as soon as possible to cure its defects. But I wish to add that, in my opinion, having regard to the conclusion reached by the majority of their Lordships as to the construction of paragraph 2 of the Companies (Forms) Order, that paragraph should also be amended to make it perfectly clear that the prescribed particulars

are those contained in the relevant form (as amended), and in the relevant form alone, so that those who use the form may know exactly where they stand. I trust that this comment will be brought to the attention not only of those responsible for companies legislation in Hong Kong, but also of those responsible for companies legislation in England.



