



JUDGMENT

**Attorney General of the Turks and Caicos Islands
and another (Appellants) v Richardson (as Trustee
in bankruptcy of Yellowstone Club World LLC
(Respondent)**

**From the Court of Appeal of the Turks and Caicos
Islands**

before

**Lord Hope
Lord Kerr
Lord Reed
Lord Carnwath
Sir John Chadwick**

**JUDGMENT DELIVERED BY
SIR JOHN CHADWICK**

ON

14 March 2013

Heard on 13 December 2012

Appellant
David Phillips QC
Patrick Patterson

(Instructed by Edwards
Wildman Palmer UK
LLP)

Respondent
Ariel Misik QC

(Instructed by Sharpe
Pritchard)

SIR JOHN CHADWICK:

1. This is an appeal from the order of the Court of Appeal of the Turks and Caicos Islands, dated 26 January 2012, in proceedings brought by Mr Ross Richardson, as Trustee in Bankruptcy of Yellowstone Club World LLC, against the Attorney General and the Registrar of Lands. The issue raised by the appeal is whether the Registrar was wrong to register a restriction, under section 132 of the Registered Land Ordinance, against property in respect of which the Government claimed an interest in respect of unpaid stamp duty.

The underlying facts

2. At all material times the property known as Emerald Cay, Chalk Sound, Providenciales, has been registered at the Land Registry with title number 60400/219. On 14 August 2006 that property was acquired by Emerald Cay Ltd a company incorporated in the Turks and Caicos Islands of which Mr Timothy Blixseth was the ultimate beneficial owner. It is accepted, for the purposes of these proceedings, that the purchase price paid by Emerald Cay Ltd was US \$28,000,000; but that the acquisition was structured through a series of agreements in such a way that the consideration stated in the transfer to Emerald Cay Ltd – and on which stamp duty was paid - was US \$10,000,000. Yellowstone Club World LLC, another company of which Mr Blixseth was the ultimate beneficial owner, was party to one of those agreements. On 17 August 2006 Emerald Cay Ltd was registered as the proprietor of the property.

3. On 18 February 2009 Mr Richardson was appointed by the United States Bankruptcy Court for the District of Montana to be the Trustee of the Estate of Yellowstone Club World LLC. On 5 March 2009, as Trustee, he lodged a caution with the Registrar of Lands, pursuant to section 127 of the Registered Land Ordinance, forbidding the registration of dispositions and the making of entries in respect of the property (Emerald Cay) registered under title number 60400/219 without his consent. The caution was registered by the Registrar on 25 March 2009.

4. On 24 November 2009 the Trustee commenced proceedings against Mr Blixseth in the United States. The claims made in those proceedings included claims in respect of the Emerald Cay property. The Trustee and Mr Blixseth reached a settlement in respect of those claims; and, on 10 June 2010 the United States Bankruptcy Court approved the terms of that settlement. On 13 August 2010 Emerald Cay Ltd executed a collateral charge over the property for the purpose of securing

payment of US \$9,600,000 under the settlement. On 16 September 2010 the Trustee applied to the Registrar for withdrawal of the caution and registration of the charge.

5. In the meantime, on 4 June 2010, the Government of the Turks and Caicos Islands, having become aware of the underpayment of stamp duty due on the transfer of the Emerald Cay property to Emerald Cay Ltd in August 2006, applied to the Registrar for a restriction to be entered, pursuant to section 132 of the Registered Land Ordinance, prohibiting dealings with the property until the full amount of the stamp duty had been paid. That application was made without notice to the Trustee. The Registrar ordered the restriction sought; and it was entered on the same day (4 June 2010).

6. On 12 October 2010 the Land Registry informed the Trustee that, pursuant to his application of 16 September 2010, his caution had been withdrawn; but that, by reason of the restriction which had been entered on 4 June 2010, the charge could not be registered.

