



Easter Term
[2015] UKPC 16
Privy Council Appeal No 0067 of 2014

JUDGMENT

**JMMB Merchant Bank Limited (Formerly Capital
and Credit Merchant Bank Limited) (Appellant) v
The Real Estate Board (Respondent) (Jamaica)**

From the Court of Appeal of Jamaica

before

**Lady Hale
Lord Sumption
Lord Carnwath
Lord Hughes
Lord Hodge**

JUDGMENT GIVEN ON

20 April 2015

Heard on 14 January 2015

Appellant

Michael Hylton QC
Kevin Powell
Shanique Scott
(Instructed by Sheridans)

Respondent

Peter Knox QC
Dr Lloyd Barnett

(Instructed by MA Law
(Solicitors) LLP)

LORD HODGE:

1. This appeal, from the Court of Appeal of Jamaica, is concerned with the interpretation of section 31 of the Real Estate (Dealers and Developers) Act 1987 (“REDDA”). The Board recently considered the section in *Jamaican Redevelopment Foundation Inc v The Real Estate Board* [2014] UKPC 28. In this appeal there are two issues, namely (i) whether a charge in favour of the Real Estate Board (“the REB”) is valid only if it has been registered under section 93 of the Companies Act 2004; and (ii) to what extent (if at all) does a charge in favour of a regulated financial institution rank *pari passu* with the REB’s charge.

The legislation

i) REDDA

2. REDDA (sections 4 and 5) established the REB to regulate and control the practice of real estate business, including the operation of development schemes. Part IV of the Act governs such development schemes. It requires a vendor of land in a development scheme, who wishes to enter into prepayment contracts with purchasers, to be registered with the REB as a developer (sections 26 and 35). Before a vendor may enter into a prepayment contract in relation to any land section 26 requires that the land is free from any mortgage or charge securing money or moneys’ worth, except for a section 31(5) mortgage or charge in favour of an authorised financial institution. REDDA requires the vendor to forward copies of prepayment contracts to the REB (section 28) and for pre-payments to be placed in a trust account with an authorised financial institution and reported to the REB (section 29). It controls the use of the money in a trust account before completion of the contract of purchase, (a) by requiring the money to be held in trust for those legally entitled to it on completion or rescission of the contract (section 30), and (b) as an exclusive exception to that requirement, by allowing the vendor to withdraw sums from the trust account for the payment of taxes in relation to the contract of purchase and the partial reimbursement of the costs of materials supplied and work done in the construction of the building or works which are the subject of the contract (section 31(1) – (3)).

3. As this appeal is concerned with the meaning of section 31(3)(b) and (5) of REDDA, the Board sets out in full subsections (3)(b) to (7) which provide their immediate context:

“(3) Moneys so deposited in respect of a prepayment contract may be withdrawn from the account prior to the completion or rescission of the contract ... subject to the undermentioned conditions ... (b) the owner of the land on which the building or works is being constructed has executed and lodged with the Registrar of Titles a charge upon the land in accordance with subsection (4).

(4) The charge mentioned in paragraph (b) of sub-section (3) shall be a charge upon the land on which the building or works in question is being constructed in favour of the Board charging the land with the repayment of all amounts received by the vendor pursuant to the contract which shall become repayable by him upon breach by him of the contract.

(5) Such charge shall rank in priority before all other mortgages or charges on the said land except any charge created by statute thereon in respect of unpaid rates or taxes, and shall be enforceable by the Board by sale of the said land by public auction or private treaty as the Board may consider expedient:

Provided that where a mortgage or charge of the said land has been duly created in favour of an authorized financial institution to secure repayment of amounts advanced by that financial institution in connection with the construction of any buildings or works on the said land the charge created by this section shall rank *pari passu* in point of security with the mortgage or charge in favour of that authorized financial institution.

(6) For the purposes of subsection (5) a loan or advance by an authorized financial institution shall *prima facie* be taken to be made in connection with the construction of any building or works if it is expressed in the instrument creating the mortgage or charge securing the repayment of that loan or advance that the loan or advance was so made.

