

SUIT NO. E 98 of 1979

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN EQUITY

And in the matter of an Order made in
Suit NO.E 202 of 1974 in relation to
the late registration of a charge.

BETWEEN CITIBANK N.A. APPLICANT

A N D OFFICE TOWERS LTD

A N D ADELA INTERNATIONAL FINANCING
COMPANY S.A.

Respondents

APPEARANCES:-

Mr. Emil George, Q.C. and Mr. Leo Rhynie
instructed by Mr. Richard Evans of Myres Fletcher & Gordon Manton
& Hart for applicant Citibank N.A. Mr. Muirhead Q.C and Dr.
Lloyd Barnett instructed by Mr. Peter Millingen of
Clinton Hart and Company for Adela International
Financing Company S.A.

No appearance by or on behalf of Office Towers Ltd.

ROSS J.

Let me begin by saying that this motion has
been extremely well argued on both sides and that I am
most, grateful to Mr. Leo Rhynie and Mr. Muirhead for the
detailed research they did in order to assist the court
with all the authorities to which they referred in the
course of their submissions.

This is a motion by the applicant Citibank N.A.
against the respondents Office Towers Limited and Adela
International Financing Company S.A for an order that the
exparte order of the Master In Chambers made upon the
application of Office Towers Limited on 13th January 1975
in Suit
No. E 202 of 1974 in this honourable Court which said order
reads as follows:-

"That the time for registration in manner
required by section 93 of the said Act of:-

1. An equitable mortgage dated the 1st day of July, 1974,
and made between Office Towers Ltd and Adela International
Financing Company S.A. of the property therein mentioned
to secure the repayment of all the liabilities of Office
Towers Ltd to Adela International Financing CC. S.A.
whether incurred before or after the deposit of the
duplicate certificate of title therein mentioned to cover
an indebtedness of U.S \$925,000.00 equivalent to J \$839,437.50
to a rate of interest which exceeds by $3\frac{1}{2}\%$ the
arithmetic mean of the London Inter Bank offer rate
quoted to Commercial banks as being the rate at which such
banks are able in accordance with their usual practice
to acquire dollars US currency in an amount to the
aggregate amount for the time being outstanding to Adela.
Interest shall accrue from day to day and shall be computed

on a 360 day a year

"be extended to 14 days from the day
of the order to be made hereon on the ground that the
omission to register such equitable mortgage was due to
inadvertence;

"be set aside or discharged on the grounds that:-

- (1) Paragraph 7 of the affidavit of Joan E. Parris sworn
on the 11th day of December 1979 (sic) filed in
support of the application in the said suit No E 202 of
1974 which states:-

"There are no charges capable of registration
under section 93 of the said Act affecting the
property of the company except the equitable mortgage
herein before mentioned and described in favour of

Adela International Financing Co. S.A." contains a material misstatement of fact in reliance upon which the said order was made.

- (2) The applicant in the said Suit NC. E 202 of 1974 Office Towers Ltd failed to make full and fair disclosure to the court of all relevant facts and in particular the fact that

(a) the alleged charge in favour of Adela International Financing Co. S.A. dated 1st July, 1974 was in fact executed on 14th May, 1974

(b) the fact that there was in existence a mortgage dated 27th February, 1973 created by the applicant in the said suit No. E 202 of 1974 in favour of Citibank N.A. formerly First National City Bank as a result whereof the learned Master made his order under misapprehension of material facts.

- (3) The applicant's attorneys-at-law, as officers of the court failed in their duty to examine with care the material at their disposal and to ascertain the true facts viz

(a) That First National City Bank was the registered proprietor of a mortgage dated 27th February, 1973

(b) that the mortgage in favour of Adela

International Financing Co S.A. was executed

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on the 14th May, 1974 and not 1st July, 1974
the date appearing
thereon, :

before permitting the affidavits of Joan E. Parris
sworn on 11th December, 1974 and 10th January 1975
to be filed in the said cause
thereby misleading this honourable court in relation to facts
material to the said application.

