[2012] JMCA Civ 35

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 68/2011

BEFORE: THE HON MRS JUSTICE HARRIS P (Ag)
THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**THE REAL ESTATE BOARD**	**APPELLANT**
AND	**JAMAICA REDEVELOPMENT FOUNDATION INC**	**1ST RESPONDENT**
AND	**THE REGISTRAR OF TITLES**	**2ND RESPONDENT**

Dr Lloyd Barnett and Ms Gillian Burgess for the appellant

Maurice Manning and Miss Ayana Thomas instructed by Nunes, Scholefield DeLeon and Co for the 1st respondent

I St Jude Alder watching proceedings for the 2nd respondent

6, 7 March and 20 July 2012

HARRIS P (Ag)

[1] I have read, in draft, the judgment of my brother Brooks JA and agree with his reasoning and conclusion. There is nothing I wish to add.

DUKHARAN JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[3] The issue with which this appeal is concerned is whether a charge, created pursuant to the Real Estate (Dealers and Developers) Act (the Act) and lodged against the title to registered land, may properly rank ahead of a mortgage, which was registered on the title prior to that charge. Resolution of the issue turns on the interpretation of section 31(5) of the Act.

[4] In the instant case, Mangatal J ruled, on 12 May 2011, that the prior mortgage should take precedence over the later charge. She ordered that the mortgagee, the Jamaica Redevelopment Foundation Inc (JRF), was entitled to transfer the mortgaged land, pursuant to its powers of sale comprised in the mortgage, without prior reference to the chargee. The appellant, the Real Estate Board (the Board), which is the chargee in question, contends that the learned trial judge was in error when she so ruled. It asserts that the ruling is in conflict with the clear terms of the relevant provisions of the Act.

[5] In this judgment, I shall outline the factual background of the claim, set out the grounds of appeal and then summarise the respective submissions made on behalf of the Board and the respondent JRF. I trust that the summaries will do no injustice to

those erudite submissions, for which I am grateful. Thereafter, I shall set out the relevant provisions of the Act and then carry out an analysis of the issues.

The factual background

[6] Between 1994 and 1996, Horizon Merchant Bank and Horizon Building Society loaned a total of $14,800,000.00 to New World Development Corporation Ltd (New World). The loans were secured by three separate mortgages, granted by New World, in respect of 24 acres of land of which it was the registered proprietor.

[7] The mortgages were each registered on the title for the land. In 1996, New World, as part of its development of the land, subdivided it. New World requested, and was issued, several splinter titles by the Registrar of Titles (the Registrar). The three mortgages were registered on all the splinter titles. Three of those splinter titles are relevant to this appeal. There is no evidence in respect of the others.

[8] Horizon Merchant Bank and Horizon Building Society both failed and these mortgages were assigned, in the year 1999, to Refin Trust Ltd (Refin Trust). Refin Trust, in turn, assigned them, in 2003, to JRF.

[9] New World, pursuing its own interests, offered for sale, lots in the subdivision. As it was a registered developer under the Act, it entered into sale contracts with various persons for several of the lots. The contracts mentioned the construction of roadways. New World collected monies from those persons toward the sale price of

each of the relevant lots. Where monies are collected in those circumstances, such contracts for sale are regarded, by the Act, as "prepayment contracts".

[10] When New World sought to use some of those monies toward financing the development of the land, it registered a charge against four of the splinter titles, including the three titles mentioned above. In accordance with the provisions of section 31 of the Act, the charge was drawn up in favour of the Board. It was registered on each of the titles on 7 February 2007. The charge specified, however, that it was subject to the mortgages, by then, held by JRF. Undoubtedly, because it was expressed to be subject to the mortgages, the Registrar allowed the charge to be registered without the production of the duplicate certificates of title.

[11] JRF asserts that it had no prior knowledge of the registration of the charge. It is also of significance that the duplicate certificates for the titles were not produced for the purposes of the registration.

[12] It is important to note that in entering into the prepayment contracts, New World had acted in breach of section 26(1)(b) of the Act. That section prohibited New World from entering into such contracts, unless it had previously freed the land from any pre-existing mortgage or charge which secured money or money's worth. Section 26(1)(b) provided an exception to that requirement. It excluded mortgages in respect of loans, which were for financing the construction of buildings or works on the mortgaged land. There is no dispute that the JRF mortgages were not so excluded.

[13] New World later defaulted on its commitments under the mortgages. Consequently, JRF entered into contracts to sell the three lots under powers of sale contained in one of the instruments of mortgage. It succeeded in having transfers registered for two of the three titles but the Registrar refused to register the transfer of the third. In respect of the third, the Registrar asserted that the Board was entitled to the benefit of the provisions of section 31(5) of the Act, which stipulates that the charge, in favour of the Board, ranks in priority to JRF's mortgage. According to the Registrar, the Board's approval was required to permit the transfer to be registered. The inconsistency in the Registrar's approach to the various titles has not been explained but it is immaterial for the purposes of this judgment.