(7) A charge executed pursuant to this section shall be deemed to be a mortgage under the Registration of Titles Act and shall be enforceable accordingly but shall be exempt from registration fees

under the Act, transfer tax under the Transfer Tax Act and stamp duty under the Stamp Duty Act.”

4. Section 33 provides for the sale of the land by the REB if the vendor defaults in completing any prepayment contract of sale. If the REB is satisfied that that default itself or taken with other such defaults in the development scheme amounts to a failure of the scheme it can (a) require the financial institution to pay over such sums as remain in the trust account and (b) enforce the charge over the land by sale or otherwise. If the REB sells the land, it (a) divides the free proceeds between it and the authorised financial institution which has a *pari passu* mortgage or charge under section 31(5) and, thereafter, (b) distributes the aggregate of sums from the trust account and its share of the free proceeds among the purchasers rateably according to their prepayment contracts.

5. Section 44(3)(c) makes it an offence to withdraw money from the trust account in contravention of section 31, ie sums in excess of the stipulated maximum proportion of the sums certified as due under the construction contract and any sums withdrawn before the vendor has lodged the charge with the Registrar of Titles.

ii) *The Companies Act 2004*

6. Section 93(1) of the Companies Act 2004 provides that every charge created by a company registered in the island shall be void as a security against the liquidator or any creditor of the company, unless prescribed details of the charge together with the original, or a certified copy of the instrument creating the charge (if any), are delivered to or received by the Registrar, before the commencement of the winding up of the company. Sub-section (2) regulates the ranking of charges: (a) a charge registered within 21 days of its creation ranks by reference to its date of creation and (b) a charge which is not registered within that 21-day period ranks by reference to the date of its registration.

The factual background to the appeal

7. The facts in this appeal were and are undisputed. KES Development Company Limited (“KES”) carried on the business of construction and real estate development. On 16 May 2005 KES applied to the REB to be registered as a developer for the Mountain Valley Development (“the MVD”). Between December 2004 and June 2005 Zoe McHugh, the owner of the land on which the MVD was to be built (“the land”), and KES entered into prepayment contracts with persons who wished to own houses within the MVD. The deposits paid under the prepayment contracts were collected either by KES or by Jennifer Messado & Co, attorneys-at-law. The deposits were not

paid into a trust account with an authorised financial institution in breach of section 29 of REDDA. On 1 May 2006 Ms McHugh transferred the land to KES.

8. By loan agreement dated 8 August 2005 JMMB Merchant Bank Limited (“JMMB”) agreed to lend KES \$146m, of which \$120m was to finance four residential development projects, including the MVD. On the same date KES provided JMMB with a mortgage over several properties, including the land, as security for money due under the loan agreement and also obligations incurred by KES under any credit facility or financial accommodation with JMMB.

9. JMMB registered the particulars of the mortgage at Companies House on 16 March 2006 and at the Titles Office on 1 February 2007. The mortgage was later stamped to cover a further advance of \$90m and the particulars of that up-stamping were registered with both the Companies Registrar and the Titles Registrar.

10. KES granted a charge over the land in favour of the REB under section 35(3)(b) and (4) of REDDA in order to secure its contingent liability to repay the pre-payments. The charge was registered with the Titles Registrar on 18 September 2006 but particulars of the charge were not registered with the Companies Registrar.

11. The MVD failed and KES defaulted on its loan from JMMB. As a result JMMB took over and invested further funds in the MVD and later sought to sell the land pursuant to its mortgage. KES went into liquidation on 10 December 2008.

12. The REB raised proceedings in the Supreme Court seeking a declaration that its charge ranked in priority to JMMB’s charge and consequential orders. JMMB filed an ancillary claim seeking relief, including a declaration that the REB’s charge was void against it because particulars of the charge had not been registered at the Companies Office as required by section 93 of the Companies Act 2004.

13. Mangatal J delivered a written judgment dated 8 June 2011 in which she held that the REB’s charge was valid and ranked in priority to JMMB’s mortgage. Many of the issues which she addressed in her judgment are no longer in dispute. On 19 July 2013 the Court of Appeal dismissed JMMB’s appeal. Again several of the issues with which the Court of Appeal had to grapple are no longer disputed.

