

[1980–87 Gib LR 278]

**BARCLAYS BANK INTERNATIONAL LIMITED v. LEWIS
STAGNETTO LIMITED**

SUPREME COURT (Alcantara, A.J.): February 25th, 1985

Companies—registration of charges—extension of time—application for late registration under Companies Ordinance (cap. 30), s.85 in future to be by originating summons not by notice of motion

The applicant applied for permission to register a charge out of time.

The applicant applied, under s.85 of the Companies Ordinance (*cap.* 30), for the late registration of a charge which created a mortgage over certain properties in Gibraltar. It should have been registered with the Registrar of Companies within 21 days of its creation (as required by the Companies Ordinance, s.79) but had not been.

The applicant submitted that it should be allowed to register the charge out of time (a) as its solicitors had inadvertently failed to register it within the required 21 days; and (b) it should be allowed to make the application by way of originating summons as specified by O.102, r.2(1) of the Rules of the Supreme Court.

Held, allowing the application:

The applicant would be allowed to register the charge late as the court was satisfied that the omission to register it within 21 days of its creation was due to its solicitors' inadvertence, and the terms and conditions upon which the applicant sought to register the charge were just and expedient within the meaning of s.85 of the Companies Ordinance (*cap.* 30). The applicant was also correct to make the application by way of originating summons, although the usual procedure for seeking late registration in Gibraltar in recent years had been by issuing a notice of motion supported by an affidavit stating why the charge had not been registered within the prescribed time. In future, all such applications were to be brought by originating summons as this would be more convenient, conformed with modern English practice under the Companies Act 1948 and could be dealt with in chambers which would expedite applications. This procedure would also partly comply with the Companies Act 1929 (on which the Companies Ordinance (*cap.* 30) was based) which had given the applicant a discretion to proceed either by way of motion or originating summons (paras. 6–8).

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Cases cited:

- (1) *Charles (L.H.) & Co. Ltd., In re*, [1935] W.N. 15, considered.
- (2) *Gibraltar Bldg. Socy., In re*, Supreme Ct., June 17th, 1981, unreported, referred to.

Legislation construed:

Companies Ordinance (Laws of Gibraltar, *cap.* 30), s.83: The relevant terms of this section are set out at para. 1.

A.B. Serfaty for the applicant.

1 **ALCANTARA, A.J.:** This is an application under s.83 of the Companies Ordinance (*cap.* 30), which reads:

“The court, on being satisfied that the omission to register a charge within the time required by this Ordinance, or that the omission or misstatement of any particular with respect to any such charge or in a memorandum of satisfaction, was accidental, or 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, may, on the application of the company or any person interested, and on such terms and conditions as seem to the court just and expedient, order that the time for registration shall be extended, or, as the case may be, that the omission or misstatement shall be rectified.”

2 The applicant is seeking to register an indenture dated November 17th, 1983, executed by Lewis Stagnetto Ltd. creating a charge and a mortgage over certain properties in Gibraltar in favour of the applicant. This indenture should have been registered with the Registrar of Companies within 21 days of its creation. It was not. An application for registration after time is now being made to the court.

3 The procedure which is adopted in Gibraltar, and has been for as long as I am aware, is to issue an originating notice of motion supported by an affidavit showing cause why the charge has not been registered within the prescribed time. A copy of the charge or mortgage is always exhibited in the affidavit to enable the Registrar of Companies to identify which document is being authorized to be registered if an order is made. When the court makes an order authorizing late registration, the order should contain the following proviso: “But this order is without prejudice to the rights of any party acquired prior to the time when particulars of such charge shall be actually registered.”

4 This follows the ruling of Clauson, J. in the case of *In re L.H. Charles & Co. Ltd.* (1), which has been followed in this jurisdiction, see *In re Gibraltar Bldg. Socy.* (2). The application now before me comes, not by way of notice of motion in court, but by way of originating summons in

chambers. Counsel is relying on O.102, r.2(1) in 1 *The Supreme Court Practice 1985*, para. 102/2, at 1300. Order 102 is headed “The Companies Acts 1948 to 1981,” and r.2(1) reads:

“Except in the case of the applications mentioned in rules 3, 4 and 5 and applications made in proceedings relating to the winding up of companies, every application under the Act or the Act of 1976 or the Act of 1980 or the Act of 1981 must, in accordance with Order 5, rule 3, be made by originating summons.”

5 In para. 102/2/1 (*ibid.*, at 1301) there is a list of the applications that should be made by originating summons. Amongst them is “(n) Applications to extend the time for registration of a charge or to rectify any omission or mis-statement with respect to any charge or in a memorandum of satisfaction under s.101 of the Act.”

6 Section 101 of the Act is the English equivalent of s.83 of our Ordinance. There is little doubt in my mind that an application for the late registration of a charge in England must be by originating summons. Is it the same for Gibraltar in view of O.102? My initial reaction was that we were bound to follow suit, and that an application by way of motion was wrong. After doing some research, but by no means exhaustive or detailed, I have discovered that after the Companies Act 1948 such applications were directed to be made by originating summons (see 1 *The Annual Practice 1960*, O.53B, at 1331), whereas under the Companies Act 1929, it was discretionary on the applicant whether to proceed either by way of motion or summons (see 1 *The Annual Practice 1940*, O.53, at 978). Taking into account that our Companies Ordinance is based on the Companies Act 1929, and not on the Companies Act 1948, this might explain why applications for extension of time have continued to be made by motion. The explanation might be there, but is it a valid one?

7 I am of the opinion that in future such applications should be by originating summons and not by motion. It not only follows present English practice, but it is more convenient. An originating summons can be dealt with in chambers, which will expedite applications. It also conforms with the old O.53, insofar as it was discretionary on the applicant. Furthermore there will be uniformity of practice.

8 The application by Barclays Bank International Ltd. is supported by an affidavit by the company director of Lewis Stagnetto Ltd., and by another affidavit from the firm of the applicant’s solicitors, who plead inadvertence. I accept the plea, and order that the time for registration be extended by 14 days from today, subject to the usual proviso.

Application allowed.