[14] The Board refused to give its consent to the transfer unless JRF compensated the purchasers under the prepayment contracts. JRF, being dissatisfied with that stance, filed a claim in the Supreme Court asking, among other things, for declarations that it was entitled to transfer the title, pursuant to its powers of sale, and that the charge in favour of the Board was not binding on it. Mangatal J ruled in its favour on both of those issues. It is against that ruling that the Board appeals.

The grounds of appeal

[15] The Board filed eight grounds of appeal. They are as follows:

> "i) That the learned trial judge erred in law in applying the general provisions of the Registration of Titles Act instead of the specific provisions of the Real Estate (Dealers and Developers) Act.

ii) That the learned trial [judge] erred in law in interpreting s. 31(5) of the Act otherwise than in accordance with the ordinary meaning of the words of the section.

iii) That the plain and ordinary meaning of the Act is that the charge lodged in favour of the Real Estate Board under s. 31 of the Real Estate (Dealers and Developers) Act indicates that the legislative intent was that this charge should rank in priority to all other charges.

iv) The learned trial judge erred in law in finding that the protection for the purchasers was only to occur where the land, which was the subject matter of prepayment contracts, was not already encumbered by a prior non-development related mortgage.

v) The learned trial judge erred in law in finding that the fact that the Act carries criminal penalties for the vendor in the event that he breaches the provisions of the Act by extension will cause the purchaser to lose the security the Act intended to confer on the purchaser.

vi) The learned trial judge erred in law in finding that if the Act provided that the Real Estate Board [sic] charge ranked in priority to all other mortgages then the purchaser would not require an option to withdraw from the contract.

vii) That the [sic] s. 26 of the Act creates duties and penalties for persons entering into a prepayment contract <u>as vendor</u>. (Underlining as in original)

viii) That it was not the intention of Parliament to deprive a purchaser of the statutory protection because the vendor had breached the terms of the Act."

All these grounds raise the single issue identified in paragraph [3] and turns on the true construction of section 31(5), in the context of the Act as a whole and in relation to the

Registration of Titles Act (ROTA). In my view, it is unnecessary, therefore, to address each ground separately.

The Board's position

[16] Dr Barnett, on behalf of the Board, submitted that the context in which Parliament enacted the statute was that purchasers of real estate, particularly from land developers, needed protection. He argued that it was for that reason that section 31(5) of the Act, which stipulated that the charge in favour of the Board would have priority to all other charges, except those in respect of rates or taxes, was framed as it was.

[17] On learned counsel's submission, Mangatal J incorrectly ignored the clear, natural and ordinary meaning of section 31(5). He argued that the learned judge, instead, interpreted section 31(5) using the rule of interpretation dubbed "the mischief rule". Learned counsel submitted that the learned judge not only erred in using that rule but also incorrectly identified the mischief, which Parliament had intended to cure. It is on that basis, on learned counsel's submission, that Mangatal J interpreted section 31(5) by inserting words to give the meaning that Parliament intended that only mortgages or charges, registered subsequently to the entry into the prepayment contracts, were subject to the charge created in favour of the Board.

[18] Dr Barnett submitted that the learned judge erred in finding that in order to correctly interpret the section, it was necessary to insert that concept. In support of his submissions, Dr Barnett relied on a number of cases including **Westminster City Council v Haymarket Publishing Ltd** [1981] 1 WLR 677, **Paddington Borough**

Council v Finucane [1928] Ch 567, **South Eastern Drainage Board v The Savings Bank of South Australia** [1939] 62 CLR 603 and **Dormer v Newcastle-Upon-Tyne Corporation** [1940] 2 KB 217.

The JRF's position

[19] Mr Manning advanced the arguments on behalf of JRF. In support of the reasoning and decision of the learned trial judge, he made a number of submissions, which I shall summarise in point-form.

(a) Parliament intended that all mortgages, which pre-existed the prepayment contracts, would be unaffected by those contracts. The provisions of the Act, requiring the mortgagor/developer to clear off such mortgages prior to entering into such contracts (section 26(1)), or even advertising the development (section 27), make that clear.

(b) It is against this background that section 31(5) should be interpreted. Parliament, having first sought (by section 26) to protect prior mortgagees from the interests of purchasers who had subsequently entered into prepayment contracts, could not, thereafter, have intended that such mortgagees would have been placed in a position of disadvantage; being made to

rank, by virtue of section 31(5), behind the interests of such purchasers.

