

ADVANCE COPY

[2009] CCJ 10 (AJ)

**IN THE CARIBBEAN COURT OF JUSTICE
Appellate Jurisdiction**

**ON APPEAL FROM THE COURT OF APPEAL OF
THE CO-OPERATIVE REPUBLIC OF GUYANA**

**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

**Before The Right Honourable
And the Honourables**

**Mr. Justice Michael A. de la Bastide, President
Mr. Justice Nelson
Mr. Justice Pollard
Mr. Justice Saunders
Mme. Justice Bernard
Mr. Justice Wit
Mr. Justice Hayton**

Appearances

Mr Sanjeev Datadin and Mr Derek Ali for the Appellant

Mr Vidyanand Persaud and Ms Vidushi Persaud for the 1st Respondent

JUDGMENT

of

The Court

Delivered by

The Honourable Mr Justice David Hayton

On the 10th day of August, 2009

JUDGMENT

The issue

- [1] A company needs to borrow significant sums of money and a Bank or other financial institution is happy to lend the requisite sums so long as it has security for the loans it will be making. The company enters into a loan agreement with the Bank and issues a debenture to provide security by way of a charge over identified immovable and movable property so as to cover its financial obligations to the Bank. The debenture deed specifies events of default and confers power on the Bank on any such default to appoint a receiver and manager, with specified management powers and power to sell any of the charged property, while also irrevocably conferring a power of attorney upon any appointed receiver to sell the charged property.
- [2] Despite these provisions in the debenture, the Appellant contends that the receiver does not have power to take possession of the charged land and sell it because he had been appointed not by the Court in the course of some legal proceedings but merely by the Bank.
- [3] The Appellant submits that a debenture can only confer a valid security interest in respect of land if the land in question has been the subject of a mortgage passed and executed before the Registrar of Deeds in accordance with sections 12, 14 and 16 of the Deeds Registry Act, Cap 5:01. In the conventional mortgage, where the mortgagor expressly consents to a willing condemnation being adjudged against him, such process before the Registrar amounts to a money judgment in favour of the mortgagee¹ which, upon any

¹ British Guiana Electric Lighting Co Ltd v Conrad [1897] LRBG 115, Tinne v Tebbutt [1921] LRBG 14, Dhanraj v National Bank of Industry & Commerce Ltd Civ App No 70/2001, 6 Aug 2002

default by the mortgagor, enables the mortgagee to go to the Court to foreclose the interest of the mortgagor in the mortgaged land and obtain an order for its sale (organized by the Court) to recover the money owed.² It is contended that this involvement of the Court upon traditional principles of Guyanese Roman-Dutch law cannot be circumvented by a privately appointed receiver under a secured debenture that does not provide the relevant security by way of a conventional mortgage.

- [4] For the reasons that follow we reject this view and endorse the validity of receivers' powers of sale under debentures that are secured otherwise than by a separate mortgage under the Deeds Registry Act, so long as the debentures have been duly created and registered under the Companies Act, Cap 89:01.

The factual background

- [5] In view of the narrowing of the issues as this case has progressed from the High Court to the Court of Appeal to this Court, the relevant background can be treated as follows.
- [6] L.O.P. Investments Limited ("LOP") issued two debentures in favour of Demerara Bank Limited ("the Bank) to secure loans of \$85 million and then a further \$15 million. On LOP's default in making repayment the Bank duly appointed Mr. Garrett Ward ("Mr. Ward") as Receiver. Later he duly resigned and in his place the Bank duly appointed Mr. Ramon Gaskin ("Mr. Gaskin") as Receiver.
- [7] LOP refused to co-operate with the Receivers and issued proceedings claiming that the debentures contravened the law relating to mortgages and hypothecs so as to be invalid or

² FWH Ramsahoye, Land Law of British Guiana p 238, Deeds Registry Act ss 28-31, Rules of the High Court Ord 36 rr 8,17, 51,52,53

unenforceable, or could only be enforced by court foreclosure proceedings required for mortgages and hypothecs. LOP further claimed that Mr. Ward and Mr. Gaskin had not been duly appointed or, even if they had been, they had no power to interfere in the management of LOP's property unless authorized by the Court or LOP. Injunctive relief was sought and damages in excess of \$100 million were claimed.

