

JAMAICA

IN THE COURT OF APPEAL

**BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MISS JUSTICE SIMMONS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA**

SUPREME COURT CIVIL APPEAL COA2022CV00062

BETWEEN	CHINA SINOPHARM INTERNATIONAL CORPORATION	APPELLANT
AND	RIVI GARDNER & ASSOCIATES LIMITED	RESPONDENT
AND	GK INVESTMENTS LIMITED	INTERESTED PARTY

Written Submissions filed by Georgia Hamilton & Co for the appellant

Written Submissions filed by Myers, Fletcher & Gordon for GK Investments Limited an interested Party

26 September 2022 and 24 March 2023

PROCEDURAL APPEAL

(Considered on paper pursuant to rule 2.4 of the Court of Appeal Rules 2002)

BROOKS P

[1] I have read in draft the judgment of my sister Simmons JA. I agree with her reasoning and conclusion. There is nothing that I wish to add.

SIMMONS JA

[2] By notice of appeal filed on 27 May 2022, China Sinopharm International Corporation ('the appellant') seeks to set aside the order of Palmer-Hamilton J ('the

learned judge') refusing its application for a final charging order. The order reads as follows:

"(1) The application for a final charging order, in respect of property known as No 5. Lady Musgrave Road, part of Kensington, strata lot no 14 together with one undivided 26/250th share in the common property, which is comprised in the certificate of title registered at Volume 1528 Folio 254, is refused. The notation by the Registrar of Titles of the provisional charging order granted by Palmer Hamilton J, on February 3, 2021, on said property is to be cancelled.

(2) The application for a final charging order, in respect of property known as No 5. Lady Musgrave Road, part of Kensington, strata lot no 2 together with one undivided 15/250th share in the common property, which is comprised in the certificate of title registered at Volume 1528 Folio 242, is granted. The notation by the Registrar of Titles of the caveat lodged on March 8, 2021 on said property is to be removed.

(3) Costs of this application are awarded (1) to GK Investments against China Sinopharm to be taxed if not agreed and (2) in respect of Mr Riley and Ms Wellington, notice to be sent to indicate that the court is minded to make a cost order against them.

(4) China Sinopharm's attorneys-at-law to prepare, file and serve orders made herein. The Registrar of Titles is to be served.

(5) Leave to Appeal is refused."

Background

[3] The appellant is a limited liability company registered under the laws of the Republic of China which provides services as building contractors. Rivi Gardner & Associates Limited ('the respondent') is a limited liability company incorporated under the laws of Jamaica and was the developer of property known as the Orchards, situated in the parish of Saint Catherine. It is the owner of all that parcel of land part of No 5 Lady Musgrave Road, part of Kensington in the parish of Saint Andrew being strata lot 14

together with one undivided 26/250th share in the common property and being all the property comprised in Certificate of Title registered at Volume 1528 Folio 254 (‘the property’).

[4] By a contract dated 15 March 2018, the respondent engaged the appellant as building contractors to carry out certain infrastructure and building works pertaining to the Orchards. The contract price was originally \$1,089,855,989.11. Due to an increase in the scope of works, that sum was increased to \$1,578,672,534.46. A dispute developed between the parties pertaining to the respondent’s termination of the appellant’s services and the payment of several outstanding payment certificates. The parties subsequently entered into a written agreement for the payment of \$40,000,000.00 in settlement of the dispute. That sum was to be paid by the respondent to the appellant in two equal tranches. The respondent failed to honour the agreement and the appellant (then the claimant) filed a claim on 1 May 2020. The respondent failed to file an acknowledgment of service and a default judgment was entered in favour of the appellant on 1 June 2020 for the sum of \$41,245,890.20.

[5] The judgment debt was not paid and the appellant applied for a provisional charging order on 28 January 2021. On 3 February 2021, the order was granted by the learned judge charging the property as well as, all that parcel of land part of No 5 Lady Musgrave Road, Part of Kensington in the parish of Saint Andrew being strata lot 2 together with one undivided 34/250th share in the common property being all the property comprised in Certificate of Title registered at Volume 1528 Folio 242 (‘strata lot 2’), with “payment of the sum of \$42,954,488.00 together with any interest becoming due and the costs of the application”.

[6] The provisional charging order was “registered” on the title for the property as well as that for strata lot 2 on 3 February 2021.

[7] On 25 November 2021, the learned judge heard the application for a final charging order. At the hearing, GK Investments Limited (‘GK Investments’) participated as an

interested party on the basis that the respondent had executed a second mortgage over the property in its favour as security for a loan to Hartlands Holdings Investments Limited ('Hartlands'). That mortgage, which was issued on 9 March 2020, was not registered on the title for the property until 21 May 2021. Up to the date of the hearing, the loan to Hartlands had not been re-paid.

[8] At the hearing, GK Investments objected to the provisional charging order being made final. The issue that arose before the learned judge was whether the claimant's, now appellant's, provisional charging order took priority over GK Investment's mortgage that was registered subsequent to the notation of the said charging order on the registered title for the property.

[9] The learned judge found that:

"[142] ... China Sinopharm's provisional charging order, being an equitable charge would therefore be defeated by GK Investments' equitable mortgage which was first in time. Prior to the registration of the mortgage, the equities were equal. In **Bailey v Barnes** [1894] 1 Ch 25, Lindley LJ said, at page 36:

'Equality, here, does not mean or refer to priority in point of time...Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other...'

[143] In my judgment, even if the mortgage had not been registered, the provisional charging order would still have been unable to defeat it when one bears in mind the nature of a provisional charging order. Resultantly, GK Investments' delay in the registration of the mortgage is, in my view, though a factor to be considered, not highly determinative."

[10] The learned judge, having considered the issue of the delay in the registration of the mortgage, stated:

“[153]...the omission by a prior equitable owner will likely cause the creation of a later interest but, it cannot be ignored that generally speaking, the law recognises equitable interests and these may not always be noted on a title. It is noteworthy that the Jamaican system of land registration recognises that a registered title can be defeated by adverse possession.

[154] In my judgment, the equitable mortgage could only be defeated if it is that the Registration of Titles Act provides for the registration of a provisional charging order, which thereafter clothes it with the status of a statutory/registered charge and entitles it to priority if it is registered first in time.”