(c) Parliament intended to protect purchasers, who are parties to prepayment contracts, from mortgages, which have been granted after the prepayment contract was signed. These purchasers would, however, be in no different position from any other purchaser who would be fixed with notice, by virtue of the certificate of title, of the existence of pre-existing mortgages.

(d) A literal interpretation of section 31(5) would ignore Parliament's intention to protect prior mortgagees and unjustly deprive all such mortgagees of that protection. To hold otherwise would create an unfair and irrational result running contrary to the well-established principle of priority of interests existing, not only in the common law but integral to the operation of the ROTA.

(e) The correct method of resolving the issue is to hold that Parliament did not contemplate the existence of any pre-existing mortgages at the time of the exercise

of any of the powers of the Board pursuant to its charge, registered in accordance with section 31.

Learned counsel relied on a number of authorities, including **Adler v George** [1964] 2 QB 7, **Wills v Bowley** [1983] 1 AC 57, **Western Bank Limited v Schindler** [1977] Ch 1 and **Federal Steam Navigation Co. Limited v Department of Trade and Industry** [1974] 2 All ER 97.

The relevant provisions of the Act

[20] In order to address the main issue, raised in this appeal, it is first necessary to set out the relevant portions of the sections, which will have an impact on the analysis. Section 26 of the Act, among other things, requires a vendor of land, before entering into any prepayment contract, to clear off any pre-existing mortgages, which are not connected to the financing of the development of that land. The section states, in part:

> "(1) A person shall not enter into a prepayment contract as a vendor in connection with any land which is, or is intended to be, the subject of a development scheme to which section 35 applies unless-
>
> (a) ...
>
> (b) **such land is free from any mortgage or charge securing money or money's worth (other than a mortgage or charge in favour of an authorized financial institution referred to in the proviso to subsection (5) of section 31)**;
>
> (c) ...
>
> (d) ...
>
> (2) **Where a contract is entered into by a vendor in contravention of subsection (1)** the purchaser...may,

> within such time as may be reasonable in the circumstances of each case, withdraw therefrom and recover from the vendor any moneys paid to him under the contract...but without prejudice however to the provisions of section 44 (2) (relating to the penalty for contravention of subsection (1) of this section)." (Emphasis supplied)

[21] Section 27 prohibits the advertising of the relevant land for sale where there has been no compliance with the provisions of section 26. The relevant portion is subsection (1). It states:

> "(1) A person shall not advertise for sale any land or building in a development scheme unless all the requirements specified in paragraphs (a), (b), (c) and (d) of subsection (1) of section 26 have been complied with, whether or not the person advertising proposes to enter into prepayment contracts, and unless the advertisement complies with the provisions of subsection (2) of this section."

[22] Sections 29 and 30 of the Act speak to the handling of monies paid under a prepayment contract. The developer is to pay the monies into a bank account and advise the Board of all payments. The monies are to be held in trust until completion or recission of the contracts, or dealt with, pursuant to section 31.

[23] The next relevant section is section 31. It describes the structure of the administration of the monies paid by purchasers under a prepayment contract. The intention of Parliament to protect the interests of purchasers is evident. It states:

> "(1) Subject to subsections (2) and (3) moneys deposited in a trust account pursuant to section 29 and any interest earned thereon shall not be withdrawn from the account until the completion or rescission, as the case may be, of the contract under which the moneys were received by the vendor.

(2) Moneys so deposited in a trust account may be withdrawn and deposited in another trust account with another authorized financial institution subject to such conditions as may be prescribed and the provisions of this Act shall apply to that other account and the moneys held therein as they apply to the original account.

(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 and applied by the vendor in the payment of stamp duty and transfer tax payable in respect of that contract and in partial reimbursement of the costs of materials supplied and work done in the construction of any building or works which is the subject of the contract, subject to the undermentioned conditions, that is to say-

(a) the moneys withdrawn shall not exceed ninety per cent of the amount certified by a qualified quantity surveyor or architect or other person having such qualification as the Board may prescribe for the purposes of this section (not being a person in the employment of, or having an interest in, the business of, the vendor or the developer) as being properly due for work already done and materials already supplied in the construction of the building or works and not previously paid for; and

(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 subsection (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 authorised 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 that Act, transfer tax under the Transfer Tax Act and stamp duty under the Stamp Duty Act." (Emphasis supplied)

[24] Section 44(3) is the only other section of the Act, which is relevant to this analysis. It stipulates that the vendor of land who enters into a prepayment contract in contravention of section 26(1) is guilty of an offence. A fine and/or imprisonment may be imposed on offenders.

The analysis

[25] The parties, and Mangatal J, have placed more stress on the interpretation of section 31(5), in relation to JRF's mortgages. I am of the view that the relationship between the section and the charge, actually lodged by New World, is another issue

which should also be considered. Two questions arise in that context. The first is whether the charge, actually lodged, was a charge contemplated by section 31. The secondly is, if the charge is not compliant with the section, what is the consequence of the non-compliance. I shall consider the issue of the charge, first.