[8] The Bank, Mr. Ward and Mr. Gaskin strenuously denied LOP's claims. Indeed, the Bank and Mr. Gaskin filed a writ themselves against LOP complaining of unlawful interference by LOP in the conduct of the receivership and claiming damages and injunctive relief.

[9] These two actions were consolidated by consent. After hearing the case Moore J. made the following declarations:

- (a) The two Debentures issued by L.O.P. Investments Limited in favour of Demerara Bank Limited are good, valid and subsisting securities;
- (b) The appointments of Garrett Ward and Ramon Gaskin under the aforesaid Debentures were/are valid in law;
- (c) The present Receiver Ramon Gaskin is entitled to take possession of the charged assets of L.O.P. Investments Limited and to discharge the other duties of Receiver under the Debentures.

[10] Moore J. further ordered LOP to pay to Mr. Gaskin the sum of \$350,000 damages for obstructing him in the execution of his duty as Receiver and awarded costs against LOP in the sum of \$300,000.

- [11] The Court of Appeal affirmed the judgment of Moore J, dismissed LOP's appeal and ordered that the sum of \$450,000 lodged in court by LOP as security for costs be applied in satisfaction of the order for damages and costs made by Moore J, with the balance, if any, being applied towards the costs of the appeal which were fixed in the sum of \$75,000.
- [12] The Court of Appeal heaped scorn on the submission of counsel for LOP that the effect of the Civil Law of Guyana Act, Cap 6.01, was to require any security provided for in a debenture to be passed before the Registrar of Deeds, as in the case of a conventional mortgage, if it was to be valid and enforceable. The two debentures were clearly intended to take effect as secured debentures under the Companies Act and not as conventional mortgages under the Deeds Registry Act. Effect should be given to the terms of the debentures, in particular as to the general powers of the Receiver and the particular power under the irrevocable power of attorney.
- [13] LOP applied to the Court of Appeal for leave to appeal to this Court, but the Court of Appeal refused leave to appeal even though it was accepted that the property in dispute was worth more than Guyana \$1,000,000 and therefore there was an appeal "as of right" under s 6(a) of the Caribbean Court of Justice Act.
- [14] LOP then applied to this Court for special leave to appeal and, for the reasons explained in a judgment delivered by the President of this Court, this Court³ held that the Court of Appeal had misdirected itself in refusing leave to appeal and in exercise of its own discretion granted special leave to appeal to the appellant.

³ L.O.P. Investments Ltd v Demerara Bank Ltd [2009] CCJ 4 (AJ)

[15] Before examining the technical arguments, it is necessary to outline the terms of the debentures.

The Debentures issued by LOP to the Bank

[16] Following upon due notice of the debenture as advertised in the official Gazette and a daily newspaper, a document headed “PARTICULARS OF A MORTGAGE OR CHARGE CREATED BY A COMPANY REGISTERED IN GUYANA” and giving particulars of a First Debenture securing \$85 million over specific charged property, was duly registered in the Deeds Registry as Debenture No 1593.

[17] Following upon due notice of the debenture as advertised in the Official Gazette and a daily newspaper, a document with the same heading as in [16] above and giving particulars of a Second Debenture securing \$15 million over specific charged property, was duly registered in the Deeds Registry as Debenture No 1693.

[18] Apart from the amounts of money secured, the property charged and the relevant dates, the two Debentures were the same except for clause 6 commencing “The Company HEREBY ESTABLISHES THE FOLLOWING CHARGES”. In respect of the First Debenture clause 6 continued “(a) A FIXED FIRST CHARGE RANKING AS A FIRST MORTGAGE on ...”, while in respect of the Second Debenture, clause 6 continued “(a) A FIXED SECOND CHARGE RANKING AS A SECOND MORTGAGE on ...”