[11] In arriving at her decision, the learned judge considered whether a provisional charging order was an instrument to which section 59 of the Registration of Titles Act (‘ROTA’), which deals with the priority of instruments, applied. Having apprised herself of the definition of a charge in section 3 of the ROTA, she concluded that a provisional charging order did not fall within the definition of an instrument.

[12] The learned judge also considered the appellant’s submission that GK Investments had other securities available to satisfy the debt. This argument did not find much favour with the learned judge who stated that those securities could not be viewed in a vacuum as there was no information pertaining to the value of those other properties which were not the subject of the application. In addition, an examination of the certificates of title for those properties revealed that GK Investments was not the first mortgagee and one of the properties had already been transferred.

[13] As GK Investments was successful in its objections, costs were awarded in its favour against the appellant. On the determination of the application, the learned judge made the orders stated at para. [2] of this judgment.

The appeal

[14] The appellant, by way of a notice of appeal filed on 27 May 2022, challenged the learned judge’s orders on the following grounds:

“Ground 1: Refusing/failing to apply the proper approach in considering the Appellant’s application to finalise the provisional charging order

Ordering the cancellation of the Appellant’s Provisional Charging Order

- a. Failing to properly apply sections 58, 59 and 63 of the Registration of Titles Act, as being registered first in time, and further, while the Title was free and clear, the **Appellant’s** equitable interest should rightly have remained on [the] Title to facilitate satisfaction of the judgment debt owed by [the] Respondent.
- b. Failing to consider Civil Procedure Rule 48.9, which provides that any disposition by the judgment debtor of an interest in property subject to the **Appellant’s** provisional charging order is invalid-accordingly, the mortgage interest registered after the **Appellant’s** equitable interest is invalid as against the Claimant.
- c. Failing to, at [the] very least, make the **Appellant’s** provisional charging order to made [sic] final and rank after the interested party’s mortgage interest so that the Appellant would retain some prospect of recovering its judgment debt.

Ground 2: Refusing/Failing to prioritise the Appellant’s equitable interest over the mortgage interest of GK Investments

- d. Giving prominence to the interested party’s legal interest instead of properly considering sections 58, 59 and 63 of the Registration of Titles Act, which stipulate[s] [how the] priority of interests is determined by the date of registration.
- e. Failing to properly consider the effect of the interested party having at least four other securities available to it pursuant to the letter of commitment against which the indebtedness of the borrower could be enforced, in contrast to the Appellant which needs to proceed against Lot 5 in order to fully satisfy the judgment against the judgment debtor.

Ground 3: Failing and/or refusing to consider the conduct of the Respondent and GK Investments in making the award for costs and awarding costs against the Appellant in the circumstances

- f. Failing to appreciate the Respondent's conduct towards the Claimant in refusing to satisfy its judgment debt and causing the Appellant t[sic] to have to apply for a charging order in the first place.
- g. Failing to appreciate the Respondent's conduct in issuing a mortgage in favour of the interested party to secure the indebtedness of another whilst ignoring its liability to the Appellant under the judgment debt.
- h. Awarding costs against the Appellant in favour of GK Investment/the interested party in light of GK Investment's unexplained and inexplicable delay in registering their mortgage interest and consequently causing the Claimant to believe the Title for Lot 5 was unencumbered and taking enforcement steps against the said Lot 5.
- i. Failing to properly exercise her discretion by awarding costs against the Appellant when the case called for either such costs to be borne by the judgment debtor or the interested party."

[15] The orders being sought by the appellant are as follows:

- "a. Judgment of the Honourable Mrs Justice L. Palmer-Hamilton is set aside in respect of Orders 1 and 3(i).
- b. The application for a final charging order in respect of the property known as **NO. 5 LADY MUSGRAVE ROAD, PART OF KENSINGTON, STRATA LOT 14** together with one undivided 26/250th share in the common property which is comprised in the Certificate of Title registered at Volume 1528 Folio 254 is granted.
- c. Costs awarded against the Respondent to GK Investments for the Appellant or alternatively, GK Investments to bear its own costs.

d. Costs of the appeal and below to the Appellant to be taxed, if not agreed.”

The issues

[16] Having reviewed the grounds of appeal, I find that they can be conveniently subsumed into the following issues:

- (i) whether the learned judge erred in finding that GK Investments’ mortgage ranked in priority to the provisional charging order (grounds a c and d);
- (ii) whether the learned judge erred by not considering whether the grant of the mortgage to GK Investments amounted to an improper disposition by the respondent of its interest in the property in contravention of rule 48.9(1) of the Civil Procedure Rules, 2002 (‘CPR’) (ground b);
- (iii) whether the learned judge erred by failing to properly consider the availability of other securities to GK Investments (ground e);
- (iv) whether the learned judge erred in awarding costs to GK investments against the appellant where:
 - (a) it was the respondent’s failure to pay the debt which led to the imposition of the provisional charging order; and
 - (b) GK Investments had delayed in registering the mortgage (grounds f, g, h and i).

Issue 1: whether the learned judge erred in finding that GK Investments' mortgage ranked in priority to the provisional charging order (grounds a, c and d)

Appellant's submissions

[17] Counsel for the appellant, Ms Georgia Hamilton, submitted that the priority of encumbrances is governed by sections 58, 59 and 63 of ROTA. The cumulative effect of these sections is that priority is determined by the date of registration of the interest. As such, the appellant's interest having been registered first must take priority over the interest of GK Investments. Counsel relied on **Capital & Credit Merchant Bank Limited v The Real Estate Board consolidated with The Real Estate Board and Jennifer Messado & Co** [2013] JMCA Civ 29, in which the court stated that a mortgage derives its efficacy as a security by virtue of its registration. She stated that an instrument must first be executed and registered before it is capable of passing an interest or estate in the land, therefore an unregistered deed is incapable of passing an equitable interest and the interest holder merely has an equitable right (see **Thomas Edward McEllister and Others v Williams Biggs and Others** (1883) 8 AC 314 and **National Import-Export Bank of Jamaica v Montego Bay Investment Company Limited** [2017] JMSC Civ 67).