(a) Section 31(5) in relation to the charge

[26] In the reproduction above, of section 31, emphasis has been placed on the portions of the section, which concern the charge. It would have been noted that the charge is to be lodged by the owner of the land. JRF and the Board disagree as to whether it is, nonetheless, a statutory charge. Mangatal J leaned toward the view that it was not.

[27] Dr Barnett argued that the charge, lodged by New World, was a statutory charge. At paragraph 17 of his written submissions, he submitted that the "test of whether a charge is a statutory charge is whether it is the product of legislative enactment". Mr Manning argued that the charge, mentioned in section 31(3), is created by the vendor of the land, in favour of the Board. That charge, he submitted, "like any other mortgage contract arises out of contract between the parties".

[28] Although section 31(3)(b) speaks to the owner of the land lodging the charge, the *proviso* to section 31(5) speaks to "the charge created by this section". It seems to me, therefore, that Parliament intended that a charge, lodged pursuant to section 31(3)(b), was a statutory charge. I, with respect, disagree with Mr Manning that it

arises out of the contract between the vendor and purchaser of the land. A contract may well be silent in that regard; it is the statute which imposes the condition.

[29] Regardless of the correct view to be taken on that point, it seems to me that what New World lodged, was not a charge in accordance with the full intent of subsections (3)(b) and (4) of section 31. Instead, New World lodged a conditional charge. The relevant condition, for these purposes, is that the charge was subject to the pre-existing mortgages. The charge stated, in part, as follows:

> "[New World] being registered as the proprietor of an estate in the land...**subject to [JRF's mortgages],** which said lands are the subject of prepayment contracts...and desiring to render the said lands available for the purpose of securing to and for the benefit of the Real Estate Board ["the Board"]...the payment of the...moneys received pursuant to the said prepayment contracts DOTH HEREBY CHARGE the said lands with the repayment of all amounts of money received by the Chargor as Vendor pursuant to the said prepayment contracts as shall become repayable by him...and with the payment of all other amounts of money as shall be payable by the Chargor in accordance with [certain specified covenants by the Chargor].
>
> **And subject as aforesaid** the Board shall have all the powers and remedies given to a mortgagee by the Registration of Titles Act." (Emphasis supplied)

[30] It seems, therefore, that New World intended that this charge, in favour of the Board, would be subject to JRF's mortgages. This may have been done after deliberate thought, or as a matter of course, whether out of deference to the system of priorities, or purely as a means of securing registration without having to produce the duplicate

certificate of title. I impute no improper motive concerning the latter. I find that that was its intention because the document creating the charge specifically so states.

[31] As an aside, I have also noted that the endorsement on the certificate of title, in respect of the Board's charge, seems to suggest that an attempt was made to state that the charge was subject to the mortgages. The endorsement is, however, defective, in that it mentions JRF's mortgages but does not say to what end. I find that the defect does not derogate from the effect of the charge in law, whatever that effect is found to be. It is an error in the drafting of the endorsement and may be corrected by the Registrar once it is brought to the Registrar's attention.

[32] Not withstanding the error in the endorsement, how does the lodging of a conditional charge fit with the stipulation in section 31(5), that "[s]uch charge [in favour of the Board] shall rank in priority before all other mortgages or charges on the said land"? In my view, an owner of land, who, by the time of lodging a conditional charge, would have already acted in breach of section 26(1), cannot thwart the intention of Parliament by lodging a conditional charge. Neither that owner, nor the relevant mortgagee, could properly point to the charge and say that the section cannot be given effect, as against this particular mortgage, because it is specifically exempted by the charge given in favour of the Board. To find otherwise could result in abuse by dishonest mortgagors.

[33] In this context, I respectfully agree with the submission by Dr Barnett that the charge in favour of the Board is a statutory charge. It may well be a charge created by the owner of the land but Parliament has stipulated its statutory effect. What that effect is, will depend on the interpretation of section 31(5).

[34] I shall now consider the interpretation of section 31(5) in the context of JRF's mortgages.

(b) Section 31(5) in relation to the mortgages

[35] The essence of the difference between both parties to the appeal is that the Board seeks to apply the strict interpretation of section 31(5), while JRF advocates that the section must take into account the hallowed approach of the ROTA. Some of the authorities cited by learned counsel assist the exercise.