Mr. Leo Rhynie in a very detailed submission argued the
case for the applicant and referred to relevant cases in
support of his submissions.

He made the following points:-

- (1) that this court had jurisdiction to set aside an order
made ex parte
- (2) that on any ex parte application the utmost good faith
must be observed
- (3) that it is ^{the} duty of the applicant on such an application
to make full and fair disclosure of all relevant facts
within his knowledge
- (4) that the rationale for the rule is obvious: the
applicant is the only person appearing in the
proceedings as interested persons need not be served;
the only evidence on which the court can adjudicate
of
is evidence given on oath by or on behalf of the
applicant
- (5) that failure to make sufficient or candid disclosure
may suffice to cause the order to be set aside
- (6) that sec. 93 of the Companies Act which provides for
registration of the charge in question
states that the charge is void against a liquidator
and creditor

of a company unless prescribed particulars are registered in the manner prescribed within 21 days after the date of its creation and sets out the particular charges to which the section applies.

(7) that the rationale for the requirement of registration is that it is designed to give notice to prospective creditors of the company that property of the company is subject to a charge to enable a prospective creditor to determine the degree to which he is prepared to make a loan to a company with its property as security.

(8) that the Legislature regarded the rationale as being so persuasive that it has unequivocally declared that charges not registered in proper time would be void against such creditors and that it is relevant to appreciate that in January, 1975 when Towers applied for leave to register ^{the} mortgage out of time that mortgage was null and void against secured creditors of the company, and so it was of the utmost importance to Towers and Adela to correct this omission

(9) That sec. 99 of the Companies Act:

(a) gives the court jurisdiction to extend time in specific circumstances only

(b) gives the court power to impose such terms and conditions as seem to the court just and expedient and it has been the invariable practice of the courts to insert in the order granting extension

that the order is to be without prejudice to any rights acquired between the expiry of 21 days within ^{which} ~~the~~ the statute requires registration and the day of actual registration-see Buckley J.'s judgment in Re Joplin Brewery Company Ltd (1902) 1 Ch.D.

- (10) If an innocent judge, assuming bona fides of the applicant places reliance on the affidavit to the effect that there does not exist any rights of any creditors, it is understandable that such a judge would make the order without inserting the proviso-- the absence of the proviso protecting the rights of absent creditors is explicable only by reference to the misstatement contained in para 7 of Miss Parris affidavit which stated

"There are no charges capable of registration under section 93 of the said Act affecting the property of the company except the equitable mortgage herein before mentioned and described in favour of Adela International Financing Company S.A."

- (11) Miss ^{P.P.} Parris was aware of the mortgage of Citibank in 1973 and of the fact that the mortgage permitted the accrual of additional rights affecting the property; she is an attorney and an officer of the court, she was an associate of the firm of Clinton Hart & Company who were acting not only for Office Towers but also for Adela so she had full knowledge of all the relevant facts; as such, in

those circumstances she had a duty to make full disclosure that there existed a first mortgage, the Citibank mortgage which permitted further advances to any aggregate that to her knowledge Citibank did make further advances by which they acquired additional rights and that some of these advances were made between the date of creation of the Adela mortgage and date of application by Towers for extension of time to register the Adela mortgage.

- (12) The effect of the order of the court is to make valid, ab initio the mortgage in respect of which application was made in relation to secured creditors and the liquidator so it is deemed in law never to have been void; if rendered valid ab initio it gains priority over rights of other secured creditors whose rights accrued subsequent to date of creation of mortgage, unless the order contains a proviso that the order is without prejudice to the rights of parties acquired prior to ^{the} time when the mortgage shall be actually registered.
- (13) Because further advances were made ^{and} were undoubtedly rights acquired against the property, then the order ought to have been made subject to the proviso-but the trial judge could only make such a proviso if he had facts before him which indicate the existence of creditors other than Adela with rights accruing against the property during the period the Adela mortgage remained unregistered. Not only did he not have all the evidence before him ~~he~~ was misled by one of the statements he had before him; The only explanation

of the omission of the proviso is because of para 7 of affidavit of Miss Parris which conveyed the impression that the property was unencumbered.