[18] Counsel argued that, consequently, the learned judge erred when she failed to uphold the paramountcy of the system of registration. The appellant's interest was protected as against GK Investments as up to 21 May 2020, GK Investments only had an equitable right as no interest had been passed to it. Further, the interest created by the mortgage lacked the efficacy to trump the appellant's interest which was already registered on the title. Reliance was placed on para. [32] of **National Import-Export Bank of Jamaica v Montego Bay Investment Company Limited**. Counsel stated that the court, in that case, emphasized that execution and registration are required for the effective creation or transfer of an interest in land. Therefore, GK Investments' equitable mortgage would not have been binding on third parties including the appellant.

[19] Consequently, the subsequent registration of GK Investments' equitable mortgage did not automatically result in GK Investments' interest having priority over that of the appellant as the legal estate did not pass to GK Investments until the mortgage was registered. Therefore, pursuant to section 59 of the ROTA, the appellant's prior registered interest prevails although GK Investments' mortgage predates the provisional charging order. In this regard, counsel referred to rule 48.9 of the CPR which provides that there is no difference between a provisional and final charging order.

[20] It was also submitted that registration also determines the priority between equitable and legal interests. Reference was made to **Sagicor Bank Jamaica Limited v Marvalyn Taylor Wright and Others** [2021] JMSC Civ 26, para. [22], in support of that submission. Based on that case, the provisional charging order ought to have been given priority over GK Investments' legal mortgage as it was a duly registered equitable charge on land and was also first in time. As such, the learned judge erred in granting automatic priority to GK Investments' mortgage.

[21] Counsel submitted further that the learned judge ought to have allowed the provisional charging order to remain on the title to enable the appellant to recover the judgment debt by sale of the property in the event that GK Investments no longer required a charge over the property. Reliance was placed on section 59 of the ROTA which contemplates competing interests being "entitled to priority as between themselves".

GK Investments' submissions

[22] Counsel submitted that the appellant's provisional charging order created an equitable interest in the property and its endorsement on the title did not result in the creation of a legal interest (see **Jennifer Messado and Company v North America Holdings Company Limited** (unreported), Supreme Court, Jamaica, Claim No 2011 HCV 04943 & Claim No. 2011 HCV 04669, judgment delivered 20 June 2014 ('**Jennifer Messado and Company**') in which the court described a charging order as an equitable charge). Reference was also made to **Shernett Manning v Twin Acres Development**

Company Limited and Twin Acres Development Company Limited v Horace Manderson and another [2017] JMSC Civ 54 (**Shernett Manning**).

[23] The learned judge was therefore correct when she rejected the argument that the registration of the charging order created an equitable interest that took precedence over GK Investments' registered mortgage. It was stated that although a provisional charging order can be registered on a certificate of title, such registration does not automatically result in it being granted priority over other charges as the substance of the interest registered must be determined. In any event, it is the registration of a provisional charging order which gives the holder an equitable interest. Reference was made to **Beverly Levy v Ken Sales & Marketing Ltd** [2008] UKPC 6, para. 17 (**Beverly Levy**), in support of that submission.

[24] Counsel stated that the learned judge in her analysis of the issue recognized that **Beverly Levy** dealt with the interest created by the grant of an order for sale. Reference was made to para. [117] where the learned judge stated:

“[117] If an order for sale, when entered in the Register Book, gives rise to an equitable interest, then it stands to reason that the effect of a provisional charging order cannot be greater than the effect of an order for sale.”

[25] It was submitted that the reasoning of the learned judge was correct.

[26] In the circumstances, counsel submitted further, that GK Investments' pre-existing equitable mortgage which was executed on 9 March 2020 prevails over the provisional charging order that was registered on 3 February 2021. Therefore, as of 3 February 2021, GK Investments' equitable interest and that of the appellant existed simultaneously. Reference was made to **Shernett Manning** as authority for the proposition that where a charging order exists along with an equitable mortgage they are competing equities and the equitable interest created by a charging order is subject to all other prior equities.

[27] It was also submitted that it is trite law that equitable encumbrances rank in order of creation in accordance with the maxim *qui prior est tempore, potior est jure*. Reliance

was placed on the text Fisher & Lightwood's Law of Mortgage, 3rd Australian ed, para. 24.25, in which **Capell v Winter** [1907] 2 Ch 376, 381 was cited in relation to this point. It was stated that the learned judge was, therefore, correct in finding that GK Investments' pre-existing equitable mortgage ranks in priority to the appellant's equitable interest.

[28] The endorsement of the mortgage on the title created a legal interest to which the appellant's equitable interest was subject as it is well established that a legal interest supersedes all equitable interests. The learned judge was also correct when she found that the registration of the mortgage creates a "statutory charge".

Discussion

[29] The learned judge at para. [84] identified the issue as being "...whether a judgment creditor ranks in priority to a mortgagee who registered its mortgage subsequent to the notation of the judgment creditor's charging order on the title". She then proceeded to conduct a detailed examination pertaining to the effect of the non-registration of GK Investments' mortgage and concluded, at para. [105], that prior to registration "...the instrument intituled 'Guarantors Mortgage'...would be regarded as an equitable mortgage".

[30] The nature of a charging order was also examined and the learned judge correctly concluded at para. [112] that it is an equitable charge.

[31] In order to assess whether the "registration" of the provisional charging order gave it priority over GK Investments' equitable mortgage by virtue of section 59 of the ROTA, the learned judge considered firstly, whether a charging order fell within the definition of an "instrument". Based on the definition of an "instrument" in section 3 of the ROTA she also examined whether a provisional charging order fell within the definition of a "charge" in the ROTA. The learned judge made the following findings at paras. [140] - [143] and [154] of her judgment:

“[140] GK Investments is only concerned with one of the properties, strata lot No 14. It obtained an equitable mortgage on March 9, 2020, months before China Sinopharm even instituted proceedings against RGA (proceedings were instituted on May 1, 2020). Having regard to all that has been stated above, in my judgment, the registration of GK Investments’ mortgage gave it more extensive powers than it would otherwise have under the general law. Before its registration, the mortgage was an unregistered/equitable mortgage and after its registration it became a registered mortgage.

[141] With respect to the notation of the provisional charging order on the title, it seems to me that the effect is that, like a caveat, it may operate to give notice to persons who may consider dealing with the registered proprietor. When one recalls the effect of a provisional charging order, as stated by rule 48.9 (1) of the CPR, the notation is informative and if its effect is appreciated then it is unlikely that someone will become a party to an agreement that seeks to dispose of the property.