[36] Section 31(4) speaks to the Board's charge as being a "charge upon the land". In **Westminster City Council**, Lord Denning MR ruled that the term, "a charge on the land", as used in the provisions of a statute passed to impose a surcharge on rates applicable to real property, meant "all the estates and interests in the land" (see page 680 D). That interpretation was used as the basis of a finding that the surcharge took priority over a mortgage, which had been created before the surcharge, and even before the act of Parliament, which authorised the surcharge, came into existence. The court, in **Westminster City Council**, considered, with approval, the decision, to similar effect, in **Paddington Borough Council**. It should be noted that "land" is also

defined, by section 2 of the Act, in similar terms. As defined by the section, it includes "all estates and interest, whether freehold or leasehold, in real property...".

[37] It will have been noted that the English statute uses the term "a charge on the land", whilst section 31(4) uses "a charge upon the land". I doubt that there is any material difference between the two phrases. On this basis, since there is no qualification of the term "land", the charge, referred to in section 31(4), would affect all estates and interests, including all mortgages, regardless of the date of creation.

[38] Next to be considered, is the rule of statutory construction, which requires that a court, in interpreting an act of Parliament, gives to that piece of legislation its "ordinary and natural meaning". It is in this context that Dr Barnett's complaint about Mangatal J's reasoning must be considered. The learned judge said, at paragraph 47 of her judgment:

> "So that in my judgment, where the Act speaks of the Board's charge ranking in priority before all other mortgages and charges **it does mean mortgages or charges registered subsequently to entry into the prepayment contracts**, because the Board's charge only comes about because of the provisions of the Act requiring its creation by the vendor and its registration." (Underlining as in original, other emphasis supplied)

The most convenient way of giving effect to the learned judge's finding is stating that she has, in her interpretation of section 31(5), inserted another exception into the section by implicitly adding the words, "prior to the entry into the prepayment contracts or", into the section. On that interpretation of the learned judge's finding, the subsection would then read:

> "Such charge shall rank in priority before all other mortgages or charges on the said land except any charge created **prior to the entry into the prepayment contracts or** 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:" (Insertion emphasised)

Another drafting solution could be to insert the exception into the proviso, such as :

> "Provided that **mortagages and charges mentioned in this subsection mean mortgages and charges created subsequent to the entry into the prepayment contracts and** where a mortgage or charge of the said land has been duly created in favour of an authorised 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. (Insertion emphasised)

Other formulations may, no doubt, be devised but, in my view, that which has been first proposed above may be the simplest, for the purposes of this analysis.

[39] There is support for Dr Barnett's complaint about an approach, such as that used by Mangatal J. That support may be found in the judgment of the majority of their Lordships' Board in **Baker and Another v R** (1975) 13 JLR 169. In that judgment, Lord Diplock said, at page 174C:

> "Where the meaning of the actual words used in a provision of a Jamaican statute is clear and free from ambiguity, the case for reading into it words which are not there, and which, if there, would alter the effect of the words actually used can only be based on some assumption as to the policy of the Jamaican legislature to which the statute was intended to give effect. If, without the added words, the provision would be clearly inconsistent with other provisions of the statute it falls within the ordinary function of a court

> of construction to resolve the inconsistency and, if this be necessary, to construe the provision as including by implication the added words. But in the absence of such inconsistency it is a strong thing for a court to hold that the legislature cannot have really intended what is clearly said but must have intended something different. In doing this a court is passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them...."

Their Lordships are not to be understood to be prohibiting, absolutely, the insertion of words in order to achieve proper understanding of Parliament's intent, nor do I understand that to be Dr Barnett's submission. What Dr Barnett does say, is that the insertion is inappropriate in the instant case. Whether his complaint is properly directed, will now be discussed against the background of the *dictum* quoted above.

[40] Their Lordships' ruling raises a number of tests by which Mangatal J's decision may be assessed. They are:

(1) Are the words used in section 31(5) clear and free from ambiguity?

(2) Would the insertion into section 31(5) of (by my formulation) the words, "prior to the entry into the prepayment contracts or", alter the effect of the words actually used in the section?

(3) If the insertion does alter the effect of the words actually used in section 31(5), is the insertion "based on some assumption as to the policy of the Jamaican legislature to which the statute was intended to give effect"?

(4) Without the inserted words, would section 31(5) be clearly inconsistent with other provisions of the statute?

(5) If there is an inconsistency, does the insertion of the words resolve the inconsistency?

I shall address each question in turn.

[41] In respect of the first question, it is my view that the words in section 31(5) are clear and free from ambiguity. The subsection plainly states that the charge in favour of the Board "shall rank in priority before all other mortgages or charges on the said land". In reading paragraphs 45 through 54 of Mangatal J's judgment, I do not understand her to say that the words, as used in the subsection, are not clear and unambiguous. I understand her to say that the meaning of those words conflict with the provisions of other sections of the Act, particularly section 26(1) as well as the general law concerning the priority of charges. The aspect of conflict will be considered below.

[42] The second question is also easily answered in the affirmative. As has been pointed out above, the insertion of the words does alter the effect of the words actually used in the section; it creates another exception. That exception was not implied by the words actually used by Parliament in section 31(5). The submission on behalf of JRF is that the exception is created by section 26(1).