- (14) The courts in exercising their discretion under S.99 of the Companies Act to grant extension of time have consistently regarded as paramount the interest of absent creditors who have acquired rights during time that the mortgage in regard to which extension is sought was void; an applicant who has knowledge of the existence of such creditors and acquires rights has a duty to produce such evidence on an application under S. 99 especially as such an application is made ex parte; if such an applicant is made ex parte; if such an applicant fails to do so, he has not observed the uberrima fides requirement of those making applications and this failure to so disclose is sufficient grounds to set aside an order made in these circumstances; a fortiori where there is a mistake made in such application that no such creditors exist.

- (15) It is not sufficient to allege inadvertence and lead evidence in regard to inadvertence in application under S.99, it is necessary and incumbent on an applicant to lead all the evidence relevant to the exercise by the court of the power conferred by S.99.

- (16) Para 7 of Miss Parris affidavit is susceptible of no

other meaning other than that the land was unencumbered by any charges which S.93 requires to be registered.

The explanation given in Miss Paris's subsequent

affidavit smacks of an after-thought as she is there saying what she had intended to say in the earlier affidavit

- (17) the fact that the mortgage was executed and delivered on ^{14th May, 1974} / is not stated in the affidavit before the Master- that is the date of its creation. The mortgage was created on ^{14th May, 1974} / and dated ^{1st July, 1974} / and that affects priorities.

During the course of these submissions Mr. Leo Rhynie referred to various authorities including the following cases:- Becker v Noel (1971) 1 W.L.R 803
The Hagen (1908 p.201
Lazard Bros and Co. v Midland Bank Ltd (1933) A.C.307
Bloomfield v. Serenyi (1945) 2 A.E.R. 646
Ellinger v. Guinness et al (1939) 4 A.E.R; 16
Re Joplin Brewery Co. Ltd (1902) 1 Ch D. 79
Re Ehrmann Bros Ltd (1906) 2 Ch D. 697
Watson v. Duff Morgan et al (1974) 1 A.E.R 794
In re Monolithic Building Co. (1915) 1 Ch.D. 643
Halsbury's Laws (4th Edition) Vol. 7 paragraph 87.

In his submissions Mr. Muirhead began by observing that if Mr. Leo Rhynie's submissions were correct the situation could perhaps properly be met, not by the

discharge of the order as sought but by a mere variation to include the usual proviso, as the applicant would suffer no disadvantage and it would ensure that no disadvantage accrues to Adela between 1975 and the present time particularly having regard to the provision in the F.N.C.B mortgage empowering F.N.C.B to make further advances.

He then read the provisions of secs.93-100 of the Companies Act and the material in support of the application in the form of the exhibits to Mr. Virtue's affidavit.
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Having gone through these exhibits A-N ^{he} went on to make the following submissions:-

- (1) That the finding of the learned Master that the failure to register was due to inadvertence was not challenged the applicant ^{is} saying that there has not been sufficient disclosure and that there has been a lack of uberrima fides; this submission does not go to the foundation on which this order is based.
- (2) That the submission based on para 7 of the affidavit of Miss Parris is no ground at all because the applicant would have had to go on to say that the F.N.C.B mortgage was at the time of application by Office Towers to register out of time the Adela mortgage "capable of registration", i.e., a mortgage which required registration and was capable of registration; the F.N.C.B mortgage at the time did not require registration; having been already registered clearly distinguishes it from one capable of registration

not having been registered.