7. On 12 March 2011 the Attorney General, on behalf of the Government, commenced proceedings against (amongst others) Emerald Cay Ltd for recovery of unpaid stamp duty and penalties. The Government obtained judgment in those proceedings on 21 June 2011.

8. On 27 April 2011 the Trustee commenced the present proceedings; seeking removal of the restriction and registration of the charge.

The Registered Land Ordinance

9. The Registered Land Ordinance makes provision for the registration of land in the Turks and Caicos Islands “and for dealings in land so registered and for purposes connected therewith”. It establishes a land registry and a Land Register. The Land Register comprises (*inter alia*) a register in respect of every parcel which has been adjudicated in accordance with the Land Adjudication Ordinance: section 9(1). In the case of private land, that register shows whether the title is absolute or provisional and contains the name of the proprietor and a note of any inhibition, caution or restriction affecting his right of disposition: section 9(2). The Registrar of Lands is responsible for administering the land registry in accordance with the Ordinance: section 5(1).

10. Section 23 of the Ordinance provides (subject to the provisions of section 27, which are not material in the present context) that:

“23... the registration of any person as the proprietor with absolute title of a parcel shall vest in that person the absolute ownership of that parcel together with all rights and privileges belonging or appurtenant thereto, free from all other interests and claims whatsoever, but subject –

(a) to the leases, charges and other incumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 28 of this Ordinance not to require noting on the register;...

Section 28 contains a list of overriding interests which may for the time being subsist and affect the land registered, and to which it will be subject without their being noted on the register. Those interests include, at paragraph (e) of section 28, “any unpaid moneys which, without reference to registration under this Ordinance, are expressly declared by any written law to be a charge upon land”.

11. The effect of section 23 of the Ordinance is that registration as proprietor with absolute title confers on the person so registered the power to dispose of that land “free from all other interests and claims whatsoever”, subject only to the limitations or restrictions mentioned in the section. Those include (i) the unregistered rights or interests described in section 27 (in a case where the proprietor has acquired the land by voluntary transfer) and (ii) the overriding interests described in section 28. But, save in those cases, the only limitations or restrictions are those noted on the register, as paragraph (a) of section 23 makes clear. They comprise the leases, charges and other incumbrances and “the conditions and restrictions” shown in the register.

12. The “conditions and restrictions” to which the power freely to dispose of registered land are made subject by section 23(a) are described in Part VIII (“Restraints on Disposition”) of the Ordinance. They fall within one or other of the three “Divisions” set out in that Part: Division 1- Inhibitions (sections 124 to 126); Division 2 - Cautions (sections 127 to 131); and Division 3 – Restrictions (sections 132 to 134).

13. An inhibition is an order of the court “inhibiting for a particular time, or until the occurrence of a particular event, or generally until further order, the registration of any dealing with any land, lease or charge”: section 124(1) of the Ordinance. Where the court makes such an order, a copy of the inhibition, with particulars of the land, lease or charge affected by it, is sent to the Registrar for registration in the appropriate

register; section 124(2). So long as an inhibition remains registered, no instrument which is inconsistent with it shall be registered: section 125.

14. A caution is a notice lodged with the Registrar by a person who falls within one or other of the four categories described in paragraphs (a) to (d) of section 127(1) of the Ordinance “forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the same”. The Registrar may require the cautioner to support the caution by a statutory declaration (verifying the interest claimed by the cautioner) and may reject the caution if he thinks it unnecessary: section 127(3) and (4). If accepted, the caution is registered in the appropriate register: section 127(5). So long as the caution remains registered, no disposition which is inconsistent with it shall be registered except with the consent of the cautioner or by order of the court: section 128(2).

15. Section 132 (“Restrictions”) is in these terms:

“132(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land, lease or charge.

(2) A restriction may be expressed to endure –

- (a) for a particular period; or
- (b) until the occurrence of a particular event; or
- (c) until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register.

(3) The Registrar shall order a restriction to be entered in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.”

Upon the entry of a restriction the Registrar shall give notice thereof in writing to the proprietor affected thereby: section 133(1). So long as any restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the court or of the Registrar: section 133(2).