In my view, China Sinopharm’s provisional charging order, being an equitable charge would therefore be defeated by GK Investments’ equitable mortgage which was first in time. Prior to the registration of the mortgage, the equities were equal. In **Bailey v Barnes** [1894] 1 Ch 25, Lindley LJ said, at page 36:

‘Equality, here, does not mean or refer to priority in point of time...Equality means the non-existence of any circumstance which affects the conduct of one of the rival claimants, and makes it less meritorious than that of the other...’

[143] In my judgment, even if the mortgage had not been registered, the provisional charging order would still have been unable to defeat it when one bears in mind the nature of a provisional charging order. Resultantly, GK Investments’ delay in the registration of the mortgage is, in my view, though a factor to be considered, not highly determinative.”

[32] The nature of a provisional charging order was discussed in **Bardi Ltd v McDonald Millingen** [2018] JMCA Civ 33 at paras. [14]-[15], by Phillips JA who stated:

“[14] I have set out all of this to say that a 'provisional' charging order means as the word 'provisional' indicates 'arranged or existing for the present, possibly to be changed later' (Concise Oxford Dictionary, 11th Edition, Revised). So it is, as the word suggests, preliminary only.

[15] The provisional charging order was obtained as stated without notice or ex parte. The rule dictates this (rule 48.2 of the CPR). Halsbury's Laws of England, 5th Edition, Volume 77, 2016, paragraph 331 states:

'A charge imposed by a charging order has the like effect as an equitable charge. [See the [United Kingdom] Charging Orders Act 1979 s 3(4); and para 220; and Civil Procedure Vol 12A (2015) para 1475]. The court by which a charging order is made may at any time, on the application of the debtor or any person interested in any property to which the order relates, make an order discharging or varying the charging order. [See the Charging Orders Act 1979 s3(5); and Civil Procedure Vol 12A (2015) para 1479]’.” (Emphasis supplied)

[33] The “registration” of the provisional charging order did not change its designation as an equitable charge. In **Beverly Levy** to which the learned judge referred, Lord Scott of Foscote, who delivered the judgment of the Board, stated that an order for sale gives the judgment creditor an equitable interest in land subject to other interests on the register. As pointed out by the learned judge, a charging order precedes an order for sale and as such cannot create a greater interest than that enjoyed by an order for sale. I agree with that conclusion.

[34] A mortgage is a security given to secure the repayment of a loan. It is contractual in nature and where it is unregistered, an equitable mortgage is created. In **Cowell Anthony Forbes (Representative of Estate of Wilfred Emmanuel Forbes,**

deceased) and Cowell Anthony Forbes v Miller's Liquor Store (Dist) Limited

[2016] JMCA Civ 1, Brooks JA (as he then was) stated at paras. [19]-[21]:

“[19] **The Forbeses also asserted that Miller's failure to register the mortgage prevented it from exercising powers of sale as prescribed by section 106 of the Registration of Titles Act (the ROTA).** The only remedy that Miller's was entitled to have, the Forbeses argued, was that of foreclosure under the supervision of the court.

[20] **The learned trial judge, after examining sections 63, 105 and 106 of the ROTA, found, at paragraph 13 of her written judgment, that the mortgage did not confer a legal interest on Miller's. She found, however, that Miller's was an equitable mortgagee** and that it did have the power, provided by the mortgage document, to sell...

[21] **The learned trial judge was also correct in this finding.** The position that an equitable mortgagee could only rely on the remedy of foreclosure, was subject to the agreement that the parties had concluded between themselves...” (Emphasis supplied)

[35] In Fisher & Lightwood's Law of Mortgage, para. 1.28, the learned authors state:

“An equitable mortgage is a contract which operates as a security and is enforceable under the equitable jurisdiction of the court.”

[36] In **Swiss Bank Corporation v Lloyds Bank Ltd** [1982] AC 584, the court in its examination of the issue of whether a loan agreement gave rise to an equitable charge, stated at page 594-595:

“... An equitable mortgage is created when the legal owner of the property constituting the security enters into some instrument or does some act which, though insufficient to confer a legal estate or title in the subject matter upon the mortgagee, nevertheless demonstrates a binding intention to create a security in favour of the mortgagee, or in other words evidences a contract to do so: see Fisher and Lightwood's Law of Mortgage, 9th ed. (1977), p. 13.”

[37] In this matter, the document on which GK Investments relies is intitled 'Guarantors Mortgage'. Clause 3.01 of the mortgage instrument gave GK Investments the right to retain the duplicate certificates of title for the property. GK Investments was also given powers of sale in the event of a default in re-payment of the loan by Hartlands (clause 3.03). The latter clause stated that upon such default the "security shall become immediately enforceable and the powers of sale and of distress and of appointing a receiver and all ancillary powers conferred upon mortgagees by the [ROTA] shall become immediately exercisable by the lender...". There is no dispute that prior to its registration GK Investments held an equitable mortgage.

[38] The appellant has argued that the learned judge should have granted the order for the provisional order to be made final or at the very least, to have allowed the provisional charging order to remain on the title. That submission was based on section 58 of the ROTA which provides for the registration of instruments "purporting to affect land" and section 59 which grants priority to such instruments based on the date of registration. Reliance was also placed on section 63 which states that an instrument until registered is not "effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge; ...". This submission, therefore, pre-supposes that a charging order is an instrument as defined by the ROTA. The learned judge dealt with this issue in some detail and concluded at para. [141], that the effect of "the notation of the provisional charging order on the title, ... is that, like a caveat, it may operate to give notice to persons who may consider dealing with the registered proprietor".

[39] Section 3 of the ROTA states that an "instrument" includes "a conveyance, assignment, transfer, lease, mortgage, charge and also the creation of an easement". A charge is defined as "the instrument creating and charging an annuity". An annuity is "a sum of money payable periodically and charged on land under the operation of this Act by an instrument thereunder". A judgment debt is not a periodic payment and charging orders are not mentioned in the ROTA. The conclusion of the learned judge that the definition of an instrument in the ROTA did not "capture a provisional charging order" is, in my view, correct.