[19] After the Debenture deeds set out details as to the principal of the loan and as to interest and the events of default making the principal and interest become due and payable, clauses 9(e),10 and 11 of each deed conferred extensive powers upon the Bank as follows:

- “9. (e) at any time after the principal monies secured by this debenture shall become immediately payable, [the Bank] may appoint by writing a Receiver of the property hereby charged upon such terms ... as it shall think fit and may from time to time remove any Receiver as appointed and appoint another in his or her stead. A Receiver so appointed shall be the agent of [LOP] and [LOP] shall be responsible for such Receiver’s acts and defaults, and for his or her remuneration, costs, charges and expenses to the exclusion of any liability on the part of [the Bank]. Any reference to a Receiver so appointed shall be deemed to include a reference to a Receiver and Manager.
10. A Receiver so appointed shall be entitled to exercise all powers conferred on a receiver by the Laws of Guyana and by way of addition to and without limiting those powers such Receiver shall have power:
- (a) to enter into and upon and take possession of and get in the property hereby charged;
 - (b) to carry on or concur in carrying on the business of [LOP] (and for this purpose to borrow money on the security of the property hereby charged in priority to any debenture, mortgage, bill of sale or other form of securities given in accordance with the terms of the Loan Agreement or otherwise);

- (c) to sell or concur in selling any of the property charged as aforesaid or otherwise deal therewith on such terms in the interests of [the Bank] as the Receiver shall think fit;
- (d) to make any arrangement or compromise which the Receiver shall think expedient in the interests of [the Bank]; and
- (e) to do all such acts and things as may be considered to be incidental or conducive to any of the matters and powers aforesaid and which the Receiver may or can lawfully do as agent for [LOP].

11. For the purpose of the exercise of any of its powers under this debenture and in particular the provisions of clauses 9, 10, and 11 hereof [LOP] hereby irrevocably appoints [the Bank] and any Receiver appointed by [the Bank] jointly and also severally the Attorney or Attorneys of [LOP] for [LOP] and in its name and on its behalf to do all or any of the aforesaid acts and deeds and to execute transfers of any of the said assets and otherwise execute or perfect any transfer deed, assurance, agreement, instrument or act which may be required or may be deemed proper for any of the purposes aforesaid.”

Dealing with the Submissions of LOP’s counsel

[20] At the heart of counsel’s submissions was that the Civil Law of British Guiana Ordinance, 1916, now replaced by the Civil Law of Guyana Act, Cap 6:01, in dealing with immovables and mortgages thereof expressly preserved the traditional Roman-Dutch law. The vigour of this remains such that where the substance, form and effect of a

security instrument bears all the hallmarks and characteristics of a mortgage, then, despite its appellation as a debenture, the law and practice applicable to its creation, its attachment to particular security, and its perfection must be the Roman-Dutch law and practice for conventional mortgages.

[21] Roman-Dutch law coupled with the Deeds Registry Act (replacing the Deeds Registry Ordinance) requires a mortgage to be advertised in the Gazette and, like a transport (or conveyance) of land, be passed before the Court, nowadays in the person of the Registrar of Deeds.⁴ After advertisement there is a period of thirteen days in which creditors who object can file a notice of opposition to the proposed mortgage or transport,⁵ and then follow this up within a prescribed time⁶ by issuing legal proceedings. As Bernard C. has stated,⁷ “A mortgage under this system is one of ‘voluntary and willing condemnation’ and is in reality a judgment.” On default, the mortgagee goes to the Court to have foreclosure of the mortgagor’s interest in the mortgaged property and a sale carried out by officers of the Court, who use the proceeds to discharge the debt due to the mortgagee and pay any balance to subsequent mortgagees or the mortgagor. After the Court orders foreclosure an application is made to the Registrar for sale in execution⁸ by auction after advertisement of the sale has been published in the Gazette for three consecutive weeks⁹. Within fourteen days after the first advertisement any person having a right of opposition must enter opposition in a book kept for this purpose by the Marshal in charge of sales in