14. KES now appeals to the Board with the permission of the Court of Appeal.

Discussion

Issue (1): whether the REB's charge required to be registered in the Companies Office

15. Mr Hylton QC for JMMB challenged the reasoning of the Court of Appeal. He submitted that the court erred in holding (a) that the REB's charge was a statutory charge which did not need to be registered with the Companies Registrar and (b) that REDDA created a new scheme for the regulation of real estate development and that if it had been intended that the charge in favour of the REB, in order to be a valid security, had to be registered with the Companies Registrar, section 31 would have said so.

16. The Board agrees with the conclusions reached by the Jamaican courts but for reasons which differ in part from their reasoning. The Board accepts JMMB's submission that the charge in favour of the REB was not a statutory charge, which is a charge that takes effect by reason of the statute which creates it without more. In REDDA by contrast the vendor creates the charge in favour of the REB by executing and registering it in accordance with the statutory regime in order to obtain access to the prepayments before completion of the implementation of the contracts of sale. Without the executed and registered mortgage there would be no charge.

17. Nonetheless, the Board sees the regulation of development schemes in Part IV of REDDA as a self-contained statutory scheme. The REB as regulator is charged with operating a scheme to provide security for the repayment of would-be purchasers who have made prepayments to a vendor, which the developer uses, if the developer does not complete the contract. The aim of the statutory scheme is to keep the prepayments and the charged land, which is the security for their repayment on default, separate from the vendor's patrimony which is available to its other creditors. It does so by (a) requiring the establishment of the trust account with the authorised financial institution and (b) prohibiting the vendor from using the prepayments before completion unless it has created a charge over the land in favour of the REB. The scheme protects the REB's charge and thus the would-be purchasers in two ways. First, section 26(1)(b) requires the land to be free of any mortgage or charge, other than one in favour of an authorised financial institution under section 31(5), before the vendor can enter into a prepayment contract. Secondly, section 31(5) grants *pari passu* ranking only to a mortgage or charge "to secure repayment of amounts advanced ... in connection with the construction of any buildings or works on the said land". Thus, if the developer implements the statutory scheme, its other creditors will not have an interest in either the prepayments or the land in so far as it is secured to ensure their repayment.

18. Section 31(3)(b) makes the execution of the charge and its lodging with the Registrar of Titles the pre-condition of withdrawal of the pre-payments before

completion. No mention is made of registration with the Companies Registrar. Section 44(3)(c) makes it a criminal offence for the vendor not to comply with that precondition. In the Board's view these provisions are consistent with there being a self-contained scheme.

19. Another pointer towards a self-contained scheme is the conflict which could arise between the ranking conferred by section 31(5) of REDDA and the Companies Act regime if section 93 of the latter Act were to apply. Take the example of a section 31(5) charge in favour of an authorised financial institution which was created and registered in the Companies Register before the date on which the vendor created or registered with the Companies Registrar the charge in favour of the REB. Under section 93(2) of the Companies Act 2004 the security in favour of the financial institution would rank ahead of the REB's charge, but REDDA would give it only *pari passu* ranking. Thus the Companies Act 2004 would be in conflict with REDDA, unless the charge in favour of the REB took effect without registration in the Companies Register.

20. There are also practical considerations which support the view that the REB does not need to register its charge in the Companies Register. First, other creditors, who wished to obtain a security over the land, on searching the register in the Titles Office would discover the REB's charge, which section 31(5) of REDDA gives priority over all charges except the *pari passu* charge which it allows. The developer will have discharged all prior mortgages except the protected section 31(5) mortgage in compliance with section 26. There is therefore no need for the charge in favour of REB to be registered in accordance with section 93 of the Companies Act 2004 for creditors to obtain notice of the REB's charge. Secondly, REDDA imposes no obligation on a corporate developer to register the charge in favour of the REB at the Companies Office and no sanction for its failure to do so. It imposes no obligation on, and provides no mechanism for, such a developer to inform the REB when it creates the charge in order to enable the REB to register it. Indeed, REDDA imposes no obligation on the developer to inform the REB when it withdraws money from the trust fund before completion in order to fund construction. While under section 59 of the Registration of Titles Act 1889 the Registrar of Titles sends the charge holder a duplicate of a security once registered, there is no requirement on the Registrar to do so within a set time limit, thereby enabling the REB to register its charge in the Companies Register within 21 days of its creation.