[43] For the third question, I find that it is fair to say that Mangatal J, in implying the insertion, did make an "assumption as to the policy of the Jamaican legislature to which

the statute was intended to give effect". The assumption was that the order of priorities recognised by the common law as well as the ROTA is sacrosanct. That she did so, is evident from paragraphs 45, 47 and 49 of her judgment. At paragraph 45, the learned judge said:

> "However, it seems to me that the rationale for the Act expressly providing an option to the purchaser to withdraw [from a prepayment contract, made where there is a pre-existing mortgage]...is so that the purchaser can decide whether to abort the contract in those circumstances. **One of the reasons is because the mortgagee in respect of that pre-existing mortgage will have rights in priority to that of the purchaser under the prepayment contract and hence, the land is as a security subject to an interest that will take precedence over that of the purchaser in the event of breach or default on the part of the vendor**." (Emphasis supplied)

The assumption is included in the emphasised portion of the above quotation. The learned judge continued along in that theme in paragraph 47:

> "...In other words, the Act is [by section 31(7)] spelling out and **according to the Board's charge, what would have been the status of a usual registered mortgage** which comes into existence as a mortgage or charge on the basis of the nature of the contractual relations and Instruments entered into between mortgagor and mortgagee, or between charger and chargee." (Emphasis supplied)

The learned judge also said at paragraph 49:

> "Although the prepayment contracts are not automatically void because of the vendor's breach of section 26 of the Act, **it does not follow that there is in those circumstances of breach of the statutory provision any interference with the general rights of mortgagees to priority based on time of registration pursuant to the Registration of Titles Act.** This is why the Act has

> bestowed upon the purchaser the right to avoid the contract and recover his moneys with commercial interest." (Emphasis supplied)

[44] It is along those lines that the learned judge concluded, at paragraph 52, that JRF's mortgages ranked in priority to the charge in favour of the Board. She said:

> "In my judgment, JRF's mortgages rank in priority to the Board's charge **in accordance with the general provisions of the Registration of Titles Act**. The Board's charge has been entered in respect of prepayment contracts where the developer [New World] has breached the express provisions of the Act and **in my view it is plain that the Act is not intended to deprive a prior mortgagee or chargee of its security**." (Emphasis supplied)

[45] I now turn to the fourth question set out above. I find that, without the inserted words, there is no inconsistency between the provisions of section 31(5) and those of any of the other provisions in the Act. Section 31(5) speaks to an order of priority but no other section addresses priority. Mangatal J focussed on section 26(1)(b), as the basis for her interpretation of section 31(5). What section 26(1)((b) seeks to do, however, is to remove pre-existing mortgages from the issue of priority. Where, despite the statutory requirement, a pre-existing mortgage has not been removed, a remedy is provided for the purchaser by section 26(2) and a penalty is provided against the offending mortgagor/developer by section 44(3)(a).

[46] Contrary to the finding of Mangatal J, it is my respectful view, that the creation of that remedy and sanction does not demonstrate an inconsistency between section 31(5) and section 26(1)(b). I accept that no remedy is provided for the "innocent"

mortgagee under the pre-existing mortgage. The result may well be onerous to that mortgagee but there is no inconsistency between the sections. It cannot be properly said, however, that Parliament did not consider a situation where there may be a breach of sections 26(1)(b) and 27(1). That is because Parliament has provided the remedy and penalty, which have been mentioned above. For this reason, I disagree with the Mr Manning's written submissions to the contrary.

[47] It is fair to say that the inconsistency, which both JRF and her Ladyship have identified, is between section 31(5) and the general structure of the ROTA, concerning priorities. I find, however, that the path, used by Mangatal J, was that described by their Lordships in **Baker and Another v R** as, "a court...passing out of the strict field of construction altogether and giving effect to concepts of what is right and what is wrong which it believes to be so generally accepted that the legislature too may be presumed not to have intended to act contrary to them".

[48] It was their Lordships' view that such an approach was, "a strong thing"; not one, I expect, they would endorse. I find that it is not an approach, which was necessary in this case. It is true that JRF would be relegated, by my finding on this point, to the position of being a second mortgagee, behind the Board's charge. It is not clear whether it would be financially prejudiced by this finding. It may be prejudiced in respect of the contract, into which it has entered, to sell the land in question, but no details have been provided in that regard.

[49] Since, on my finding, there is no inconsistency between section 31(5) and the other sections of the Act, question five, dealing with the resolution of an inconsistency, as set out in **Baker and Another v R**, does not arise for analysis.