[40] Equitable encumbrances rank in order of the date of their creation. In Fisher & Lightwood's Law of Mortgage, the learned authors state at para. 24.2, that "...equitable encumbrances rank in order of the date of creation, provided the equities are otherwise equal". That prior interest can only be displaced if there is strong evidence justifying such a course. In **Capell v Winter** Parker J stated at page 381:

"...if the two equities be otherwise equal, that of the beneficiaries which is prior in point of time, must prevail."

[41] A similar view was expressed in **Shernett Manning** by Dunbar-Green J (as she then was), who stated thus:

"[117] In its effect, the charging order creates an equitable charge over the property (see **Halifax Plc v Curry Popeck (A Firm)** 2008 EWHC 1692). In circumstances, as the instant case, where the charging order exists along with an equitable mortgage, they are competing equities."

[42] In order to determine who has the better equity, Kindersley VC in **Rice v Rice** (1853) 61 ER 646 at page 648, indicated that the following factors are relevant:

- i. The nature and condition of the respective equitable interests;
- ii. The circumstances and manner of their acquisition; and
- iii. The whole conduct of the parties.

[43] In **Rice v Rice** the equitable mortgage was later in time, however, the scales were tipped in favour of the mortgagee who was in possession of the title deeds.

[44] In the Australian case of **Bunnings Group Ltd v Hanson Construction Materials Pty Ltd and another** [2017] WASC 132, the court stated that where the merits of the equities are unequal, the general rule pertaining to priority may be displaced. Chaney J, at para. 22 of the judgment, stated that this could arise where "the conduct on the part of the holder of the earlier interest has led the other to acquire his interest on the supposition that the earlier interest did not exist".

[45] GK Investments being the holder of an equitable mortgage had the option of lodging a caveat to protect its priority. Section 139 of the ROTA states:

“139. Any beneficiary or other person claiming any estate or interest in land under the operation of this Act, or in any lease, mortgage or charge, under any unregistered instruments, or by devolution in law or otherwise, may lodge a caveat with the Registrar in the Form in the Thirteenth Schedule, or as near thereto as circumstances will permit, forbidding the registration of any person as transferee or proprietor of, and of any instrument affecting, such estate or interest, either absolutely or until after notice of the intended registration or dealing be given to the intended caveator, or unless such instrument be expressed to be subject to the claim of the caveator, as may be required in such caveat.”

[46] In **Clark v Raymor (Brisbane) Pty Limited [No 2]** [1982] QSCFC 58, a respondent contracted to purchase land that was jointly owned by Mr and Mrs S. Mr S executed a guarantee in favour of the appellant on 27 February 1980. No caveat was lodged to protect the appellant’s interest. A title search revealed that there was a mortgage registered on the title. The mortgage was discharged and the registered title was delivered to the respondent on 2 May 1980. On the same day, the relevant documents were lodged for registration. The judge at first instance held that the appellant’s prior equitable interest had been postponed in favour of that held by the respondent. The court of appeal dismissed the appeal. Andrews SPJ stated at pages 791-792:

“Speaking to the point taken by the appellants that the respondents’ equity as it were crystallized at the time of the signing of the subject contract of sale and that that was the time at which it is relevant to consider the conduct of the holders of the competing equities, it is my view that the cases establish clearly enough that it is the whole conduct of the parties which is relevant.

It is my further view that subsequent events may alter the character of an equitable interest in land so as to make relevant the continuing expansion of relevant circumstances,

that is to say, relevant to the question of the whole conduct of the parties.

It has been stressed by the learned trial Judge and by Thomas J. that the chargee obtained an equitable interest over the whole of the property of the man Sanders; that the chargee left matters in such state that a search of the Register of Titles would demonstrate that the land was subject only to a registered mortgage. The clear inference to anybody making such a search is that the certificate of title is in possession of the registered mortgagee.

In those circumstances I think the holder of the prior equitable interest is bound in his own defence against postponement of his interest to lodge a caveat with the Registrar of Titles. It would I think be quite different if he were the holder of an equitable interest backed up by possession of the relevant title deed.

In *J. & H. Just (Holdings) Pty. Ltd. v. Bank of New South Wales* (1971) 125 C.L.R. 546 Barwick C.J. said at pp. 554–555:-

'Whilst it may be true in some instances that 'the register may bear on its face a notice of equitable claims', this is not necessarily so and whilst in some instances a caveat of which the lodgment is noted in the certificate of title may be 'notice to all the world' that the registered proprietor's title is subject to the equitable interest alleged in the caveat this, in my opinion, is not necessarily universally the case. **To hold that a failure by a person entitled to an equitable estate or interest in land under the Real Property Act to lodge a caveat against dealings with the land must necessarily involve the loss of priority which the time of the creation of the equitable interest would otherwise give, is not merely in my opinion unwarranted by general principles or by any statutory provision but would in my opinion be subversive of the well recognized ability of parties to create or to maintain equitable interests in such lands.** Sir Owen Dixon's remarks in *Lapin v. Abigail* (1930) 44

C.L.R. 166, at p. 205 with which I respectfully agree, point in this direction.

Of course, there may be situations in which such a failure may combine with other circumstances to justify the conclusion that 'the act or omission proved against' the possessor of the prior equity 'has conduced or contributed to a belief on the part of the holder of the subsequent equity, at the time when he acquired it that the prior equity was not in existence' cf. per Knox C.J. in *Lapin v. Abigail* (1930) 44 C.L.R., at pp. 183–184. This is the relevant principle to apply if it is claimed that the priority of a prior equitable interest has been lost in competition with a subsequent equitable interest.

'In general an earlier equity is not to be postponed to a later one unless because of some act or neglect of the prior equitable owner. In order to take away any pre-existing admitted title, that which is relied upon for such a purpose must be shown and proved by those upon whom the burden to show and prove it 'lies, and ... it must amount to something tangible and distinct, something which can have the grave and strong effect to accomplish the purpose for which it is said to have been produced: per Lord Cairns L.C. in *Shropshire Union Railways and Canal Co. v. The Queen* (1875) L.R. 7 H.L. 496, at p. 507. **The act or default of the prior equitable owner must be such as to make it inequitable as between him and the subsequent equitable owner that he should retain his initial priority. This in effect means that his act or default must in some way have contributed to the assumption upon which the subsequent legal owner acted when acquiring his equity'**: *Lapin v. Abigail* per Dixon J. (1930) 44 C.L.R., at p. 204.