The Stamp Duty Ordinance

16. Section 4(1) of the Stamp Duty Ordinance requires that, subject to the provisions of the Ordinance, every instrument, wherever executed, specified in Schedule 1 shall be chargeable with the stamp duty specified in that schedule. Section 4(3) provides that, if any instrument chargeable with stamp duty is not duly stamped, the person or persons specified in Schedule 1 as being liable for stamping that instrument and any person who uses that instrument shall be liable to the Collector for the payment of the stamp duty and any penalty. Section 14(2) is in these terms:

“No instrument chargeable with stamp duty shall be acted upon, filed or registered by any public officer or body corporate unless such instrument is duly stamped; and any public officer or body corporate failing to comply with this subsection shall incur a penalty of \$500 which shall be recoverable by the Collector as a civil debt due to the Government.”

17. The prohibition against the registration of an instrument chargeable with stamp duty, but not duly stamped, is given further effect by section 109 of the Registered Land Ordinance, which provides that:

“No instrument required by law to be stamped shall be accepted for registration unless it is duly stamped.”

The restriction dated 4 June 2010

18. The restriction which is the subject of these proceedings was entered on 4 June 2010, following an application of the same date made by the Government of the Turks and Caicos Islands. The application was expressed to be made under section 132 of the Registered Land Ordinance and was in these terms, so far as material:

“We [the Government of the Turks and Caicos Islands] confirm that we have a sufficient interest in the Land [registered under title no 60400/219] which has arisen as a result of information we have received suggesting that full Stamp Duty was not paid on the last transfer of the land to its current owners. It is our understanding that:

- (i) Emerald Cay Ltd (Emerald), the current owner of the land, is beneficially owned by Timothy Blixseth (Blixseth).
- (ii) Emerald purchased the land from Worldwide Commercial Properties Ltd on 14 August 2006 (the Transaction).
- (iii) The Transfer of Land Instrument filed with the Turks & Caicos Islands Land Registry on 14 August 2006 (the Instrument) recorded the consideration of the Land as having been \$10 million. The Instrument also states that the Transaction did not form part of a larger transaction involving the conveyance on sale of other immoveable property in the Turks & Caicos Islands.
- (iv) The Instrument further shows that a stamp duty of \$975,000, assessed based on the recorded consideration of \$10 million, was paid by Emerald on 15 August 2006.
- (v) In Blixseth's disposition of 3 May 2007, on relation to Civil Claim No DV-29-06-26 in Montana Fifth Judicial District Court, Madison County, a copy of which has recently been provided to TCIG [the Government], Blixseth said that *'we bought a facility down in the Turks & Caicos Islands for...27, 28 million bucks'*. He then confirmed that the price paid for this property in the Turks & Caicos was \$28 million.
- (vi) It would therefore appear that the actual consideration for the Land was not correctly recorded on the Instrument; it should have recorded the consideration as \$28 million rather than \$10 million.
- (vii) Pursuant to paragraph (c)(ii) of Head 4 of Schedule I of the Stamp Duty Ordinance (the SDO), the correct amount of stamp duty payable should be \$2,730,000. It would appear that Emerald has failed to pay the full amount of the stamp duty on the Transaction.
- (viii) It would therefore appear that we have a sufficient interest in the Land, in particular a restriction to

prohibit and restrict any dealing with this Land until the full amount of the stamp duty on the Transaction has been duly paid to the Government.

We apply to enter a restriction against the land in the following words:

The Government of the Turks and Caicos Island (*sic*) claims an interest under the Stamp Duty Ordinance in whole of the above-mentioned parcel as more fully set forth in the Application to Enter a Restriction dated 19 May 2010 (*sic*) and prohibits any dealing with this parcel until the full amount of stamp duty on the sale of the parcel from Worldwide Commercial Properties Ltd to Emerald Cay Ltd on 14 August 2006 has been duly paid.”

