

IN THE CARIBBEAN COURT OF JUSTICE

Appellate Jurisdiction

CCJ Appeal No CV 4 of 2008
GY Civil Appeal No 27 of 2006

Between

L.O.P. INVESTMENTS LIMITED

Appellant

And

**DEMERARA BANK LIMITED
GARRETT WARD
RAMON GASKIN**

Respondents

Executive Summary

The factual background

[1] L.O.P. Investments Limited (“LOP”) issued two debentures in favour of Demerara Bank Limited (“the Bank”) to secure loans of Guyanese \$85 million and \$15 million respectively. The first debenture was “A Fixed First Charge ranking as a First Mortgage” over specified property and the second was “A Fixed Second Charge ranking as a Second Mortgage” over specified property. Each debenture secured by such charge was duly registered under ss 233 and 234 of the Companies Act 1991 after a notice of the intended registration had been published in the Gazette and one local newspaper not less than seven days previous to the registration.

- [2] Under the terms of each debenture upon certain events of default, which occurred, the Bank had power to appoint a Receiver of LOP's charged property and its business. A Receiver so appointed was expressly given extensive powers to carry on the business of LOP and sell any of the charged property. Indeed, he also had an irrevocable power of attorney from LOP to do all acts and execute any instruments required for carrying on the business and selling the charged property.
- [3] Mr. Garrett Ward ("Mr. Ward") was first appointed as Receiver. Later he resigned and Mr. Ramon Gaskin (Mr. Gaskin") was appointed Receiver.
- [4] LOP refused to co-operate with the Receivers and issued proceedings against the Bank and the Receivers, who themselves sued LOP.

Proceedings in the High Court and the Court of Appeal

- [5] After hearing the consolidated actions Moore J declared that the two debentures were good, valid and subsisting securities, that the appointments of the Receivers were valid and that Mr. Gaskin was entitled to take possession of the charged assets of LOP and to discharge the other duties of Receiver under the debentures. The judge then ordered LOP to pay Mr. Gaskin \$350,000 damages for obstructing him in the execution of his duty as Receiver and awarded costs against LOP.
- [6] The Court of Appeal affirmed the judgment of Moore J and dismissed LOP's appeal with costs.

Proceedings before the Caribbean Court of Justice

- [7] Before the CCJ, counsel for LOP alleged that the debentures were invalid or unenforceable because they had not been passed and executed as conventional mortgages before the Registrar of Deeds (who had taken over this role from High Court Judges) in accordance with ss 12, 14, and 16 of the Deeds Registry Act. Compliance with this Roman-Dutch law and practice protected mortgagors on events of default occurring because the mortgagee then had to have recourse to the court to foreclose the mortgagor's interest and to arrange a judicial sale of the property to enable the mortgagee to recover the principal and interest due to him. Private sales by a mortgagee or his appointed receiver were wholly impermissible.
- [8] Counsel relied upon proviso (ii) of s 3(d) of the Civil Law of Guyana Act: "the law and practice relating to conventional mortgages or hypothecs of movable or immovable property ... shall be the law and practice now administered [on 1st January 1917] in those matters by the Supreme Court" e.g. in having mortgages passed and executed before it and, if appropriate, in foreclosing the interests of mortgagors and arranging a judicial sale of the mortgaged property.
- [9] This submission, however, overlooked the Companies (Consolidation) Ordinance, Chapter 178, No. XVII of 1913, based closely upon the English Companies (Consolidation) Act 1908, though adapted to deal with the Roman-Dutch law background in Guyana. Section 91 of the Ordinance had the effect that a company, instead of securing a debenture by a conventional mortgage or hypothec according to the law and practice administered in the Guyanese Supreme Court, could secure a debenture by duly

registering it after notice of the intended registration had been published in the Gazette and one local newspaper not less than seven days previous to the registration. From ss 92-93 it appears that, in an event of default, the debenture could empower a receiver to take possession of and sell the charged property so as to avoid the cumbersome involvement of court proceedings leading to a judicial sale.

[10] It is now s 234 of the Companies Act 1991 that in identical language to that of the Ordinance provides a company with these two alternative methods of creating security over its property. The provisions of Part III of the 1991 Act disclose an underlying *laissez faire* philosophy which tends to further the interests of companies seeking financial assistance by enabling them to confer whatever powers are appropriate to provide comfort and encouragement to lenders, though certain statutory duties of care and accountability are imposed upon the exercise of such powers.

[11] By virtue of clauses in LOP's debentures conferring extensive powers of disposition and management on the appointed Receiver in addition to the express incorporation of the powers conferred on a receiver by the laws of Guyana (e.g. under the 1991 Act) the Receiver was entitled to carry on LOP's business and take possession of and, indeed, sell LOP's property charged to the Bank under the debentures. A purchaser taking under an exercise of the irrevocable power of attorney will be protected under s 6 of the Powers of Attorney Act.

Conclusion

[12] Thus LOP's appeal was dismissed and the order of the Court of Appeal affirmed, with LOP to pay the Bank's costs of this appeal, to be taxed unless agreed.