

Re J. EDDINGS MOTOR CYCLES Ltd.

Supreme Court
Unsworth, C.J.
12 June 1970

Companies — registration of charges — whether registration under the Land (Titles) Order cures failure to register under the Companies Ordinance — Companies Ordinance, s. 77.

Companies — extension of time for registration of charge — qualification to protect accrued rights — Companies Ordinance, s. 83.

On an application for extension of time to register a mortgage under s. 77 of the Companies Ordinance (Cap. 30, 1974 Reprint) it was argued that the mortgage was valid by virtue of registration under the Land (Titles) Order and that, as examination of the land titles register would have given notice of the mortgage, the usual proviso saving accrued rights should not be inserted. On the other hand, it was argued for a creditor of the company that the mortgage was void against creditors, whose accrued rights should be saved if the time for registration were extended.

Held: (i) Registration under the Land (Titles) Order does not prevent a mortgage becoming void against the liquidator and creditors for failure to register it under s. 77 of the Companies Ordinance.

(ii) The fact that a mortgage had been registered under the Land (Titles) Order was no reason for not inserting the usual proviso when extending time for registration under the Companies Ordinance, preserving rights acquired prior to actual registration.

Cases referred to in the order.

Re Ehrmann Brothers Ltd., [1906] 2 Ch. 697.

Re M. I. G. Trust Ltd., [1933] Ch. 542.

Peat v Gresham Trust Ltd., [1934] A.C. 252.

Application

This was an application for extension of time for the registration of a mortgage under s. 77 of the Companies Ordinance.

P.J. Isola for the applicant company.
J.E. Triay for the judgment creditor.
B. Vaughan for the mortgagee.

30 June 1970: The following order was read—

This is an application on behalf of J. Eddings Motor Cycles Ltd. for an extension of time in which to register an indenture of mortgage dated 8 July 1965. The indenture should have been registered in accordance with s. 77 of the Companies Ordinance and became void as against the liquidator and a creditor of the company on failure to register within 21 days of the date of execution.

The application is made under s. 83 of the Ordinance which enables the court to extend the time for registration if satisfied that the omission to register the charge was due to inadvertence or to some other sufficient cause, or is not of a nature to prejudice the position of creditors or shareholders of the company, or that on other grounds it is just and equitable to grant relief. Orders under this section normally contain a proviso that the extension of time is to be without prejudice to any rights acquired prior to actual registration against the person entitled to the mortgage or charge.

The facts leading up to this application are as follows:—

(1) On 1 October 1963 the applicant company entered into a credit agreement with Lombank Ltd. and have from time to time obtained credit under that agreement. The agreement did not create a charge and did not require to be registered.

(2) On 8 July 1965, the applicant company entered into a mortgage deed with Adelaide Durham. The charge created by this deed is void as against creditors as it has not been registered in accordance with the provisions of s. 77 of the Ordinance.

(3) On 7 May 1970, Lombank Ltd. obtained judgment against the applicant company in respect of advances made under the agreement of 1 October 1963.

(4) On 20 May 1970, Lombank Ltd. sealed a writ of fieri facias for execution against the property of the applicant company but the writ was withdrawn when the solicitors for the applicant company drew attention to the existence of the mortgage referred to in para. (2) above. The solicitors at the time were not aware of the fact that the mortgage had not been registered and there can be no doubt that they were acting in good faith.

(5) It appears that at this stage the solicitors for the applicant company and Lombank Ltd. became aware of the fact that the mortgage had not been registered.

(6) On 4 June 1970, the applicant company applied to this court for an extension of time in which to register the mortgage.

(7) On 12 June 1970, the application came before me in chambers and I directed that Lombank Ltd. and the mortgagee should be given notice of the application.

(8) On 22 June 1970, Lombank Ltd. issued a fresh writ of execution.

(9) On 26 June 1970, the hearing came before me when the applicant company, Lombank and the mortgagee were represented by learned counsel.

It was agreed that the failure to register the mortgage was due to inadvertence but it was submitted on behalf of Lombank Ltd. that leave to extend the time for registration should include the usual proviso which protects rights acquired against the property before the actual registration. Counsel for the applicant company and the mortgagee submitted that the mortgage was valid as it had been registered under the Land (Titles) Order and argued that an examination of the Land Titles Register would have given notice of the existence of the mortgage to persons advancing credit to the company. The Companies Ordinance, it was submitted, was inconsistent with the Land (Titles) Order as the charge was valid if registered under the Order. Furthermore there was nothing to suggest that credit had been given on the assumption or representation that there was no charge against the property.

I do not think that registration under the Land (Titles) Order gives a document a validity which it would not otherwise possess and to this extent the registration under that Order is subject to the provisions of the Companies Ordinance. The effect of the Companies Ordinance is not to make the mortgage deed invalid for all purposes but only to make the charge created by it void against the liquidator and creditors. The position in this respect is not, in my view, altered by the fact that a creditor could have discovered the existence of the charge by an examination of the Land Titles Register.

It seems to me that this is a case in which an extension of time for registration should be given as the failure to register was admittedly due to inadvertence. In my view the normal proviso should be inserted and this would have the effect of protecting Lombank who have taken steps to enforce their debt and acquired rights against the property by the issue of the writ of execution: *Re Ehrmann Brothers Ltd.*¹ and *Re M.I.G. Trust Ltd.*². In reaching this conclusion I have carefully considered the submissions of learned counsel for the applicant company and the mortgagee but, in my view, the submissions put forward by them are not sufficient to justify me in departing from the normal procedure. I have also considered whether it is equitable to give protection to Lombank Ltd. in view of the fact that the writ of execution was issued after the application for an extension of time had been made and I have come to the conclusion that on the facts of this case it is equitable to do so particularly having regard to the facts set out in para. (4) above relating to the initial application for execution.

¹ [1906] 2 Ch. 697.

² [1933] Ch. 542.

I should also mention that it has been disclosed to me that there are circumstances relating to the financial position of the applicant company which could lead to winding up proceedings. No such proceedings have, however, been commenced and on the facts before me I do not think that I should refuse to extend the time for registration on the usual terms (*Re M.I.G. Trust Ltd.* and *Peat v Gresham Trust Ltd.* ¹).

The order that I make is that the time for the registration of the mortgage of 8 July 1965 be extended for a further 7 days from the date of this order but the extension shall be without prejudice to any rights acquired prior to actual registration including a right to issue execution acquired by the issue of a writ for that purpose.