The application was signed for and on behalf of the Attorney General. It was dated 4 June 2010.

19. On receipt of that application Entry No. 5 was made in the Proprietorship Section of the register in respect of title 60400/219:

“Date of registration	4.6.10
Instrument Number	511/10
Nature of Instrument	Restriction

The Government of the Turks and Caicos Islands claims an interest under the Stamp Duty Ordinance in whole of the above-mentioned parcel as more fully set forth in the Application to Enter a Restriction dated 19 May 2010 and prohibits any dealing with this parcel until the full amount of stamp Duty on the sale of the parcel from Worldwide Commercial properties Ltd to Emerald Cay Ltd on 14 August 2006 has been duly paid.”

It can be seen that the restriction, as entered, reproduces the text of the restriction sought in the application without material variation: the only difference lies in the substitution of the word “Islands” for “Island”. In particular, the restriction, as entered, follows the text of the restriction sought in mis-stating the date of the application; and in stating that it is the Government which “prohibits any dealing” with the parcel until the stamp duty has been paid.

20. The Board observes that section 132(1) of the Registered Land Ordinance describes and defines “a restriction” as “an order [made by the Registrar] prohibiting or restricting dealings with any particular land . . .”. It is difficult to reconcile an entry made in terms which suggest that it is the applicant, rather than the Registrar, who “prohibits any dealing” with the land with the provisions of section 132(1). It is necessary to have regard to the difference between the Registrar’s task in relation to cautions – which is to register the caution in the terms in which it has been lodged – and the task in relation to restrictions – which is to decide whether to make an order (and in what terms) and to enter that order in the terms in which it has been made. If a practice has grown up of treating applications for the entry of a restriction in the same way as applications for the entry of a caution, consideration needs to be given to reviewing that practice.

These proceedings

21. These proceedings were commenced by an originating summons dated 27 April 2011 and amended, and redated, on 31 May 2011. The relief sought by the Trustee was, first, determination of the question:

“Whether, on the true construction of the Stamp Duty Ordinance and the Registered Land Ordinance, the effect of under payment of stamp duty on a transfer of land from a vendor (A) to a purchaser (B) who subsequently becomes the registered proprietor of the land is to prevent B from being able to give a valid charge over the land in favour of a third party (C).”

If the answer to that question were “No”, the Trustee sought declarations (a) that the actions of the Attorney General and the Registrar of Lands in procuring the removal and in removing the caution without registration of the charge were wrong and improper, (b) that the Trustee was entitled to the registration of the charge dated 13 August 2010 granted by Emerald Cay Ltd and (c) that the registration of the restriction by the Registrar at the request of the Attorney General so as to prevent the registration of the charge was wrong and improper. Further, the Trustee sought an order rectifying the register in respect of title 60400/219 by removing the restriction (alternatively, by varying the restriction so as to permit registration of the charge) and by registering the charge.

22. The proceedings came before Mr Justice Martin on 7 June 2011. By an order made on 9 June 2011 he ordered that the Registrar of Lands remove the restriction and register the charge. The defendants appealed from that order. The appeal came before the Court of Appeal (Zacca P, Mottley and Ground JJA) on 23 and 24 January 2012.

On 26 January 2012 the Court of Appeal dismissed the appeal and affirmed the order of the Supreme Court.