- (3) The statutory grounds for extension of time under S. 99, Companies Act are accidental failure to register, inadvertence, or ~~some~~ other sufficient cause, or some ground which is not of a nature to prejudice the position of creditors or shareholders of the company or that on other grounds it is just and equitable to grant relief; each of these grounds is independent of the others and in the application of Office Towers the order was sought and granted on one ground viz inadvertence.
- (4) The learned trial judge having been satisfied as the law requires in regard to inadvertence granted leave in accordance with the established principles and practice that such orders are freely given unless the delay was occasioned by fraudulent intent or alternatively proceedings for winding up had already commenced.
- (5) Once the learned trial judge was satisfied that a statutory ground as provided for in s. 99 ^{the} exists for granting of order for extension of time to register and there is no reason for denying the application the Judge may impose a limitation on the order if the circumstances so warrant. In the circumstances, if there were creditors whose rights might be prejudiced by the late registration, then the court in accordance with the practice that has developed would impose

limitations in the form of the usual proviso.

- (6) There were no such creditors- because at all material times F.N.C.B mortgage had already been registered and both in the correspondence and in terms of the Adela mortgage F.N.C.B's mortgage was recognised as a first mortgage with all the priorities which the law confers thereon; accordingly at the time when Miss Paris affidavits were sworn and the application heard ^{the} F.N.C.B mortgage having already been registered was no longer capable of registration and there were no other creditors with charges capable of registration.
- (7) Any advances made by F.N.C.B under that 1st mortgage would come under its umbrella and would be protected by the charge created by the 1st mortgage and those advances would not require registration as it is the charge and not the advances which is capable of registration
- (8) Looking at the complaints of the applicant he submitted that the alleged misstatements and or non disclosure relate only to factors which may or may not or might ^{might} or ~~might~~ not have affected the inclusion of the proviso, but these complaints do not affect the grounds viz inadvertence, upon which the order extending the time for registration was granted.
As to ^{the} complaint that the date of execution of the mortgage was 14th May, 1974 and not 1st July, 1974 (the applicant
- @/

relying on para 8 of statement of claim in support of that allegation), the paragraph itself states that the instrument was dated ^{1st July, 1974} and the effective date as evidenced by the mortgage instrument is ^{1st July, 1974} and this is the date of its effective creation. Further, the complaint as to the date does not affect the ground of inadvertence upon which the order for extension of time is granted. In addition, in the circumstances of applications of this kind and in the instant application for extension of time for the Adela mortgage the difference in time between ^{1st July, 1974} 14th May, 1974 and ^{1st July, 1974} would in the nature of events constitute a de minimis complaint.

- (9) In regard to the complaint as to the absence of an affidavit of solvency this is not a legal requirement, nor is it a factor in the consideration of the application for extension of time- nor is there any evidence that Office Towers Limited was going into liquidation or that any winding up proceedings were contemplated or instituted at the time of the application.
- (10) In regard to the complaint directed to para 7 of the affidavit of Miss Farris that it contains a material misstatement of fact in reliance on which the said order was granted, for reasons already adduced, that is not a factor on which reliance is placed in the granting of the order (which was granted on the ground of inadvertence) and further, that the contents of the paragraph are true, i.e. that except for the Adela

mortgage, there were no charges capable of registration as the F.N.C.B mortgage had long since been registered. The inclusion of the proviso would arise if there was a creditor with a charge capable of registration within 21 days and which charge would be affected adversely by the late registration under the grant of leave by the court to register the Adela mortgage out of time but here there was no possible prejudice that could accrue to anyone.

- (11) As to the complaint of the applicant that there was a failure to disclose the F.N.C.B mortgage there was no necessity to disclose the existence of the registered F.N.C.B mortgage as the registration itself had ensured and accorded F.N.C.B the priority and the protection which the law allows; this therefore could not be a material fact for the consideration of the Master for extension of time
- (12) The attorneys for the applicant Office Towers acted properly and never failed in their duty by way of disclosure of material facts or otherwise to the court in support of the application for extension of time to register the Adela Mortgage.