⁴ Deeds Registry Act s 12 & 16

⁵ Rules of the High Court (Deeds Registry) r 3

⁶ Within ten days after the Registrar has certified the entry of opposition: r 8 of above Rules

⁷ *Dhanraj v National Bank of Industry & Commerce Ltd* Civ App No 70/2001, 6 Aug 2002, at p 4

⁸ Rules of the High Court Order 36 rr 8 & 42

⁹ Rules of the High Court Ord 36 r 51

execution¹⁰. Within a further fourteen days the opposer must bring an action to restrain the sale or the sale will go ahead¹¹. As a result there is no need for any subsequent advertisement of the proposed transport to a purchaser¹².

[22] Thus, while the mortgagor has full absolute ownership of the mortgaged property, he is subject to a personal money judgment so that, in the event of non-payment by him, the mortgage debt can be repaid via recourse to the mortgaged property by a judicial process. The registered mortgage, however, unlike a right to specific performance of an immovable¹³, ranks as a “registered incumbrance” under the Deeds Registry Act ss 2, 23 (1)(b) and 40, so that a successor in title to the mortgagor will be bound by it as an *in rem* right – if it has not been previously discharged by payment of the money due.

[23] From 1st January 1917, the general rule under s 3(a) and (b) of the Civil Law of Guyana Act is that Roman-Dutch law ceased to apply to Guyana, so that the common law of Guyana became the common law of England as at that date, but including the doctrines of equity as then administered or at any time thereafter administered by the courts of justice in England.

[24] Exceptionally, under s 3(c) “the English common law of real property shall not apply to immovable property in Guyana” so that under s 3 (d) there shall, so far as possible, be one common law for both immovable and movable property, namely the English common law applicable to personal property.

[25] There were however the following provisos:

¹⁰ Ibid Ord 36 r 52

¹¹ Ibid Ord 36 rr 53, 54

¹² Deeds Registry Act s 28(1)

¹³ On which see *Ramdass v Jairam* [2008] CCJ 6(AJ) at [33]

- “(i) immovable property may be held as heretofore in full ownership which shall be the only ownership of immovable property recognized by the common law ...;
- (ii) the law and practice relating to conventional mortgages or hypothecs of movable or immovable property, and to easements, profits a prendre, or real servitudes, and the right of opposition in the case of both transports and mortgages, shall be the law and practice now administered in those matters by the Supreme Court.”

[26] LOP’s counsel assumed that this last clause of proviso (ii) preserved the pure Guyanese Roman-Dutch law and practice relating to conventional mortgages or hypothecs and opposition to mortgages, but the Bank’s counsel pointed out that one had to consider “the law and practice administered in those matters by the Supreme Court” on 1st January 1917, taking account of the Companies (Consolidation) Ordinance, Chapter 178, No XVII of 1913. On examining this Ordinance, however, it appears that a company, instead of securing a debenture by a conventional mortgage or hypothec according to the law and practice administered in the 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.

[27] The 1913 Ordinance, based closely upon the English Companies (Consolidation) Act 1908, in sections 91 to 104 sets out a special regime for secured borrowings of companies that extend to debentures secured by mortgages or charges, though “the holding of debentures entitling the holder to a charge on land shall not be deemed to be an interest in

land.”¹⁴ Where a debenture is not secured by a separate conventional mortgage or hypothec, a mortgage or charge securing the debenture must be registered or the security becomes void against creditors and the liquidator. Section 91 (1) requires due registration of “every mortgage or charge created after 1st January 1914 by a company registered in the colony, and being either

(a) a debenture not secured by any separate mortgage or charge; or

(b) a mortgage or charge for the purpose of securing any issue of debentures; [or other mortgages or charges specified in (c), (d), (e), (f) (g)]”

while proviso (e) provides that

“a debenture not secured by a separate mortgage or charge but which has been duly registered after a notice of the intended registration has been published in the Gazette and one local newspaper not less than seven days previous to the registration, shall be valid and shall rank as a mortgage notwithstanding that it has not been secured by any separate mortgage or charge.”

