Neutral Citation Number: [2016] EWCA Civ 30

Case No: A3/2014/1508

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION, COMPANIES COURT
NICHOLAS STRAUSS QC (SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)
[2014] EWHC 1161 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2016

Before :
LORD JUSTICE BEATSON
LORD JUSTICE LINDBLOM
and
LORD JUSTICE DAVID RICHARDS

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Between :

URBAN VENTURES LIMITED	**Appellant**
- and -	
(1) SIMON ROBERT THOMAS and NICHOLAS O'REILLY as ADMINISTRATORS OF THE BLACK ANT COMPANY LIMITED (IN ADMINISTRATION) and BILLSOP PROPERTIES LIMITED (IN ADMINISTRATION)	
(2) DUNBAR ASSETS PLC	**Respondents**

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Gary Cowen (instructed by **Moon Beever**) for the **Appellant**
Marcia Shekerdemian QC (instructed by **DLA Piper UK LLP**)
for the **1st Respondents**
Ben Valentin (instructed by **Freshfields Bruckhaus Deringer LLP**) for the **2nd Respondent**

Hearing date: 8 December 2015

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Approved Judgment

Lord Justice David Richards:

1. "Tacking" describes the means by which a creditor, with a charge securing an original advance, is able to use the charge to secure a further advance and so obtain priority for the further advance over sums secured by any second or subsequent charge. Because of the potential prejudice to the interests of the holders of second or subsequent charges, first equity and then statute have severely restricted the circumstances in which tacking will be permitted. The issue on this appeal is whether, in the particular circumstances of the case, any further advances were made by the holder of first charges on various properties. Only if the proper legal conclusion on the undisputed facts is that further advances were made, will the restrictions on tacking be engaged. The judge at first instance held that no further advances were made, so that the priority of the first charges remained unchanged. The holder of second charges on the properties appeals against that decision, with permission given by Sir Timothy Lloyd.

2. Section 48 of the Land Registration Act 2002 provides that charges over registered land rank in the order of their registration. That is subject to the restrictions on tacking contained in sections 49 and 50. Section 49(1)-(5) provides the circumstances in which a further advance may be secured by the higher-ranking charge. Section 49(6) provides that "Except as provided by this section, tacking in relation to a charge over registered land is only possible with the agreement of the subsequent chargee." It is common ground that none of the circumstances specified in section 49(1) – (5) in which the tacking of "further advances" is permitted applies in the present case. The statutory position as regards other property is similar, but more shortly stated: see section 94(1) of the Law of Property Act 1925.

3. In the present case, the borrowers were two companies, The Black Ant Company Limited (TBAC) and Billsop Properties Limited (Billsop). Three properties owned by TBAC and one property owned by Billsop were the subject of first charges in favour of Dunbar Assets plc (Dunbar) and second charges in favour of the Appellant, Urban Ventures Limited (Urban). Although the details of the borrowings secured on each of these properties differ, the submissions before the judge at first instance, and before this court, have proceeded by reference to the borrowings secured by charges on one property owned by TBAC, a freehold property known as The Former Balham Bowling Club, Ramsden Road, London SW12 (the property). It appears that no issue arises in respect of the property owned by Billsop because the parties entered into a deed of priorities which governed the priorities as between their respective advances.

4. TBAC and Billsop became insolvent and were placed in administration on 15 August 2011. In the course of 2012, the administrators sold each of the four properties, realising gross proceeds of £7,312,500. Distributions totalling £6,641,000 have been made to Dunbar by the administrators. The administrators hold a further amount of approximately £200,000, pending the outcome of this appeal. There remains a shortfall of some £3,464,000 due to Dunbar and, therefore, unless Urban succeeds on this appeal, there are no funds available to meet any part of its outstanding advances.

5. By a facility letter dated 28 September 2006, Dunbar agreed to make available to TBAC a loan facility in the sum of £2.47 million. The purpose was stated to be, as to £2.3 million, to refinance current borrowings with Heritable Bank and, as to the

