

COMPETING CHARGING ORDERS: WHEN NO EFFECT HAS SOME EFFECT



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Following the Court of First Instance's decision in Incorporated Owners of Century Centre v Bank of China (Hong Kong) Ltd [2011] 4 HKC 439, judgment creditors can enforce their judgment by registering a charge over property owned by the judgment creditor, but the registration ceases to have effect after five years. This decision nevertheless suggests that the charge does not then lose all priority. Charges registered later but before registration of the first charge expires will still be subject to it if creditors re-register them.

Introduction

Hong Kong's venerable Land Registration Ordinance (LRO)¹ nowadays rarely receives attention from the courts. In its 167th year and with its principal provisions untouched for most of that time, the meaning of the Ordinance is for the most part well-settled. Moreover, the Ordinance is on the way out: since 2004 a Land Titles Ordinance has been waiting to take the LRO's place, so there is little incentive to consider the LRO. However, the issue which faced the court in this case was of practical importance to commercial lenders and will still arise if and when the land titles legislation comes into force.² The question was of the priority of two registered charging orders where registration of the first of the orders had been allowed to lapse, before its registration had been later renewed. Did the order registration of which had ceased lose priority to the later-registered order registration of which had continued?

Registration of most deeds and other documents affecting land is once-and-for-all. After the document has been recorded on the register, the registration stays in effect; the registration does not expire after a certain time and so does not need to be renewed. There is however an exception for charging orders and pending legal actions. Registration of these ceases to have effect automatically after five years. Their registration

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¹ (Cap 128).

² Amendments to the Land Titles Ordinance have been under consideration for seven years; it will not be brought into force until these have been agreed and enacted.

may be renewed, before, upon or after expiry, but the automatic expiry is a trap for the unwary creditor litigant. One of the lending banks in this case, or its solicitors, fell into that trap.

Facts

What happened was that the owner of a flat at Century Centre owed money (presumably management fees) to the Incorporated Owners of the building. As the debt remained unpaid, the IO applied to the court for permission to sell the property.³ This was granted in 2009 and the flat was sold in 2011. After deduction of the outstanding debt and expenses from the proceeds of sale, a surplus of HK\$1,734,357.71 remained. Who was entitled to that surplus?

Competing for the surplus were two judgment creditors of the flat owner, each with charging orders registered against the property in execution of its money judgment. The first was Bank of China (BoC) which had obtained its judgment in late 2000 and had been granted, and had registered, a charging order in June 2001. The second was The Hong Kong and Shanghai Banking Corporation (HSBC) which had obtained its judgment in mid-2002 and had been granted, and had registered, a charging order in August 2002. No difficulty arose as to the priority of these charging orders: BoC, being the first on the register, had priority by virtue of the provisions of s 3(1) of the LRO. This subsection says that precedence is given according to the chronological order of registration of instruments.

However, under s 17 of the LRO, the validity of the registration of each order expired after five years. Section 17 provides simply that the registration of a judgment, order or *lis pendens* (pending land action) shall cease to have effect at the end of five years from the date of registration, but it may be re-registered from time to time and, if so, shall have effect for five years from the date of re-registration. In 2005, before expiry of the registration of its order in 2006, BoC had re-registered the order. HSBC did the same with its order, re-registering it in 2007. So at that stage, BoC's charging order retained priority.

Matters changed however on 13 August 2010 when the registration of BoC's charging order expired without being renewed immediately. There was then an interval or gap of nearly seven weeks during which no registration of BoC's order was in effect. During that period HSBC's

³ No doubt pursuant to a charge for unpaid fees; the judgment does not say and the order for sale by Yam J is not available.

charging order (registration of which would not cease until 2012) remained effectively registered. BoC's order was eventually re-registered, for the second time, on 29 September 2010.

Issues

Did the period of non-registration result in BOC's losing priority to HSBC? In other words did the second re-registration of BoC's charging order have effect only from the date of re-registration, so that the registration of HSBC's charging order became first in time?