In my opinion, the failure to lodge a protective caveat cannot properly be said necessarily to be such an act or default. It could not properly be said to be so in the present case.'

It could not be suggested that the learned Chief Justice was qualifying the significance of a failure to lodge a caveat which had come up for mention in earlier cases. He was clearly speaking to the facts of the case with which he was concerned and it is quite apparent that his statements leave open the relevance in proper circumstances of a failure to lodge a protective caveat."

[47] In **Abigail v Lapin** [1934] All ER 720, Lord Wright who delivered the decision of the Board stated at page 726:

"... it is now clearly established that prima facie priority in time will decide the matter unless, as laid down by LORD CAIRNS, LC, in *Shropshire Union Railways and Canal Co v R* (4) that which is relied on to take away the pre-existing equitable title can be shown to be something tangible and distinct having grave and strong effect to accomplish the purpose."

[48] The appellant, having had no notice of GK Investments' equitable interest, sought to enforce its judgment by applying for a charging order. That is a two-step process. Firstly, an ex-parte application is made for a provisional charging order. Once that order is obtained, an application may be made for a final charging order. At that hearing an interested party such as GK Investments can make submissions in opposition to the grant of the final order. Whilst the judgment debt owed to the appellant is quite substantial, the sum secured by the mortgage is even more so and GK Investments was entitled to the possession of the registered title for the property. In addition, in order for the appellant to receive the fruits of its judgment an order for sale would be required.

[49] In this matter, the mortgage was first in time. Whilst the failure of GK Investments to notify the world of its interest may have influenced the appellant's decision to apply for a charging order and the incurring of costs, that does not in my view qualify as a "grave and strong effect". In the circumstances, it is my view that the priority afforded

to GK Investments' equitable mortgage, being first in time, was not displaced on account of its failure to give notice of its interest.

[50] The mortgage was registered on 21 May 2021. As at that date, GK Investments secured a legal interest in the property. Section 63 of the ROTA states:

"63. When land has been brought under the operation of this Act, **no instrument until registered in [the] manner herein provided shall be effectual to pass any estate or interest in such land, or to render such land liable to any mortgage or charge**; but upon such registration the estate or interest comprised in the instrument shall pass or, as the case may be, the land shall become liable in [the] manner and subject to the covenants and conditions set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature; and should two or more instruments signed by the same proprietor, and purporting to affect the same estate or interest, be at the same time presented to the Registrar for registration, the Registrar shall register and endorse that instrument which shall be presented by the person producing the certificate of title."

[51] The appellant has argued that by virtue of section 59 of the ROTA, the earlier "registration" of the provisional charging order conferred priority over GK Investments' legal mortgage. Section 59 states:

"59. Every instrument presented for registration may be in duplicate (except a transfer whereon a new certificate of title is required), and shall be registered in the order of, and as from, the time at which the same is produced for that purpose; and instruments purporting to affect the same estate or interest shall, notwithstanding any actual or constructive notice, be entitled to priority as between themselves according to the time of registration, and not according to the date of the instrument. Upon the registration of any instrument the Registrar shall bind up the original in his office in a book to be kept for that purpose and shall deliver the other (hereinafter called the duplicate) to the person entitled."

[52] This provision does not, in my view, assist the appellant. As stated above at para. [39], a charging order does not fall within the definition of an “instrument” in the ROTA. In the circumstances, the earlier “registration” of the charging order did not confer automatic priority over GK Investments’ mortgage. The “registration” of the charging order constituted notice to persons of the appellant’s equitable charge.

[53] The issue of the delay in the registration of the mortgage was raised as a factor that could displace the priority accorded to instruments that are registered first. In light of my findings above that section 59 of the ROTA does not apply to charging orders, GK Investments’ mortgage would be entitled to priority. In any event, based on my reasoning in para [49] above, the delay in its registration did not have a “grave and strong effect” on the appellant. The learned judge was therefore correct in her finding that GK Investments’ mortgage took priority over the provisional charging order.

Issue ii - whether the learned judge erred by not considering whether the grant of the mortgage to GK Investments amounted to an improper disposition by the respondent of its interest in the property in contravention of rule 48.9(1) of Civil Procedure Rules, 2002 (ground b);

Appellant’s submissions

[54] Counsel directed the court’s attention to rule 48.9 of the CPR and submitted that any disposition by the judgment debtor of an interest in property that is subject to a charging order is invalid. It was stated that the CPR provides that a provisional and a final charging order are treated in the same way. Reference was made to para. [58] of **Jennifer Messado and Company** in support of that submission. Reference was also made to para. [59] of that case where E Brown J (as he then was) stated:

“[59] So, the charging order is a court imposed equitable charge for securing a money judgment or order. While it does not divest the judgment creditor of his proprietary rights, its interference with those rights is reflected in the judgment debtor’s inability to dispose of the charged property to the detriment of the judgment creditor. Although the right to dispose of the charged property is part of the bundle of rights the owner of property enjoys, any disposal of the judgment

debtor's interest therein is invalid against the judgment creditor."

[55] It was submitted that based on the fact that the provisional charging was "registered" on the certificate of title for the property prior to the registration of GK Investments' mortgage, the registration of the mortgage would amount to a subsequent disposition of the respondent's interest in the property. In those circumstances, the registration of GK Investments' mortgage would be invalid as against the appellant.

GK Investments' submissions

[56] Counsel submitted that GK Investments' equitable mortgage was created before the grant of the provisional charging order and as such prevails over the said charging order. Reliance was placed on Fisher & Lightwood's Law of Mortgage, para. 24.2, referred to above at para. [27].

Discussion

[57] There can be no dispute that rule 48.9 of the CPR invalidates any disposal by a judgment debtor, in this case, the respondent, of its interest in property that is subject to a provisional charging order.

"Effect of a provisional or final charging order

- 48.9 (1) No disposition by a judgment debtor of an interest in property subject to a provisional or final charging order is valid against the judgment creditor.
- (2) No person or body on whom an order was served under rule 48.6(2)(c) or (d) may permit the transfer of any stock specified in the order or pay any interest or dividend payable out of the stock to any person while the order remains in force.
- (3) Where after service of the order [on] the person or body listed in rule 48.6(2)(c) or (d) makes a transfer or payment prohibited by paragraph (2), that person or body is liable to pay the judgment

creditor an amount equivalent to the value of the stock transferred or payment made or as much of it as is necessary to satisfy the judgment debt and costs.”

