

DELUX INVESTMENT COMPANY LIMITED

High Court of Solomon Islands

(Muria CJ)

Civil Case No. 192 of 1992

Hearing: 20 May 1993

Ruling: 21 May 1993

Ruling

MURIA CJ: The applicant, ANZ Banking Group, applied for an order that it has a valid registered mortgage debenture on the company's fixed term estate in Parcel 192-010-38 and that the said property be excluded from the company's siezable assets. The company referred to is Delux Investments Company Limited.

The company had been ordered by the court on the 6th October 1992 to be wound up. The court then appointed the Official Receiver to be the Provisional Liquidator of the affairs of the company.

Mr Radclyffe submitted on behalf of the applicant that his client has a registered mortgage debenture in its favour issued by the company as security for moneys lent to the company. By the mortgage debenture, the company charged "ALL AND SINGULAR its undertaking and all its assets whatsoever and wheresoever both present and future..." It is also noted that the mortgage debenture provides that it shall operate as a fixed charge.

It was further submitted by Mr. Radclyffe that a charge had been registered pursuant to the provisions of the Land and Titles Act over Parcel 192-010-38, but had not been registered with the Registrar of Companies as required by the Companies Act. Mr Radclyffe, however, said that the registered mortgage is nevertheless effective to secure the applicant's claim over that parcel of land and as such the property should not therefore be placed in the hands of the liquidator.

Mr. Kama objected to the application, arguing that the charge had not been registered under the companies Act and so it is void as against the liquidator. As such it should be placed in the hands of the liquidator as part of the siezable assets of the company and that the applicant will just have to take its place in line along with the other creditors.

Section 90 of the companies Act clearly provides that every charge is void as against the liquidator and any creditor of the company unless the prescribed particulars of the charge together with the instrument

creating the charge and duly stamped are delivered to or received by the Registrar of companies for registration within 21 days after the charge was created.

That provision does not say that a charge is void unless it is registered. The emphasis is on lodgement for registration. Thus it would appear that it is sufficient for the purpose of section 90 of the Companies Act that the particulars and the instrument creating the charge are lodged with the Registrar of Companies and hereby gaining provisional entry in the Companies Register.

The basis for the provision such as section 90 of the Act is to provide incentive to chargees to ensure that charges are lodged and registered as required by the Companies Act and that the chargee knows that if he fails to lodge the charge for registration he is exposing himself to the risk that the charge will be void as against the liquidator.

In the present case the Bank has a registered mortgage over all the assets of the company. The Bank also took out a charge under the Land Titles Act over one of the company's property, Parcel 192-010-38 and registered it under the provisions of the Land Titles Act. That charge over Parcel 192-010-38 however, had not been registered under the Companies Act as required. Section 90 of the Companies Act applies to a charge created on immovable property of a company, such as the property here concerned. As such prescribed particulars of the charge together with the charge instrument creating the charge should be lodged with the Registrar of Companies. That was not done.

It would be difficult for the Bank to rely solely on the mortgage debenture in the absence of the charge over Parcel No. 192-010-38 being registered as required by the Companies Act also. In any case, subsection (6) of section 90 says that the holding of debentures entitling the holder to a charge on immovable property does not amount to an interest in the movable property for the purpose of section 90 of the Act.

Had the Bank lodged the particulars of the charge together with the charge instrument within the time prescribed for registration with the Registrar of Companies, I would not have held it to be void. In this case the failure to comply with section 90 of the Companies Act leaves the court with no choice but to hold that the charge is void as against the liquidator.

The application that the Parcel No. 192-010-38 be excluded from the company's seizable assets is refused.

Each party to bear his own costs.

(G.J.B. Muria)
CHIEF JUSTICE