- (13) The authorities cited indicated that an ex parte order may be set aside on grounds that the court was misled as to some material facts relative to the ground on which the jurisdiction was ~~invoked~~ or the discretion exercised. These cases are applications for leave to serve out of the jurisdiction they are very scrupulously examined and leave can only be given by a judge of the High Court in the special circumstances laid down; this was clearly evident from the cases examined as what it amounts to is making a foreigner amenable to the jurisdiction of the local court. In the absence of an attempt to deceive it would not be right for the Judge to set aside the ex parte order, and in the present case it had not been alleged that there was any attempt to deceive.
- (1) The ground on which the Judge granted leave for registration of the mortgage out of time was inadvertence and the complaints do not in any way impinge on this issue.
- (15) Limitations must be appropriate to the circumstances and Buckley J expressed the opinion in the Joplin case that there was no need for the proviso in case in which the order could not prejudice the rights of any creditor
- (16) In considering this application the court should bear in mind that the application to register out of time was made by Office Towers and that there

has been no allegation of impropriety negligence or fault made against the innocent mortgagee, Adela; further the setting aside of the order would have serious consequences on Adela who would suffer irreparable damage and perhaps very grave financial loss as it would render Adela's mortgage void under the provisions of the Act and destroy its security. The balance of convenience dictates the dismissing of the application.

- (17) The prejudice to Adela has been aggravated by inordinate delay on the part of the applicant in applying to set aside the order; the affidavit in regard to delay explains the delay only after the opinion of Mr. V.C. Blake was obtained, but says nothing in regard to the period from January, 1975 when the order was made to July, 1978 when he sought and obtained Mr. Blake's opinion a period of $3\frac{1}{2}$ years.
- (18) The gravamen of F.N.C.B's complaint is that there were facts which were either misrepresented or not disclosed, and if these facts had been presented to the court, it would have resulted in the addition of the proviso to the order for the extension of time made in January, 1975 there has been no allegation that the Judge improperly exercised his discretion and accordingly the court should be most reluctant to interfere with the order for extension of time granted in exercise of that discretion; and should dismiss the motion

- (19) If the court is of the view that the proviso ought to have been included either by way of practice or out of an abundance of caution no prejudice can accrue to F.N.C.B because their priority is preserved up to date of registration of the Adela mortgage in January, 1975 and in view of the hardship and injustice that would be occasioned to Adela by setting aside the registration, the court should invoke its inherent jurisdiction and dismiss the motion in toto, but add to the order a supplemental order in terms of the usual proviso.

In the course of his submissions Mr. Muirhead dealt with some of the authorities cited by Mr Leo Rhynie, as well as the following authorities:-

Re Mendip Press Ltd (1901 T.L.R 38

Re Kris Cruisers Ltd (1948) 2 A.E.R 1105

Pennington on Company Law (2nd edition) 384

(or 3rd edition p. 411)

RE Scowby (Scowby v Scowby) (1897) 1C hD 741

Mr. Muirhead submitted that the Scowby case referred to above was authority for saying that the court had power to make a supplemental order adding the usual proviso (as submitted by him) to the order made by the learned Master in January 1975.

In reply Mr. Leo Rhynie dealt with the

points raised on behalf of the respondents and in particular he submitted that the court had no power to make a supplemental order as suggested or to make any variation or amendment to the order of the learned master and he referred to the following authorities:-

Hals Laws (3rd ed.) Vol. 22 paras 1664-1671

Ford-Hunt v. Raghbir Singh (1973) 2 AER 700

Freston Banking CO. V. William All Sup & Son (1895) 1 ch D 141

McCarthy v Agar (1933) 2 K.B. 417

Supreme Court Practice (1976) O.20 r.11 at p.350

Let us first consider para 7 of the affidavit of
12th December, 1974

which has already been set out in full. Mr Leo Rhynie submitted that this was a misstatement as it was not correct that there are no charges capable of registration under section 93 of the Companies Act affecting the property of the company except the equitable mortgage in favour of Adela, since the F.N.C.B mortgage was then in existence; on the other hand Mr. Muirhead submitted that the F.N.C.B mortgage was not then a mortgage capable of registration as it had already been registered and strove valiantly to persuade the court to his view.