[28] It is clear that because s 91 does not apply to require registration of unsecured or “naked” debentures eg debenture loan stock¹⁵, and because proviso (e) states that the debenture “shall rank as a mortgage,” (which can only be for purposes of priority), the proviso needs to be construed as if its opening part contained the following italicized words

“a debenture not secured by a separate mortgage or charge but which *is otherwise secured and* has been duly registered ...”

¹⁴ See s 91(1) proviso (d)

¹⁵ See s 90

[29] Noticeably, the English 1908 Act did not contain the equivalent of s 91(1)(a) and proviso (e) that particularly deal with the Roman-Dutch Guyanese situation. Under the adapted 1913 Ordinance, in Guyana a debenture could be secured in one of two ways. As reflected in the distinction between s 91(1) (a) and (b), it could be secured under traditional Guyanese Roman-Dutch law by a separate mortgage advertised in the Gazette and then passed and executed before the Court as a money judgment, so that on a default by the mortgagor a judicial sale process would then be invoked for the due debt to be repaid. Alternatively, as s 91(1)(a) and proviso (e) indicate, the debenture could be secured by it containing provisions charging identified property and by advertising the intended registration of the debenture in the Gazette and a local newspaper not less than seven days before going ahead with the registration under s 91.

[30] These two methods of protection continue to be available under the current Companies Act 1991. Section 234 of this Act reproduces the wording of proviso (e) to s 91(1) of the 1913 Ordinance in providing

“A debenture not secured by a separate mortgage or charge but which has been duly registered after a notice of the intended registration has been published in the *Gazette* and one local newspaper not less than seven days previous to the registration, shall be valid and shall rank as a mortgage notwithstanding that it has not been secured by any separate mortgage or charge.”

[31] If, however, default is made under a debenture not secured by a separate mortgage, how is it going to be possible to have the security realized? Section 92(1) of the 1913

Ordinance envisaged that this would be possible, as in England¹⁶, either by a court appointment of a receiver or manager or by a private appointment under powers contained in the debenture since it catered for both situations by providing

“If anyone obtains an order for the appointment of a receiver or manager of the property of a company or appoints that receiver or manager under any powers contained in any instrument he shall within seven days from the date of the order or of the appointment under the powers contained in the instrument give notice of the fact to the registrar ...”

[32] Section 93 (1) then provides safeguards by requiring “every receiver or manager of the property of a company who has been appointed under the powers contained in any instrument and has taken possession, shall, once in every half-year while he remains in possession, and also on ceasing to act as receiver or manager, file with the registrar an abstract in the prescribed form of his receipts and payments ...”

[33] There is also the further safeguard that if the receiver sells the charged land, the intended transport of the land will need to be advertised in the Gazette so as to allow a notice of opposition to be filed. In practice, so counsel informs us, it has to be admitted that such safeguard is of very limited assistance due to problems in timely publication and distribution of the Gazette. By way of contrast, publication in a local daily newspaper of an intended registration of a debenture better serves its intended purpose and will afford an objector the opportunity to take interlocutory legal measures if appropriate. The key feature, however, in the case of registered debentures is that registration enables anyone

¹⁶ See Companies (Consolidation) Act 1908 ss 94 and 95

before lending money or affording credit to a company to check how burdened the company is with secured debts. There is public access for a prescribed fee to the register of charges kept by the Registrar¹⁷, while the debtor company must keep copies of debentures for inspection by creditors and shareholders free of charge¹⁸.