21. The Board therefore concludes that a charge which a vendor creates in favour of the REB under section 31(4) of REDDA is valid without its registration in the Companies Register.

Issue (2): Whether JMMB's mortgage ranked pari passu with the REB's charge

22. Mr Hylton QC submitted that the proviso in section 31(5) applied to a mortgage which covered both lending to fund construction works on the land and also other unconnected advances. He argued that it was open to the authorised financial institution to lead evidence to show which parts of its secured lending to the developer had been used to fund construction on the land comprising the development.

23. The Board does not agree. In the Board's view the words of the proviso in section 31(5) should be given their ordinary and natural meaning, which the context and the purpose of both the provision and the Act as a whole support.

24. The proviso in the sub-section speaks of "a mortgage or charge of the said land" created in favour of an authorised financial institution "to secure repayments of amounts advanced by that financial institution in connection with the construction of any buildings or works on the said land". The natural meaning of the proviso is that one looks to the wording of the charge to ascertain its purpose and therefore whether it is entitled to the *pari passu* ranking. A charge over that land and for that purpose is given *pari passu* ranking. The sub-section confers the ranking on the charge and not on the sums secured by a more general charge which the authorised financial institution can prove to have been advanced to fund such construction and works. The proviso is addressing the terms of the charge and not what the authorised financial institution has done once it has obtained the charge.

25. Both context and statutory purpose support the ordinary and natural meaning of the language of the proviso. The purpose of the proviso is to allow a security an exclusive *pari passu* ranking with the REB's charge because that security will in the ordinary course of things have enabled the developer to enhance the value of the land which is security for the repayment of the prepayments. It excludes from that ranking all securities which do not have the required attributes. An obvious means of identifying whether a security is entitled to that ranking is to look to its terms. That avoids disputes as to whether a more general security in fact covered lending which the vendor used on such construction works. Section 31(6) provides further support for this view as it looks to the terms of the mortgage or charge to obtain prima facie evidence that the loan or advance has been made in connection with construction on land within the development.

26. On this interpretation of section 31(5) an authorised financial institution which wishes to benefit from the *pari passu* ranking has to obtain from the developer a charge which specifies its purpose as the funding of construction within the development, either expressly or by reference to a loan document which provides funding exclusively for this purpose. The institution cannot rely on a general charge which covers lending for other purposes.

27. As the decision in *Jamaican Redevelopment Foundation Inc v The Real Estate Board* (above) shows, the scheme of the Act allows a different ranking where a vendor fails to pay off a mortgage which pre-dates the prepayment contracts and the purchasers do not elect to withdraw from their contracts. But where, as here, the financial institution wishes to support the development of land by lending to a registered developer after it has entered into prepayment contracts, its security must comply with the terms of the proviso in section 31(5) to obtain the exclusive *pari passu* ranking which it confers.

28. It is not necessary in this appeal for the Board to decide a point which Mr Knox QC raised on behalf of the REB, namely whether REDDA requires the charge in favour of the authorised financial institution to be plot-specific or whether the vendor can create a security over the aggregate of the land within the development scheme without identifying in the security the sums to be spent on each plot within the scheme. The language of REDDA can support more than one interpretation. Section 31(3)(b) and (4) can be read as envisaging a plot-specific charge in favour of the REB. The proviso in section 31(5) can be read as requiring a similar charge in favour of the authorised financial institution as it refers to “the said land”. But section 33 appears to envisage an aggregate security as it provides for the rateable distribution of the proceeds of sale of the security and any residue in a trust account between the would-be purchasers following a default by the vendor. The Board leaves that question to a case in which the answer matters.

Conclusion

29. For these reasons the Board will humbly advise Her Majesty that the appeal ought to be dismissed. The Board invites the parties to agree a form of order to include the issue of costs. In the absence of agreement the parties should make written submissions on the form of order and costs within 21 days of the judgment being delivered.