balance of £170,000, to roll-up interest until 30 June 2007. The facility letter is headed "Loan Facility – No.13 Account". The Indebtedness, defined to mean all monies from time to time due or contingently due to Dunbar from TBAC or any third party in connection with the facility, was repayable on demand but, in the absence of such demand, the facility was to remain available until 30 June 2007 after which date Dunbar would "consider renewing the Facility for a further period, on terms to be negotiated". Drawdown of the facility was to be made in one drawing not later than two months after the date of the letter. Interest was payable at the rate of 3% over Dunbar's base rate, subject to a minimum base rate of 4% per annum, and would be charged and become payable on a quarterly basis. Security for the Indebtedness was to consist of a first legal charge over the property, a first floating charge over all of TBAC's assets and undertakings and a personal guarantee in a principal sum of £500,000. The facility was drawn down on 26 October 2006 and on the same day a first legal charge over the property was executed, securing in standard terms all monies for the time being and from time to time due from TBAC to Dunbar. The charge was expressed to be a continuing security to Dunbar notwithstanding any settlement of account. It was registered with the Registrar of Companies on 31 October 2006 and with the Land Registry, as a first-ranking charge on the title of the property, on 10 November 2006.

6. By Heads of Terms dated 20 December 2006, Urban agreed to lend to TBAC the sum of £650,000 at a rate of interest of 30% per annum (payable as to half the interest by quarterly payments and as to the balance on the last day of the 12 month term of the loan) and secured by a second charge on the property. Clause 6 provided that at the end of the loan period, if both parties were agreed, "the contract will be renewed for at least another 12 month period by way of a new contract on terms no less favourable than those in this contract". Clause 7 provided that if either party wished to terminate the contract at the end of the loan period, six weeks notice prior to the end of the loan period should be given in writing and the loan capital and interest accrued was to be repaid in full on the last day. The second charge in favour of Urban was contained in a CH1 document dated 21 December 2006 and, with the consent of Dunbar, it was registered on the title of the property in January 2007.

7. On 9 March 2007, Urban agreed to provide a second loan facility of £450,000 to TBAC, at an interest rate of 25% per annum, secured by a third charge on the property executed on 12 March 2007 and registered on the title on 25 May 2007.

8. By a series of letters dated 28 June 2007, 1 February 2008, 16 September 2008 and 29 December 2008, the loan facility provided by Dunbar was extended. Each letter is headed "Loan Facility – No.13". Each letter refers to the facility letter dated 28 September 2006 and each states that "we are pleased to confirm that subject to the Indebtedness remaining payable upon demand, the facility shall remain available to you until" a date specified in each letter. The date specified in the last of these letters was 30 June 2009. Each letter refers to "the terms and conditions of this letter to amend the terms of the facility" and provides that "all other terms and conditions as specified in our facility letter dated 28 September 2006 continue to apply".

9. Dunbar provided to TBAC a facility letter dated 26 March 2009, which was signed as agreed and accepted on behalf of TBAC on 28 March 2009. Like the facility letter dated 28 September 2006, it was headed "Loan Facility – No.13 Account". Its text followed almost exactly the terms of the facility letter dated 28 September 2006,

except that the amount of the facility was shown as £2,593,400 and the purpose of the facility was stated to be "to continue to fund your existing borrowings". The Indebtedness under this facility was repayable on demand and, in the absence of a demand, the facility was to remain available until 30 June 2009. The security for the Indebtedness was the same as stated in the facility letter dated 28 September 2006, save for the addition of a first legal charge over all other freehold and leasehold properties held by TBAC from time to time. There was the same provision for draw down (no later than two months from the date of the letter) and the conditions precedent to the making of any drawings under the facility were in largely identical terms. Clause 14(ii), on which Urban strongly relies, provided:

> "This offer is in substitution of and not in addition to all our previous Facility letters to you which shall be deemed cancelled."

10. The difference between the sum of £2,470,000 stated in the facility letter dated 28 September 2006 and the sum of £2,593,400 stated in the facility letter dated 26 March 2009 represents the amount of accrued but unpaid interest under the original facility letter as at 26 March 2009.

11. Further facility letters, in similar terms, were issued and agreed on or about 30 June 2009, 30 September 2009 and 22 December 2009. The only differences between the facility letter dated 26 March 2009 and the subsequent facility letters were:

    i) the amount of the facility was increased to reflect the current balance, including further unpaid interest,

    ii) the statement of the purpose of the facility letter was "to fund your existing borrowings", rather than "to continue to fund your existing borrowings", and

    iii) renewal fees were payable.

12. It was Urban's case at first instance, as it is before this court, that the effect of the facility letter dated 26 March 2009 and of each of the subsequent facility letters was that Dunbar made a new or further advance to TBAC in place of the previous advance.

13. It is common ground that, if this was the effect of the facility letter dated 26 March 2009 and the subsequent facility letters, Dunbar was not entitled under the relevant statutory provisions to tack such further advance to its first legal charge so as to gain priority over Urban's second and third legal charges.