[50] Using the tests set out in **Baker and Another v R**, I find that there was no basis for the interpretation which required the insertion of words into section 31(5) of the Act. Based on that finding, it is my view that the learned judge erred in interpreting section 31(5) by way of creating an exception, for prior mortgages (not created in relation to the development of the land), to the provisions of the section.

[51] There is also one other tool, used in the interpretation of statutes, which is of assistance in this context. This tool stipulates that where the specific provisions of a later statute conflict with the general provisions of an earlier one, the later provisions should prevail. That principle was tersely stated in **South-Eastern Drainage Board**. The High Court of Australia, on an appeal from the Supreme Court of South Australia, said at page 616:

> "If there is an inconsistency between one statute and a later statute, the later statute prevails."

The decision is also of assistance because it involved the Real Property Act of South Australia (1886) and a later statute of that state, the South-Eastern Drainage Amendment Act (1900). The former, was the then, Torrens statute of South Australia. The later statute provided for the imposition of a charge, which was held, by the High Court of Australia, to take priority to a mortgage, created earlier in time. This was so, despite a scheme of priority of interests, similar in effect to the ROTA, under that state's

Real Property Act. In this context, it is to be noted that the Act is younger, by a century, than the ROTA.

[52] Mangatal J sought to distinguish the **South-Eastern Drainage Board** case on the basis that the imposition of the charge, in that case, was not dependent on the lodging of a document. I am constrained to, respectfully, disagree with the learned judge in this regard. In my view, once the document has been filed, the charge becomes a statutory charge and its effect is the same as if it had been automatically imposed.

Two conflicting propositions

[53] I cannot bring this judgment to a close without considering two conflicting propositions. Dr Barnett argued that "if the scheme of priority to be applied was the scheme under the [ROTA] there would be no need to enact that the Board's charge ranks in priority to subsequent mortgages because it would follow that by registering the [charge] it would rank in priority to subsequent mortgages" (paragraph 19 of the written submissions). The proposition was advanced before Mangatal J who formulated her understanding of it, at paragraph 46 of her judgment, thus:

> "...if Parliament's intention was for the Board's charge to rank only in priority to the mortgages registered subsequently, then there would have been no need for [section] 31(5) because that situation would be adequately provided for by the [ROTA]".

[54] The second proposition to which I refer, was one advanced by Mangatal J. She ruled (at paragraph 50 of her judgment) that "the provision of the purchaser's option

conferred by section 26(2) to avoid the contract would have been unnecessary if indeed section 31(5) did contemplate the Board's charge ranking in priority even to pre-existing mortgages".

[55] Both propositions require close consideration. Mangatal J rejected Dr Barnett's proposition on the basis that, sections 26(1)(b), 27 and 44(3) prohibit a vendor entering into pre-payment contracts while a prior mortgage existed. The learned judge's reason, for so doing, was set out at paragraph 46 of her judgment:

> "...the Act does not provide for, indeed, it prohibits, and hence does not contemplate, the entry by the vendor into prepayment contracts in circumstances where there is a pre-existing mortgage in respect of advances to the vendor not connected to development. **It is in fact a contravention of the Act for a developer to enter into prepayment contracts where there are prior mortgages or charges not related to development**." (Emphasis supplied)

[56] Dr Barnett, on the other hand, complained that by invoking, what I have identified as, the second proposition, Mangatal J "fell into error by trying to identify the mischief without first finding that section 31(5) was ambiguous or unclear" (paragraph 25 of the written submissions).

[57] In my view, the proposition by Mangatal J suffers from a slight flaw in that section 26(1) is not limited to pre-existing mortgages. That section also requires that vendors secure all relevant approvals in respect of the development; comply with any, and all, conditions attached to such approvals; and deposit copies of all such approvals with the Board. Section 26(2), therefore, in referring to section 26(1), does not only

address the aspect of mortgages. That comment does not, however, go to the substance of the proposition.

[58] If one concentrates on the pith of the proposition, there still remains a practical difficulty. Questions of priority and the right to recover money, usually only arise where the vendor has encountered difficulty, for whatever reason, and there is an insufficiency of funds and assets to satisfy all his creditors, be it purchasers or mortgagees. In such a case, it is unlikely that the purchaser would be entitled to invoke a right to withdraw from the prepayment contract. Section 26(2) allows the purchaser to withdraw "within such time as may be reasonable in the circumstances of each case".

[59] If a purchaser, because of the passage of time, were unable to withdraw from the prepayment contract, he would need the protection, which section 31(5) was intended to give to him, namely, a place in the creditors' line, ahead of the mortgagees. If he were still within the window of time afforded by section 26(2), but an insufficiency of funds prevented his recovery, he would, similarly, need the protection envisaged by section 31(5). For those reasons I, respectfully, do not accept Mangatal J's proposition as sound.