[34] Provisions equivalent to sections 92(1) and 93(1) of the 1913 Ordinance are found in s 248 of the 1991 Act so that where “any person ... appoints a receiver of any of the property of a company”, notice of the appointment and of cesser of the receivership must be given to the Registrar. There is however, a new Division C (“Receivers and Receiver-Managers”) in Part III of the 1991 Act which lays down detailed provisions as to the powers and duties of receivers in sections 272 to 284 for the benefit of debenture holders and for the protection of the debtor. Pervading these provisions is extensive recognition that receivers or receiver-managers can be appointed privately under the terms of a debenture, whereupon they have broad powers to realise the security interests of the debenture holder(s) and, in the case of receiver-managers, broad powers concerning the carrying on of the debtor’s business, though also being under significant duties: in particular, see ss 273, 274, 277, 278, 280, 281. The underlying philosophy appears to be that, in furtherance of commercial financial interests and practices, companies can enter into debentures conferring on the lender whatever powers they consider appropriate.

[35] This philosophy is also apparent in ss 250-271 of the new Division B (“Trust Deeds and Debentures”) of the 1991 Act, which have no corresponding provisions in the 1913 Ordinance and which deal exclusively with the extensive modern phenomenon of

¹⁷ Section 91(9), now see s 471 of the 1991 Act

¹⁸ Sections 98 & 99, now see s 247 of the 1991 Act

companies issuing a class of debentures to the public pursuant to a trust deed (see ss 250-251); indeed, public companies are required by s 265 to execute a trust deed to cover any issue of debentures. Section 271(5) expressly recognises that the remedies automatically conferred by the earlier subsections are in addition to and not in substitution for any other powers and remedies conferred on the trustee under the trust deed.

[36] LOP, a private company, entered into private debentures with the Bank and not by way of trust deeds and so clauses 9 to 10 expressly confer extensive powers of disposition and management on the appointed Receiver in addition to expressly incorporating the powers conferred on a receiver by the laws of Guyana (eg s 273 in Division C of the 1991 Act), while clause 11 supports these powers of disposition with an irrevocable power of attorney, thereby protecting a purchaser under s 6 of the Powers of Attorney Act, Cap 5:08. There is thus no doubt that the Receiver can transfer good title to a purchaser by virtue of this irrevocable power of attorney. Even without such power the Receiver can transfer good title pursuant to clauses 9 and 10 of the debenture deeds and Division C of the 1991 Act, which also entitle him to carry on the business of LOP to protect the Bank's security interest.

Conclusion on powers of privately appointed receivers

[37] For these reasons we endorse the view of the Court of Appeal and Moore J that the Receiver, Mr Ward and then Mr Gaskin, was acting within his powers when improperly obstructed by LOP. It is, however, noteworthy that the Roman-Dutch law and practice relating to the creation and enforcement of mortgages and hypothecs can only be circumvented by a security transaction on which validity is conferred by the Companies

Act 1991. Thus, if an irrevocable power of attorney were to be inserted into a conventional mortgage passed and executed before the Registrar, then in the event of a default by the mortgagor, this could not be exercised to circumvent the integral procedure requiring court proceedings for foreclosure of the mortgagor's interest in the mortgaged land and for organizing sale of the land.¹⁹ The election for the judicial transport procedure for a sale of the mortgaged land precludes any attempt to rely upon a private procedure for sale of the land.

The underlying conditions for a valid sale by a receiver

[38] The LOP First and Second Debentures, given under the seal of LOP in the presence of two subscribing witnesses and a Notary Public, satisfied the requirements for a valid security interest by way of a charge concerning specific property when perfected by registration. A charge in respect of particular property transfers no ownership or possessory interest in that property, so that it “rests in contract: there is therefore no distinction between a charge and an agreement for a charge” as Sir Roy Goode has stressed²⁰. Each debenture was a formal agreement by LOP for security to be given to the Bank, adequately identified the particular property of LOP that was to be security for the specified loaned money that LOP was obliged to repay with interest, and was perfected by registration after advertisement as required by the Companies Act. It is not disputed that due notice was given under the Debentures before appointment of the Receiver.