Contentions

The words of s 3(1) of the LRO would suggest so. This provides that all written instruments (including judgments and orders) "registered in pursuance hereof shall have priority one over the other according to the priority of their respective dates of registration". In the cases of charging orders or *lis pendens*, priority is stipulated to run from the commencement of the day following the date of registration.⁴

BoC's order was lodged for further re-registration on 29 September 2010 so, applying the statutory rules, the re-registration took effect on 30 September 2010 and not before. Moreover, s 4 of the LRO says that no notice whatsoever of any prior unregistered written instrument shall affect priority, so the fact that HSBC would have known about BoC's temporarily unregistered charging order is not relevant to the question of priority. Section 17 states that a re-registered instrument shall have effect for five years from the date of re-registration: this implies that the instrument the registration of which has expired does not have effect until it is re-registered. On this basis counsel for HSBC submitted that the further re-registration of BoC's charging order commenced from the day following that re-registration only (30 September 2010) and that the order had lost its priority over HSBC's order.

Decision

Sakhrani J, however, did not agree. The judge pointed out that the forebears of s 17 of the LRO referred to sections in two English statutes

⁴ LRO s 5A.

of the early Victorian era, the Judgments Acts of 1839 and 1855. Those sections had concerned the priority of registered legal actions and judgments and had provided that their registration would expire after five years but that they could be re-registered. Their provisions had been considered in two English cases.

Authorities

In *Beavan v Earl of Oxford*,⁵ circumstances analogous with the present case had been before the English Court of Appeal. Two judgment creditors, B and C, had registered their judgments, in 1841 and 1848 respectively. B had failed to re-register until 1847, after expiry after five years, but had done so by 1848 when C's judgment had been registered. Then in 1849 a third judgment creditor, T, registered his judgment. Registration of B's judgment again expired in 1852: it was re-registered, but two months after expiry. In January 1854, T re-registered his judgment just before expiry of five years. In September 1853, registration of C's judgment expired; it was re-registered more than a year later, in November 1854. So T's judgment had always been effectively registered from first registration in 1849 and during that time registration of the judgments of each of B and C had lapsed for a period. Had they lost priority to T? The Lord Chancellor, Lord Cranworth, ruled that they had not. An omission to re-register had no effect upon previous creditors, he held. This was because at the time that a previous creditor registered his judgment, notice of the existence of the prior judgment had been given to him through the effective registration of the prior judgment. The object of the legislation was to enable a judgment creditor to ascertain what other judgments already existed, not to give him a chance of improving his position by the possible subsequent neglect of a judgment creditor to re-register. The Lord Chancellor explained that "there could be no object in protecting those who had thought fit to become ... creditors in spite of a judgment of which the register had already apprised them". So, B and C had priority when T's judgment was registered, T knew this, and B and C's priority over T was not affected by their subsequent omission to register again at the end of five years.

A creditor whose judgment or charge comes on the register subsequent to judgments or charges registered earlier is therefore always inferior to the holders of those earlier registrations notwithstanding that an interval

⁵ (1855) 6 De GM & G 492, 43 ER 1325; hereinafter *Beavan*.

in the earlier registrations may subsequently occur. What, through, of a creditor whose judgment or charge is first registered during that interval? The Lord Chancellor's reasoning would suggest that such a creditor would have precedence over the earlier, lapsed registrations. This is indeed what the Lord Chancellor held. Neglect to renew a registration after five years, he said, "will of course deprive the judgment creditor of his rights against subsequent ... creditors becoming so before any re-registry has taken place, and so will operate as a protection to them".⁶

The Court of Appeal's decision in *Beavan* was later approved by the House of Lords in *Shaw v Neale*.⁷ In the latter, the new Lord Chancellor, Lord Chelmsford, confirmed his predecessor's view that the intent of s 4 of the Judgments Act 1839 was to give a registered incumbrancer the benefit of registration for five years so as to protect him from those who might purchase, mortgage or become creditors during that period and during any subsequent period of re-registration. But, Lord Chelmsford LC added, if after expiration of the first five years, the incumbrancer omitted to re-register and in the intervening period before his re-registration, a person became a registered mortgagee or purchaser of the estate or creditor of the owner, the subsequent re-registration would not prevail over that person's interest.⁸