The reasons which led Mr Justice Martin to make the order of 9 June 2011

23. The reasons which led Mr Justice Martin to make the order which he did are set out in his judgment dated 10 June 2011. After rehearsing the underlying facts and the relevant provisions of the Registered Land Ordinance, the judge turned to consider the question: “Did the Crown have a registrable interest?”. He observed (at paragraph 12 of his judgment) that the Government sought to justify its claim to an interest in the land on the basis: (i) that stamp duty on the transfer to Emerald Cay Ltd had been underpaid (a premise which the Trustee, through his counsel, had accepted for the purposes of these proceedings); (ii) that, by reason of section 109 of the Registered Land Ordinance, the transfer to Emerald Cay Ltd should not have been registered, so “that title has not been registered in accordance with the Registered Land Ordinance”; (iii) therefore “the Crown has an interest sufficient to apply for a restriction to freeze the title until full duty has been paid”. He pointed out (at paragraph 13 of his judgment) that “an interest in land” for the purpose of the Registered Land Ordinance could only mean an interest recognised by that Ordinance. He held that the obligation to pay stamp duty did not create an interest in land; it created a civil debt. He explained that the only circumstance in which a debt is recognised by the Ordinance as enforceable against land (without more) is where it constitutes an overriding interest within section 28(e): which required that the debt be “expressly declared by any written law to be a charge upon land”. As the judge pointed out, the Stamp Duty Ordinance “does not expressly declare any such thing”.

24. At paragraph 14 of his judgment, the judge addressed the submission, made on behalf of the Government, that “it would be extraordinary if title cannot be disputed when it should not have been registered at all”. He said this:

“14...Under the Torrens system of land registration anywhere, registration creates a new title independent of that of the previous owner. Unless the law permits it, you cannot go behind the registered title to challenge the fact of registration and say that it should not have happened. In Australia Barwick CJ described it [in *Buskvar v Wall* (1971) HCA 70] as ‘. . . not a system of registration of title, but a system of title by registration’ in which ‘. . . the title it certifies is not historical or derivative. It is the title which registration itself has vested in the proprietor.’. In Australia, in the interests of the indefeasibility of title, except in the case of fraud (which is specifically excepted) the Act restricts rights which would exist otherwise at law or in

equity. The situation is similar in New Zealand, where there also are specific exceptions. The comments to which I was referred in *Frazer v Walker* [[1967] AC 569, 582] are very relevant. In that case Lord Wilberforce made the general point that:

‘In all systems of registration of land it is usual and necessary to modify and indeed largely [to negative] the normal rules as to notice, constructive notice, or inquiry as to matters [possibly] affecting the title of the owner [of the] land.’

The effect of registration in each jurisdiction depends on the terms of the local law. The only aspects that vary between jurisdictions are the circumstances (always limited) in which registration can be challenged. In Australia there is an exception for fraud; in New Zealand there are three main specified exceptions. Any exceptions that apply here depend on the terminology of [the Registered Land Ordinance].”

25. The judge then set out the provisions of section 3 of the Registered Land Ordinance – which, as he pointed out, required that “any claim must be determined only in accordance with what is to be found within the Ordinance” – and the provisions of section 23, to which reference has already been made earlier in this judgment. He set out, also, the provisions of section 140 of the Ordinance:

“140(1) Subject to the provisions of subsection (2) of this section, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration including a first registration has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession or is in receipt of the rents or profits and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act neglect or default.”

The judge explained (at paragraph 16 of his judgment) that the combined effect of those provisions was that registration in the Turks and Caicos Islands “confers title which cannot be challenged by reference to any antecedent transactions unless registration was obtained by fraud or mistake of which the proprietor knew or to which he substantially contributed.” In that case, he said:

“16...the only way to challenge it is to apply for rectification. So long as the title remains registered it cannot be disputed in any other way. Unless and until an order is made to cancel or vary the entry the proprietor’s title remains intact and he can do whatever he likes with the land.”

26. The judge went on to say this (at paragraphs 17 and 18 of his judgement):

“17. The company [Emerald Cay Ltd] did not take a transfer of the Property; it acquired ownership of it by registration, after which the previous title was extinguished. It has full title to the land, which as proprietor it can charge if it wishes. The title cannot be ‘frozen’ as the defence argues until something else happens – in this case, until a debt is paid. In Cayman Islands, where the provision as to restrictions is identical to ours, it has been stated [in *Attorney General v Denbo* (1990-91) CILR 245, 248] that a judgment creditor cannot obtain a restriction on dealings in the judgment debtor’s land to secure payment of a judgment debt. Harre J said ‘It is indeed clear . . . that the judgment creditor cannot obtain a caution under section 127 of the Registered Land Law (as revised) or a restriction under section 132’. That was only on an application to strike out, so it was obiter, but I respectfully agree with him. If a judgment creditor cannot register a restriction to protect his interest, a party who has not even obtained judgment cannot be in a better position.