¹⁹ This is the position in South Africa where the law is similar to that in Guyana: see Wille's Principles of South African Law 9th ed (2007) at p 636

²⁰ Legal Problems of Credit and Security 3rd ed 2003, Sweet & Maxwell para 2-04, page 61

Observations on mortgages, charges and hypothecs of immovables

- [39] So far as concerns land within the Deeds Registry Act, “the law and practice relating to conventional mortgages or hypothecs” is that administered in 1917 by the Supreme Court of Guyana²¹ except for secured debentures of companies as already explained. “Conventional” hypothecs or mortgages are simply those created by express agreement.
- [40] Conventional mortgages and hypothecs, like charges, confer no ownership or possessory rights in land²². A Guyanese mortgage is totally different from the traditional common law mortgage that confers ownership rights and, unless ousted by the mortgage deed, also possessory rights. In Guyana there cannot be equitable charges²³, only legal or statutory charges. The Companies Ordinance 1913 and the Companies Act 1991 provide regimes for companies to create charges to secure their borrowings, the charges being perfected after due registration. Companies are assumed to be fully capable of looking after their own interests, while in the interests of the ready availability of finance for company borrowers, lenders to them need to have efficient remedies to enforce their security. The Companies Act in Part III therefore recognizes and endorses the commercial practices of lenders having express powers and remedies for them to realize their security without time-taking and expensive court proceedings. Hence a duly appointed receiver can be empowered to sell the charged land and transfer good title to a purchaser with or without the benefit of a statutory irrevocable power of attorney, though marketability of the land is improved if a prospective purchaser will be able to rely on the protection of s 6 of the Powers of Attorney Act.

²¹ S 3(d) proviso (ii) Civil Law Act

²² See FHW Ramsahoye, *Land Law of British Guiana* (1966) pp 237-240

²³ *Re Sampson ex p Official Receiver* (1922) LRBG 133, *Ramdass v Jairam* [2008]CCJ 6 (AJ)

[41] Whenever an instrument is an agreement whereby a landowner agrees with a creditor that particular land that he owns will be available to secure a loan from the creditor, this amounts to a contract for a “mortgage” or “hypothec” or “charge”, the particular terminology being immaterial. If nothing more is done with this contract, if the debtor defaults, the creditor can invoke the court’s aid for a money judgment determining the precise extent of the debtor’s secured financial obligation²⁴ and then for orders foreclosing the debtor’s ownership of the mortgaged, hypothecated or charged land and for selling the land to enable the creditor to be duly reimbursed. If, however, the creditor passes and executes the mortgage, hypothec or charge before the Registrar so as to obtain a money judgment and a real right by registration in the Deeds Registry, he can later rely upon the priority of this in the event of the borrower’s default, so as to have the court foreclose the borrower’s ownership and arrange for an auction sale of the land to enable the mortgagee to be duly reimbursed.

²⁴ Under Deeds Registry Act s 35 the security will not extend to future advances unless the instrument expressly provides for this and places a maximum limit upon the amount of such advances

Disposition of the appeal

[42] The appeal is dismissed and the order of the Court of Appeal is affirmed. The appellant, LOP, is to pay the respondent's costs of the appeal to this Court, to be taxed unless agreed.

.....
The Rt. Hon. Mr. Justice Michael A. de la Bastide (President)

The Hon. Mr. Justice R. Nelson

The Hon. Mr. Justice D. Pollard

The Hon. Madame Justice D. Bernard

The Hon. Mr. Justice A. Saunders

The Hon. Mr. Justice Jacob Wit

The Hon. Mr. Justice D. Hayton