Discussion

In deciding in favour of BoC in the present case, Sakhrani J relied heavily upon the reasoning in *Beavan* and *Shaw*. Was he correct to do so? Both were decisions upon the interpretation of a particular English provision, s 4 of the Judgments Act 1839. The wording of that section is more elaborate than the wording of s 17 of the LRO. Section 17 merely says that the registration of a judgment, order or *lis pendens* shall "cease to have effect" at the end of five years from the date of registration, but that the judgment, order or *lis* may be re-registered from time to time and, if so re-registered, shall have effect for five years from the date of re-registration. By contrast s 4 of the 1839 Act provided that after five years' registration, judgments and orders shall "be null and void" as to purchasers, mortgagees or creditors unless a memorandum of the judgment or order is left with the Court (i.e. re-registered) within

⁶ *Beavan*, 499.

⁷ (1858) 6 HL Cas 581, 10 ER 1422; hereinafter *Shaw*.

⁸ *Shaw*, 605; Lord Cranworth, the retired Lord Chancellor, was a member of the House of Lords panel too and not surprisingly confirmed his earlier judgment in *Beavan*.

five years before the execution of the instrument vesting or transferring of the right or interest to the purchaser, mortgagee or creditor.

Sakhrani J's justification for treating decisions upon s 4 of the Act as helpful in the interpretation of s 17 of the Ordinance seems to have been that previously s 17 referred to and incorporated provisions of the 1839 Act as well as two other English Judgments Acts and that intervening amendments had simply introduced modern terminology in place of the old references. However, those references have long gone as have the Acts themselves, so the effect of expiration of registration and of re-registration would seem to be a matter of interpretation of the words of s 17 as they stand rather than a matter of interpretation of the words of those old provisions. Whilst amendments to s 17 may have been intended to introduce modern terminology, that does not preclude an effect of changing the law as well, whether deliberately or by inadvertence.

Nor is it immediately apparent that the results in *Beavan* and in *Shaw* are correct. If a provision states that registration of an instrument lasts only for a certain time and after that time the instrument shall have no effect or shall be void until re-registered, one could easily interpret that as meaning that the instrument loses all priority after that time. To some it may seem unfair that the holder of a later charging order should remain bound by a previous charging order that has become void or ineffective, especially since the period between expiry and re-registration of the previous order could be lengthy. It might be said that although the holder of the later charging order is aware of the earlier order at the time of the registration of his later charge, he has an expectation that if registration of the earlier order is not renewed prior to expiry of five years from its registration and thereby becomes void, his charge will thenceforth have priority.

Nevertheless, the judge's reliance upon the reasoning in the old authorities can be justified. The position facing Sakhrani J was for practical purposes the same as that which faced the English courts. There is nothing express in s 17 about the effect of expiration or of re-registration on later judgments or orders. The wording of s 4 of the Act, although lengthy, says nothing about the effect of expiration or re-registration beyond saying that on expiry the judgment or order shall be null and void against creditors. There is no indication as to whether this means all creditors or just those who register during the period of non-registration: that was the issue decided in *Beavan* and confirmed in *Shaw*.

The reasoning in those cases does however create a logical difficulty. BoC's charge retained priority over HSBC's despite the interval during which BoC's was not registered. Had a third charger registered during the interval, BoC's charge would have lost priority to the third charge,

according to the dicta. Yet as between HSBC and the third chargor, HSBC retains priority because registration of the latter's charge was current at the time of registration of the third charge. Which order of priority then applies between the three charges?

Conclusion

In effect, the courts' answer was that one should look at the state of the register at the date of registration of the second judgment or order rather than at the state of the register at the date or re-registration of the earlier judgment or order. This renders the ceasing of effect of the expired order somewhat illusory but is at least clear and workable.