18. The Crown had to have an interest in the land before it could apply for a restriction. It had no such interest. It follows that it was not entitled to apply for the restriction, and the Registrar was not entitled to register it.”

The judge accepted (at paragraph 19 of his judgment) that it was open to the Crown to seek remedies *in personam*: he pointed out that it was doing so in other proceedings (to which reference has been made earlier in this judgment). He accepted, also, that

the Government could seek rectification of the register, on the grounds that registration (of Emerald Cay Ltd as proprietor) was obtained by fraud or mistake; but, as he said, “. . . it has not chosen to do so and that is not the issue here.”

27. The judge took the view that the conclusion that he had reached in those paragraphs – in particular, the conclusion that the Government had no interest in the land, that it was not entitled to apply for the restriction and that the Registrar was not entitled to register the restriction – were sufficient to determine the matters which were before him. Although the order which he made does not answer, in terms, the question posed in the Originating Summons – “Whether the effect of under payment of stamp duty on a transfer of land from a vendor (A) to a purchaser (B) who subsequently becomes the registered proprietor of the land is to prevent B being able to give a valid charge over the land in favour of a third party (C)” – it is clear from the reasoning in his judgment that his answer to that question was “No”.

The judgment in the Court of Appeal

28. The judgment of the Court of Appeal is dated 3 May 2012. It was delivered by Ground JA. At paragraph 17 of that judgment the Court upheld the judge’s view that the Government had no interest in the land. They said this:

“In this case TCIG was claiming unpaid Stamp Duty. Even after judgment such a claim remains *in personam*. We have been shown nothing in the Stamp Duty Ordinance or elsewhere which converts such a claim into a charge against the land concerned. An unsatisfied judgment could give rise to a charge by way of a Charging Order, but that had not been done here at the time of the registration of the Restriction. TCIG had, therefore, no interest in the land, despite the assertions to the contrary contained in the application. We do not understand that point to be seriously contested before us, although it was argued at length before the trial judge.”

29. The Court went on to address the submission, advanced on behalf of the appellants, that the terms of section 132(1) of the Registered Land Ordinance enabled the Registrar, “either with or without the application of any person interested in the land”, to make an order (a restriction) prohibiting or restricting dealings with the land; so that, even if the Government had no interest in the land, it was, nevertheless open to the Registrar, of her own motion, to register a restriction. In particular, reliance was placed on section 132(3) which, it was said, required the Registrar to order a restriction to be entered “in any case where it appears to [her] that the power of the

proprietor to deal with the land . . . is restricted.” The Court said this, at paragraph 18 of its judgment:

“...it is true that the Registrar may impose a Restriction without application by an interested person, and is obliged to do so where it appears to him that the proprietor’s powers of disposition are restricted, but as the Judge observed that is not this case. We think that the Judge was right to look at the actual facts as to how and why the Registrar came to act. It is plain from the terms of the application and from the Restriction as entered, that the Registrar thought that she was acting on the application of a person with an interest in the land. It is also plain that she brought no independent judgment to bear. She did not direct any inquiries to be made, nor notices to be served, nor did she hear anyone. There is no evidence from her that she even put her mind to these things. At one point Mr Phillips [counsel for the Crown] seemed to argue that the Registrar had not presented her case because this was not a public law action, but there was no reason why she should not have done so, not least because she had been joined as party to the proceedings. In the absence of any evidence to the contrary from her, the reality appears to be that she registered the Restriction in direct response to the application without further thought, or even correction of the grammatical and factual errors in it.”