I sometimes wonder these days whether Jamaicans have joined Alice in Wonderland where words mean what we want them to mean. If the F.N.C.B mortgage is a mortgage registrable under the provisions of sec.93 does its registration under that section render it unregistrable under the section? Put in this form it seems clear that

it could not accord with common sense to suggest that once the mortgage has been registered under Sec.93 it becomes unregistrable thereunder, If instead of using the term "registrable" we use the term which Miss Parris used, i.e. "capable of registration" the position is the same. Can it be said that a mortgage which is capable of registration under Sec. 93 having been registered thereunder, immediately becomes by virtue of such registration incapable of registration thereunder?. I am more than a little surprised that an Attorney at law having made a statement that there are no charges capable of registration under S.93 could attempt to justify this statement by saying that a charge registered under this section is no longer a charge ^{capable} ~~of~~ registration under the section Mr. Leo Rhynie was more than kind, I thought in the restraint he showed in his comments on Miss Parris' affidavits in connection with this matter. I consider that the explanation offered in her affidavit of 18/9/79 was a poor and unsuccessful attempt to explain what I regard as a serious and material misstatement of fact in the affidavit before the learned Master who must obviously have been misled by this flat unqualified statement which must have conveyed to the learned Master the clear impression that there were no incumbrances registrable (i.e.,capable of registration) under s. 93 except the Adela mortgage.

Even if by some stretch of the imagination it were possible to accept the explanation offered, it is clear from the authorities that ~~in~~ ex parte applications there should

be full and candid disclosure and Miss Parris was under a duty to set out fully the facts relating to the F.N.C.B mortgage for the information of the learned Master at the time of the application by Office Towers, and she did not.

It seems to me that one of the issues between the applicant and respondent in the action E 29 of 1975 is the question of priorities between the Adela mortgage and any advances made by the F.N.C.B between the ^{14th May, 1974} / and the date of registration in January, 1975.

Para 11 of the applicant's amended defence and c/claim states in part "alternatively the second defendant (the applicant) says that up to the 9th October, 1974 it was induced by the representations of the plaintiff (the respondents) their servants and or agents to believe that the plaintiff's said mortgage was intended to rank subsequent to all advances made by the 2nd defendant to the 1st defendant and paragraph 5 of the reply to the defence and counter-claim states "With reference to paragraph 11 of the defence the plaintiff says that it never represented by itself its servant or agents that its security would rank subsequent to all or any subsequent advances made by the second defendant"

I note too exhibit M (to affidavit of Mr. Virtue
29th June, 1979 a letter dated ^{21st November, 1974} / from Mr. Virtue of
Messrs Manton & Hart to Messrs Clinton Hart & Company
(for the attention of Miss Parris) in which reference

is made to a meeting and discussions as well as to the question of priorities of the mortgages.

Although Mr. Muirhead stated that the respondents affirm that their mortgage is dated and effective by agreement as from ^{1st July, 1974} / it is clear that this document had been executed earlier and the statement of claim in E 29 of 1975 gives the date of execution as ^{14th May, 1974} / and no doubt one of the issues in the action No. E 29 of 1975 is likely to be what ^{was} the date of creation of the document, which date appears relevant under the provisions of Sec. 93 so if advances were made by F.H.C.B. under its mortgage subsequent to ^{14th May, 1974} / this question will be rather important having regard to the fact that registration under the grant of extension of time by the Master renders the Adela mortgage valid as from the date of its creation and not the from / date of its registration.

Again there is no reference in Miss Farris' affidavits ^{14th May, 1974} to the date of the / which according to the statement of claim is the date of its execution or creation; it would be more than a little surprising if Miss Farris failed to appreciate the significance of this date (having regard to the correspondence exhibited) and it was a little less than frank to have omitted any reference to this date in her affidavits.

Attorneys are officers of the court and the court should be able to rely on and to act on the statement of attorneys to the court- how much more so the affidavits of attorneys ! on ^{any} / application made ex parte good faith

must be observed; it is the duty of the applicant to make full and fair disclosure to the court of all the relevant facts within his/her knowledge.