[60] Dr Barnett's proposition, identified above, also suffers from a flaw. It ignores the situation where a vendor may mortgage the property after entering into a prepayment contract, yet registers the Board's charge, after having that mortgage registered. That mortgage would not have been one contemplated by section 26(1), yet the ROTA would not provide the protection for the purchaser, which is covered by section 31(5).

From that point of view, sections 26(1) and 31(5) do not cover identical ground. This, however, is not a flaw, which invalidates the core of the proposition.

[61] At its core, it seems to me that the proposition is sound. Ignoring, for the moment, the difficulty identified above, Dr Barnett is correct in saying that, if it were the intention to maintain the structure concerning priorities, at common law and in the ROTA, namely, that the first in time has priority, that system of priorities would have been adequate to address a situation, where a vendor has encountered difficulties. It seems to me, therefore, that Parliament intended to alter the usual order of priorities. In my view, this is plain from the words, "[s]uch charge shall rank in priority before all other mortgages or charges on the said land..." in section 31(5). Parliament also provided for an exception to that principle, allowing charges in respect of unpaid rates and taxes to have priority to the Board's charge.

[62] I cannot agree with Mangatal J that the prohibition imposed by section 26(1)(b) addresses the core of Dr Barnett's proposition. In my view, the fact that the Act provides a remedy to a purchaser and a penalty against an offending vendor, means that Parliament did contemplate a breach of section 26(1)(b) and decided on the steps which would address that breach. It is significant that, Parliament specifically provided a remedy for the victimised purchaser but did not provide a special remedy for the innocent mortgagee. I agree with Dr Barnett's submission that, in the case of an insufficiency of funds or assets, "[t]he loss would have to fall somewhere and the legislature has determined that the purchasers under the prepayment contracts should

be first compensated under the legislative scheme" (paragraph 44 of his written submissions).

[63] Before concluding this judgement, I wish to consider a comment made by Mr Manning about the result of the application of the literal approach and would make a recommendation for the way forward.

A Recommendation

[64] Mr Manning argued, at paragraph 33 of his written submissions, that if a prior mortgagee could lose his priority in the manner contemplated by the literal approach, it would "introduce uncertainty in commercial transactions as no mortgagee [could be confident] that his security would not be undone by a subsequent purchaser secured by a statutory charge and even a subsequent mortgagee connected with the development would have higher security than the prior mortgagee". The comment is not without merit. The following is not by way of criticism of the Registrar, but is a suggestion to prevent a recurrence of the difficulty revealed in the instant case. The Registrar, if she, rightly, based on this judgment, takes the view that no mortgage may take precedence to the Board's charge, should not register a charge, in favour of the Board, which charge purports to be subject to prior mortgages. Such a charge should be made to reflect the stipulation in section 31(5).

[65] In addition, since the prior mortgage will, by registration of the Board's charge, be relegated in the order of precedence, the Registrar should insist that the duplicate certificate of title be produced so that the charge may also be registered on the

duplicate. That demand should at least ensure that the intention of the mortgagor, to register such a charge, is, at least, brought to the attention of the holder of the prior mortgage. That mortgagee would then have the option to prevent the registration of the charge or take such other steps as are open to him under the provisions of the mortgage.

Conclusion

[66] Having reviewed the judgement of the court below, the relevant provisions of the Act and the submissions of counsel, I find that the words used by Parliament in section 31(5) of the Act are clear and unambiguous. In my view, a charge created in favour of the Board must rank in priority to a pre-existing mortgage which is not connected to the development of the land. The fact that Parliament sought to first, remove prior mortgages from any complications involving priorities, does not mean that it excluded those mortgages from the operation of section 31(5). Parliament specifically considered that there may be owners who act in breach of section 26(1)(b). It provided a penalty for such breaches and provided a window for a purchaser to withdraw from a contract, which had been entered into in breach of the section. It could easily have provided a remedy for the holder of a prior mortgage but it did not do so. It specifically said that the charge in favour of the Board would rank in priority to all mortgages and charges.

[67] I find that the clear and unambiguous words should be given effect. The fact that the Act is passed after the ROTA also indicates that Parliament intended that the usual order of priorities established by the ROTA should be altered in this respect. I

would, therefore, allow the appeal, reverse the order of Mangatal J and award costs to the appellant to be agreed or taxed

HARRIS P (Ag)

ORDER

[1] The appeal is allowed. The order of Mangatal J is set aside.

[2] It is declared that the charge endorsed as Miscellaneous No 1453150 on Certificate of Title registered at Volume 1324 Folio 686 of the Register Book of Titles in favour of the Real Estate Board ranks, pursuant to section 31(5) of the Real Estate (Dealers and Developers) Act, in priority to Mortgages numbered 826623, 871222 and 915285 endorsed on the said Certificate of Title;

[3] Costs here and below to the appellant to be taxed if not agreed.