30. The Court rejected the Government’s submission (noted at paragraph 19 of their judgment) that the judge’s approach was fundamentally mistaken because, it was said, “one should look at the Restriction as it were in abstract, and first establish what the Registrar’s legal powers were, then establish what the facts known to the Registrar were, and then ask whether those facts justify the exercise of the power.”. The Court pointed out that the power of the Registrar to order a restriction to be entered under section 132(1) was a discretionary power. They went on to say this:

“19...It is plain that the Registrar exercised it on an erroneous basis, because she recited the alleged interest in land in the entry in the Register. We cannot substitute for that the assumed exercise of her discretion on a different basis, not least because, if she had considered the matter on a correct basis, that consideration may well have been finely balanced. There was no fraud to prevent here, it having happened long before. At the highest a restriction might prevent ECL from benefitting from its prior fraud. The evidence of that prior fraud was, at least on the face

of the application, limited solely to the alleged admissions of Mr Blixseth: none of the detailed history of the sham transactions, nor of YCW's alleged involvement, is recited in the application. It is not clear whether it was even known to those advising TCIG, who did not issue the writ claiming the duty until 3 December 2010 (*sic*).

20. Nor was this a case where the power of the proprietor to deal with the land was, when properly considered, restricted, as envisaged by section 132(3). . . . ECL had absolute title to the land and did not hold it subject to any other interests (except, possibly, those represented by the Trustee and already protected by his Caution). For the reasons explained above, ECL certainly did not hold the land on any form of trust for TCIG. It was, therefore, at least arguable that TCIG's remedy was to obtain a judgment and then a Charging Order, and that if it wished to restrain disposal of the land in the interim, its recourse was a Mareva Injunction, in order to obtain which it would have had to have satisfied the well-known pre-requisites for the exercise of that jurisdiction. But there is nothing to suggest that the Registrar put her mind to any of these difficult issues."

31. The Court of Appeal held (at paragraph 26 of their judgment) that the judge was right to conclude that the Restriction was bad; and was right to order that the Trustee's collateral charge be registered.

The submissions on this appeal

32. This appeal is brought with the leave of the Court of Appeal. It is submitted on behalf of the appellants that it was immaterial that the Government may have been wrong to assert, in its application for the entry of a restriction, that it had an interest in the land comprised in title 60400/219. The relevant questions were (1) the extent of the Registrar's power to register a restriction and (2) whether, on the facts known to her, it was lawful for her to have exercised that power.

33. In relation to the first of those questions the appellants rely exclusively on section 132(1) of the Registered Land Ordinance: it is not said that this is a case in which section 132(3) has any application. It is accepted that the power conferred by section 132(1) is discretionary: "...the Registrar *may* ... make an order ... prohibiting or restricting dealings with any particular land ..." (emphasis added). But it is pointed out that the discretionary power may be exercised "for any ... sufficient cause"; and that it

may be exercised by the Registrar of her own motion: "... without the application of any person interested in the land ...".

34. Those propositions are not in dispute. But, on the facts as presented (and, in particular, in the absence of any evidence from the Registrar herself), it is impossible to avoid the conclusion that, in this case, the Registrar did not exercise the power conferred by section 132(1) of her own motion: she exercised that power on the basis of the application that was made on behalf of the Government.

35. In exercising the power on the basis of the application that was made on behalf of the Government – and in making Entry No 5 on the register - the Registrar must be taken to have accepted that the Government was entitled, by virtue of the interest in the land which it claimed, to prohibit any dealing with the land comprised in title 60400/219. The Board can see no escape from the conclusion that the Registrar did not, in fact, ask herself whether there was any sufficient cause – other than the claim made on behalf of the Government – which should lead her to enter a restriction.