14. It is also common ground that in fact TBAC never made any payment to Dunbar in or towards repayment of the advance made to it under the facility letter dated 28 September 2006. Equally, it is common ground that Dunbar never paid any sums to TBAC after the original advance under that facility letter, nor that there were any accounting entries in the records of Dunbar or TBAC showing a notional repayment of the original advance and the making of further advances.

15. Mr Cowen, on behalf of Urban, submits that the effect of the facility letter dated 26 March 2009 was that a further advance in the sum of £2,593,400 was made in place of

the original advance and accrued interest. He submits that this is confirmed by the terms of clause 14(ii) which are clear and should be given their natural meaning, that is to say that any previous loans were cancelled and replaced by the new loan under the facility letter. He emphasises that the new facility letter, as clause 14(ii) makes clear, does not vary the terms of the original facility letter, as amended by the subsequent letters up to and including the letter dated 29 December 2008, but is a new facility which replaces the previous facility letters. The facility letter was an offer of a new contract, which was accepted by TBAC. It created a new contractual relationship in place of that which had existed before. Adopting the words of Lord Haldane in *Morris v Baron & Co* [1918] AC 1 at 19, the new facility letter makes "manifest the intention in any event of a complete extinction of the first and formal contract, and not merely the desire of an alteration, however sweeping, in terms which will still leave it subsisting". The terms of the facility letter dated 26 March 2009 are to be contrasted with the earlier amending letters, which clearly leave the original facility letter in place subject only to the amendments made by those letters.

16. Mr Cowen submits further that the facility letter dated 26 March 2009 is geared towards a new loan for a higher sum, not merely a revision of the terms of an existing contract of loan. Clause 14(ii) can be read only as a reference to the loan itself. The purpose of that provision is to show that the loan is not an additional loan but is a replacement of the previous loan. The fact that the new facility letter continued to refer to "Loan Facility – No.13 Account" was a purely practical matter to which little legal weight attached. There was, he submitted, no practical need to give the new loan a different name or to show the deemed repayment and new borrowing in the borrower's account.

17. These submissions were rejected at first instance by Mr Nicholas Strauss QC, sitting in the Chancery Division as a deputy judge of the High Court. He stated the core of his reasoning in his judgment at [6]:

> "Essentially all that has happened in this case is that Dunbar required TBAC and Billsop to sign up to date versions of their standard terms, and added unpaid interest and fees in respect of the original advances to the account. No new advances were made."

18. The judge noted at [24] that, as is common ground, there is no directly relevant authority on the meaning of "further advances". As he correctly remarked, the court must therefore start with the language and purpose of the relevant statutory provisions.

19. The judge rejected the submission on behalf of Urban that the effect of the facility letter dated 26 March 2009 was to replace the contract contained in the original facility letter with a new contract set out in the new facility letter. It was, he said, obvious that the parties were slightly altering the terms of the contract so that they complied with Dunbar's up to date standard forms. He pointed to the heading to the new facility letter, the amount of the facility being the amount of the original loan plus accrued interest and fees, the stated purpose of the facility, the fact that, as both parties knew, there was to be no new drawing under the facility, and the absence of any deemed repayment and new advance. If a deemed repayment and new advance had been intended, it is to be expected that the letter would have said so. Equally,

the presence of conditions precedent to drawdown in paragraph 9 of the new facility letter did not indicate that there was a new advance, as there is no evidence that fulfilment of the conditions was ever required or intended. He accepted the submission of Mr Valentin, on behalf of Dunbar, that the purpose of clause 14(ii) was to make clear that TBAC was not being offered an additional advance, but that the letter contained the updated terms applicable to the advance already made.

20. At [33], the judge said:

> "For these reasons, I do not accept the argument that the intention of the parties in this case was to enter into a new contract but, even if it had been intended, it does not follow that such a new contract would mean that there was a new advance. On the contrary, it would simply mean that there was a new contract relating to the existing advance. Whether or not there was a new contract, neither the parties, nor any reasonable reader of the facility letters with knowledge of the facts, would have said that a new advance had been made. In my view, Urban's main argument in this case is artificial and wrong."