It seems abundantly clear to me that in the application by Office Towers to the Master for extension of time to register the Adela mortgage there were not only material misstatement but also that there was lacking the full and candid disclosure to enable the Master properly to adjudicate on the application and to exercise his discretion; the failure to put before the Master all the relevant material facts was such that he was unable to exercise properly his discretion whether or not to add the usual proviso which as Buckley J said in the Joplin case ought to be added in every case, unless there is good ground not to do so. If the Master had been aware of the F.N.C.B mortgage, that ^{it} was registered and that it provided for continuing advances I have not the least doubt that the learned Master would have added the proviso; as it was he was misled by Miss Parris' affidavits into believing, as is clear from the affidavits that there was no registrable encumbrance on the property except the Adela mortgage and in those circumstances omitted to add the proviso in his order.

On the authorities cited, I am satisfied and it ^{that I have an} appeared to be common ground) ~~in~~ inherent jurisdiction to set aside an order made ex-parte, and that applicants have a duty to make full and fair disclosure. Although the cases cited deal with ex-parte applications to serve a writ out of jurisdiction the same principles apply to an applicant ⁱⁿ other ex-parte applications such as the one made before a Master under section 99, Companies Act with which we are now concerned.

The question now arises. Do I set aside order of Master or do I dismiss the application or Do I have power to make a supplemental order as Mr. Muirhead submits I have?

Mr. Leo Rhynie submitted that only the Court of Appeal can vary or alter an order or judgment- this statement being subject only to certain limited cases in which a court can vary its own order. He distinguished the case of Scowby by pointing out that the supplemental order made in that case was made only on the ground that facts not available when the original order was made had subsequently become available at the time of the application for the supplemental order, and the court held that in the changed circumstances it could make the supplemental order.

He submitted further that the ^{general} ~~of~~ rule is that the court has no jurisdiction to vary an order after that order is passed and entered, and this present case does not fall within any of the recognised exceptions to the general rule.

With this submission I am inclined to agree I am satisfied that this case does not fall within any of the recognised exceptions to the general rule that this court has no jurisdiction to vary an order after it has been passed and entered or to make a supplemental order and accordingly, I have no power to make a supplemental order or to vary or amend the order made by the Master.

This being so, what course do I adopt?

Mr. Muirhead submitted that the balance of convenience favours the respondent, Adela, the

innocent mortgage against whom there was no allegation of impropriety, negligence or fault, and that the proper course would be to dismiss the application; he further submitted that there had been inordinate delay in bringing this application to the court and that the reasons for delay were not satisfactory.

In considering this last submission I bear in mind that it was open to Adela to have taken steps to register the charge under S. 93 of the Companies Act within the prescribed period, but that, like the company Office Towers Limited, Adela failed to act to effect the registration of the company so it would seem that there was some neglect on the part of Adela as well in regard to the registration of the mortgage.

When we turn to the question of the delay on the part of the applicant in bringing the present application; I think I ought to bear in mind that the application before the learned Master was an ex-parte application, the applicant was not a party to this application and one forms the impression that some time may well have elapsed before the applicant become aware of or considered it necessary to dig up the details of what transpired at the hearing of the ex-parte application before the learned Master. It seems to me that in the circumstances of this case it cannot properly be said that there was inordinate delay in making this application to set aside the order.

Taking into account all the various submissions made on both sides and the authorities to which I have been referred, it seems to me that having been satisfied that not only was there not full disclosure to the Master but also that he was misled by para 7 of the Miss Farris affidavit to which reference has been made and would if all the relevant facts had been put before him have made an

order limited by the usual proviso, This is a proper case in which to exercise my discretion and set aside the order of 13/1/75 made by the learned Master and it is ordered that the motion be granted in the terms set out in the notice of motion filed herein.

Costs to be taxed or agreed- to be paid to the applicants by the 2nd respondent, Adela.

Leave to appeal is granted.