[58] A mortgage is a form of secured loan that gives the mortgagee an interest in the land. Section 105 of the ROTA states:

“105. A mortgage and charge under this Act shall, when registered as hereinbefore provided, have effect as a security, but shall not operate as a transfer of the land thereby mortgaged or charged...”

[59] The issue of whether the respondent breached rule 48.9(1) of the CPR is dependent on the priority between the charging order and GK Investments’ mortgage. In light of the learned judge’s finding that GK Investments’ mortgage had priority over the respondent’s provisional charging order, with which I have agreed, there was no need for her to consider whether there was any breach of said rule, occasioned by the registration of GK Investments’ equitable mortgage. In any event, the mortgage was created before the grant of the provisional charging order and as such, there was no breach of rule 48.9.

Issue iii - whether the learned judge erred by failing to properly consider the availability of other securities to GK Investments (ground e);

Appellant’s submissions

[60] Counsel submitted that the learned judge erred by failing to consider the superior position of GK Investments compared to that of the appellant which is heavily indebted. She stated that GK Investments was provided with three other properties as security for the loan, two of which were, and remain unencumbered. In addition, the loan that was secured by the mortgage was also secured by four personal guarantees. The learned judge it was submitted, in making her decision, ought to have also considered the failure of GK Investments to register the mortgage until 21 May 2021, which was almost one year after the repayment of the loan to Hartlands became overdue.

[61] It was stated that, from all appearances, GK Investments has taken no steps to realise the other available securities. Counsel also made the point that the respondent is not the registered proprietor of the other properties and as such, the appellant unlike GK Investments, would have no right to pursue charges in respect of these properties. GK Investments can also seek to recover the sum loaned from Hartlands.

[62] Alternatively, it was submitted that the appellant is suffering hardship in seeking to enforce its judgment against the respondent and has no other prospects of realizing the fruits of its judgment. In any event, even if the judgment is enforced, the value of the property will be insufficient to liquidate the judgment debt.

GK Investments' submissions

[63] No submissions were made that addressed this issue directly.

Discussion

[64] The learned judge dealt with this issue in para. [155] of her judgment, where she stated thus:

“[155] In her submissions, Ms Hamilton brought the court’s attention to the fact that GK Investments had a number of securities for their debt. The affidavit of Mr Leonardo Brown filed on July 30, 2021, outlines these securities at paragraph 5. The documents exhibited to Ms Mew’s affidavit are also telling. There is no evidence before me as to the value of the properties which are not the subject of this application but there is evidence that GK Investments loaned \$65,000,000 to Hartlands. In my mind, the number of securities that GK Investments has cannot be looked at in a vacuum. Notably, the notations on some of the titles reveal that GK Investments is not the first mortgagee. Further, one notation reveals that one property was recently transferred to NCB Insurance Company Limited.”

[65] The letter of commitment from GK Investments to Hartlands dated 28 February 2020 lists the securities for the loan as being:

1. A second mortgage over the property;
2. A first mortgage over property registered at Volume 1289 Folio 630 of the Register Book of Titles (owned by CL);
3. A second mortgage over property registered at Volume 1219 Folio 524 of the Register Book of Titles (owned by CL);
4. Property registered at Volume 982 Folio 19 of the Register Book of Titles (owned by CL and already subject to a mortgage); and
5. The personal guarantees of KS, ES, HS and CL.

[66] As noted by the learned judge, no evidence of the value of those properties was presented. There was, therefore, in my view, insufficient information on which she could assess whether the value of the other securities was sufficient to satisfy the loan. In the circumstances, I am of the view, that the learned judge did not err in her consideration of this issue.

Issue iv - whether the learned judge erred in awarding costs to GK investments where:

- (a) it was the respondent's failure to pay the debt which led to the imposition of the provisional charging order; and**
- (b) GK Investments had delayed in registering the mortgage (grounds f, g, h and i).**

Appellant's submissions

[67] Counsel submitted that the learned judge erred by failing to consider the conduct of the respondent and GK Investments when making the costs order against the appellant. Specifically, it was stated that the learned judge failed to consider that it was the respondent's refusal to satisfy the judgment debt that had caused the appellant to

apply for a charging order. She also failed to have regard to the fact that the respondent had issued a mortgage in GK Investments' favour whilst failing to satisfy its indebtedness to the appellant. GK Investments' delay in registering the mortgage was also stated to be a factor that the learned judge ought to have taken into account. It was submitted that the circumstances warranted an award for costs against the respondent or GK Investments.

[68] The learned judge it was stated, failed to have sufficient regard for the respondent's disinterest in the proceedings which culminated in the enforcement proceedings. This, it was said, denied the court the opportunity to consider the respondent's true circumstances. The appellant did, however, provide the court with evidence of the respondent's "persistent unconscionable conduct" in its dealings with the appellant. These were stated to be:

- i. The respondent has benefited from the goods and services of the nominated suppliers and contractors of the development but has not provided any satisfaction resulting in the appellant suffering liability.
- ii. The respondent has made several commitments to the appellant to give satisfaction which it has not complied with.
- iii. Dishonest conduct to include its misrepresentation that it did not have sufficient assets to meet its liabilities. This was the driving force behind the appellant's urgent application for a charging order.
- iv. The respondent's director's resolution contained a misrepresentation that it would be able to pay its liabilities after guaranteeing the Hartland's loan facility. The respondent must have been aware that this was not true given its indebtedness to the appellant for over \$110,000,000.00 at the time.

[69] It was submitted that by awarding costs to GK Investments against the appellant, the learned judge has effectively rewarded GK Investments for its lack of diligence in protecting its mortgage interest. Counsel relied on **National Import-Export Bank of Jamaica v Montego Bay Investment Company Limited** for the submission that the formalities of registration must be observed. Where that is not done, the purpose of the system of land registration is lost. It was stated that a title search had been done pertaining to the property before the application for the provisional charging order was made and the title appeared to be unencumbered due to the delay in the registration of the mortgage. On this basis, the appellant sought to rely upon the unencumbered title in hopes of satisfying the debt. The actions of the respondent in delaying for over a year after the execution of the instrument to register its interest and 114 days after the appellant was granted a provisional charging order has caused the appellant to incur legal fees. This is in circumstances where the appellant has failed to provide any sufficient explanation for this delay. It is unfair that GK Investments has been allowed to flout the law with no sanctions and as such they should be made to bear their own costs.