21. The critical issue in this case is whether a new or further advance was made by Dunbar to TBAC on the terms of the facility letter dated 26 March 2009 and subsequently on the terms of the later facility letters. The answer to this central question is not, in my judgment, determined by whether the facility letter dated 26 March 2009 took effect as a variation of the earlier facility letter or as a replacement for it. It is, of course true, that if it were only a variation, it would follow that there was no new or further advance, but the contrary proposition does not follow. The judge was, in my view, right when he said at [33] that a new contract would not mean that there was a new advance. It could well, as he said, take effect as a new contract relating to the existing advance.

22. I consider that the judge was right to conclude that there was no new advance pursuant to the facility letter dated 26 March 2009 or any of the subsequent facility letters. So far as relevant for present purposes, an advance is a payment of money on terms that it will be repaid, in other words a loan. In this case, as is common ground, no monies were repaid by TBAC to Dunbar and no monies were paid by Dunbar to TBAC pursuant to the facility letter dated 26 March 2009. Nor did the parties agree that TBAC should be treated as repaying the existing loan, with Dunbar immediately re-lending that amount to TBAC. There is nothing in the facility letter dated 26 March 2009 to that effect. Continuing or leaving outstanding an existing loan is not the making of a new or further advance.

23. Mr Cowen drew our attention to *Clayton's Case* (1815-15) 1 Mer 572 and its effect on tacking: see *Deeley v Lloyds Bank* [1912] AC 756. The effect of *Clayton's Case* is that where there is a running account between the parties, payments into the account go to extinguish the earliest debits to the account and further debits will represent the advance of new monies, even though there may be no change to the overall amount of the indebtedness. That is of no assistance to Urban in this case, because there was no running account and the essential pre-requisite of payments into the account is absent, save for some payments in respect of interest.

24. In my judgment there was no new or further advance in or following March 2009 nor anything which the law would deem to be a new or further advance, nor any agreement between the parties that Dunbar should be treated as making a new advance. Even if the effect of the facility letter dated 26 March 2009 was to replace, rather than vary, the previous facility letter as amended, its purpose was to set out the terms, admittedly in large part the same as previously applying, to the existing advance. In any event, I agree with the judge that that facility letter and the subsequent facility letters were restatements, with relatively minor variations, of the original facility letter, rather than the complete extinction of the original facility letter and its replacement with a new contract.

25. It follows that this is not a case in which tacking arises, and Dunbar retains its priority as first chargee in respect of the advance made by it in October 2006.

26. A further part of Urban's case before the judge was that unpaid interest, which was added to the account and capitalised in successive facility letters, represented further advances which Dunbar was not entitled to tack to its first charge in priority to Urban's charges. In view of the shortfall in the recovery of principal on Dunbar's loans following the realisation of the charged properties, this issue is academic. The judge rejected this submission and, in my judgment, he was right to do so. Even when added to the principal amount stated in the facility letters, the unpaid interest remained just that – interest which had not been paid. From the start, the Indebtedness secured by the first legal charge included interest accruing under the facility letter. I am unable to see how, in the absence of an express arrangement between the parties to that effect, unpaid interest can be or be treated as a new or further advance.

27. The judge reached the same conclusion in relation to fees. Insofar as the fees in question were payable under the terms of the original facility letter, his conclusion must be right. Further fees, in small amounts, were payable on each renewal of the facility. Those fees were not payable under the terms of the original facility letter and were negotiated as part of the terms for each renewal. Since the judge confined himself to fees which were "contractually due in respect of the original advance and by the express terms of the facility letter", it does not appear that he dealt directly with these further fees. Because of the substantial shortfall arising on the sale of the properties, this too is an academic issue. If it had mattered to the practical outcome of this appeal, it would have been necessary to consider carefully whether, and in what ways, section 49 of the Land Registration Act 2002, and by a parity of reasoning section 94 of the Law of Property Act 1925, apply to the creation of new liabilities which fall within the terms of the charging provision of the first mortgage or charge. So far as I am aware, this is a novel point on which we did not hear argument and, as it is not a practical issue in this case, I say no more about it.

28. In a supplemental skeleton argument, counsel for Urban sought to develop arguments, by reference to entries in Dunbar's records and by reference to commercial considerations which supposedly would have affected Dunbar's approach, to support its case that the facility letter dated 26 March 2009 and the subsequent facility letters evidenced new advances. All these submissions could have been developed before the judge at first instance and some of them might have required or entitled Dunbar to file evidence. None raises any point of principle and I am satisfied that they are fully

met by the submissions of counsel for Dunbar in his supplemental skeleton argument in reply.

29. I would accordingly dismiss the appeal.

Lord Justice Lindblom:

30. I agree.

Lord Justice Beatson:

31. I also agree.