[70] The appellant is currently exposed to several claims which include a claim in excess of \$16,000,000.00 brought by a supplier, whilst a debt of \$41,245,890.25 is owed to it by the respondent. In the circumstances, the costs of GK Investments ought to be paid by the respondent who has caused the appellant to incur costs to seek satisfaction.

GK Investments' submissions

[71] Counsel stated that prior to the application for the final charging order, there was no concession by the appellant that GK Investments was an interested party. Despite the fact that the appellant did not "strenuously argue" the point, the learned judge's ruling shows that the issue of whether GK Investments was an interested party was raised and argued by the appellant. In this regard, reference was made to paras. [20], [60] to [63] and [69] to [73] of the judgment. Time and costs were, therefore, incurred in responding to that issue.

Discussion

[72] Section 47(1) of the Judicature (Supreme Court) Act states that unless there is any "express provision to the contrary the costs of and incident to every proceeding in the Supreme Court shall be in the discretion of the Court". Rule 64.3 of the CPR states:

"The court's powers to make orders about costs include[s] [the] power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings."

[73] The general rule is that costs follow the event. This is embodied in rule 64.6 of the CPR which states that the general rule is that "[the court] must order the unsuccessful party to pay the costs of the successful party". A court may, however, depart from this rule where it is necessary to do justice between the parties. Rules 64.6 (2) and (3) state:

"(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances."

[74] The circumstances that are to be considered by the court are set out in rule 64.6(4). They are:

"(a) the conduct of the parties both before and during the proceedings;

(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;

(c) ... ;

(d) whether it was reasonable for a party –

(i) to pursue a particular allegation; and/or

(ii) to raise a particular issue;

(e) the manner in which a party has pursued-

- (i) that party's case;
- (ii) a particular allegation; or
- (iii) a particular issue; ...".

[75] Rule 64.6(5) lists the orders that may be made, including an order for a party to pay a proportion of another party's costs or costs limited to basic costs.

[76] The learned judge, in dealing with the issue of costs noted that "[p]art 48 of the CPR, did not include provisions concerning how the court should treat with costs as regards interested persons/objectors". She then referred to rules 64.3 and 64.9 of the CPR. The latter rule deals with the making of costs orders against a person who is not a party and, as recognized by the learned judge, is not applicable to GK Investments.

[77] The learned judge, in the exercise of her discretion, awarded costs to GK Investments, which was the successful party. The appellant has taken issue with that order given the circumstances of this case.

[78] Costs are in the discretion of the trial judge and the principles that guide this court in matters concerned with the exercise of a judge's discretion are well defined (see **Hadmor Productions Ltd and Others v Hamilton and Others** [1982] 1 All ER 1042). This court will only interfere with a decision based on the exercise of a judge's discretion if, as stated by Morrison JA (as he then was), in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, at para. [20]:

"...it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached'."

[79] In **David Orlando Tapper (Trading as 'Fyah Side Jerk and Bar') v Heneka Watkis-Porter (Trading as '10 Fyah Side')** [2016] JMCA Civ 11, the principle was re-stated by Phillips JA who stated at para. [33]:

“[33] I am reminded by Viscount Simon LC in **Charles Osenton & Co v Johnston** [1941] 2 All ER 245 at page 250 that:

‘...The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified...’.”

[80] The learned judge in awarding costs followed the general rule and awarded costs to GK Investments, the successful party. There is no indication on the face of the judgment that she was urged to do otherwise. It has, however, been submitted that the order was unfair to the appellant who relied on the registered title for the property before embarking on the proceedings that are the subject of this appeal.

[81] GK Investments’ delay in registering its mortgage was considered by the learned judge at para. [153] when she was addressing the issue of priorities. She stated thus:

“[153] It could be said that it is desirable that a register accurately reflects all encumbrances and interests bearing on or existing in every piece of land under the system. I appreciate Ms Hamilton’s contention that the omission by a prior equitable owner will likely cause the creation of a later interest but, it cannot be ignored that generally speaking, the law recognises equitable interests and these may not always be noted on a title.”

[82] There is, however, no indication that she considered the issue of delay in her determination of the appropriate costs order. Had the mortgage been registered the

appellant would have had notice that there was a competing interest. This would have afforded the appellant the opportunity to make an informed decision on how to proceed.

[83] As pointed out by the appellant's counsel, the actions of the respondent led to the institution of the claim and ultimately the commencement of enforcement proceedings. The existence of the mortgage was also within the respondent's knowledge. The appellant would not have been privy to that information.

[84] At the date of hearing, there was no dispute that GK Investments' equitable mortgage was granted before the provisional charging order. As stated above they were competing equities. It is, however, my view that GK Investments' failure to act timeously in the registration of its mortgage contributed to this aspect of the litigation. Therefore, although GK Investments was successful in this application, this was a case in which a departure from the general rule ought to have been considered.

[85] It is my view that, in the particular circumstances of this case, an appropriate order would be for each party to bear its own costs of the hearing in the court below.

Conclusion

[86] In light of the foregoing, I propose the following orders:

- (1) The appeal is allowed in part.
- (2) The decision of the learned judge refusing to make the provisional charging order final is affirmed.
- (3) The costs order is set aside and substituted therefor is an order that each party bears its own costs of the hearing in the court below.
- (4) The appellant is awarded 30% of its costs of the appeal and the respondent 70% of its costs.

DUNBAR-GREEN JA

[87] I have read the judgment of my learned sister Simmons JA. I agree with her reasoning and conclusion and have nothing useful to add.

BROOKS P

ORDER

- (1) The appeal is allowed in part.
- (2) The decision of the learned judge refusing to make the provisional charging order final is affirmed.
- (3) The costs order is set aside and substituted therefor is an order that each party bears its own costs of the hearing in the court below.
- (4) The appellant is awarded 30% of its costs of the appeal and the respondent 70% of its costs.