36. In reaching that conclusion the Board rejects the submission, made on behalf of the appellants, that the restriction entered comprises two distinct limbs: (A) a statement that "The Government of the Turks and Caicos Islands claims an interest under the Stamp Duty Ordinance in whole of the above-mentioned parcel as more fully set forth in the Application to Enter a Restriction dated 19 May 2010" and (B) an order, made under section 132(1) of the Ordinance, by which the Registrar "prohibits any dealing with the parcel until the full amount of stamp Duty on the sale of the parcel from Worldwide Commercial properties Ltd to Emerald Cay Ltd on 14 August 2006 has been duly paid". It is plain that the subject of the verb "prohibits" is "The Government of the Turks and Caicos Islands": the restriction cannot be read in the sense that it is the Registrar who is the subject of that verb. And, given that the text of the restriction follows, without material variation, the text of the restriction applied for in the Government's application dated 4 June 2010, that is unsurprising.

37. If the Registrar did not, in fact, ask herself whether there was sufficient cause – other than the claim made on behalf of the Government – which should lead her to enter a restriction, then her decision to do so was flawed in law. For the reasons that Mr Justice Martin and the Court of Appeal have given, there was no basis for the Government's claim that it was entitled to an interest in the land comprised in title 60400/219; and no basis upon which the Government was entitled to prohibit dealings with that land until the full amount of the stamp duty payable on the transfer from Worldwide Commercial Properties Ltd to Emerald Cay Ltd had been made.

38. It was submitted on behalf of the appellants that the fact that the Registrar's decision to enter a restriction was reached on a flawed basis is not fatal to the validity

of the restriction. It is said that, on the material which was before her, the Registrar could properly have reached a decision to enter a restriction without relying on the Government's claim to an interest in the land: “. . . what matters is whether the material in the Registrar's possession justified the exercise of the power. If it did, the power will have been exercised lawfully”.

39. The Board was referred to no authority in support of that proposition. The observations of Lord Keith of Kinkel in *R v Secretary of State for Trade and Industry, Ex p Lonrho* [1989]1 WLR 525, 535B-D, to which reference was made in the appellant's Case, does not assist them. Indeed, it supports the contrary view. As Lord Keith pointed out, in the passage cited: “The question is not whether the Secretary of State came to a correct solution . . . but whether the discretion was properly exercised”. The Board was referred, also, to the judgment of the Court of Appeal of England and Wales in *R(Richards) v Pembrokeshire County Council* [2004] EWCA Civ 1000, para 58; in the context to a challenge to the exercise of statutory powers, that Court observed that “reasons which could have been, but were not, in the decision-makers' minds are immaterial.”.

40. Even if the proposition were well-founded – which, in the opinion of the Board, has not been established – it provides no basis upon which to uphold the Registrar's decision to enter the restriction in the present case. The material before the Registrar on 4 June 2010 – so far as disclosed – is confined to matters set out, as the Government's understanding of the position, in the application of that date. It is said to be common ground in these proceedings that (i) the title to Emerald Cay had been registered in the name of Emerald Cay Ltd “as part of a scheme of tax evasion”, in that the consideration for the transfer was \$28 million, but had been fraudulently stated to be \$10 million, (ii) at the material time Emerald Cay remained registered in the name of Emerald Cay Ltd and (iii) both Emerald Cay Ltd and the Trustee (as trustee in bankruptcy of Yellowstone Club World LLC) were parties to the fraud. But there is no mention of fraud in the matters set out in the application dated 4 June 2010: and there is no mention of Yellowstone Club World Ltd. The allegations are that “the actual consideration for the Land was not correctly stated on the Instrument. It should have recorded the consideration as \$28 million rather than \$10 million” (sub-paragraph (vi)); and “It would appear that Emerald has failed to pay the full amount of stamp duty on the transaction” (sub-paragraph (vii)). For the reasons explained by Mr Justice Martin and the Court of Appeal, underpayment of stamp duty at the time that the proprietor acquires title by registration is not, of itself, a basis for restricting the registered proprietor's power to deal with the land.

41. The appellants draw attention to section 109 of the Registered Land Ordinance – “No instrument required by law to be stamped shall be accepted for registration unless it is duly stamped” – and to section 140 – “the court may order rectification of the register by directing that any registration be cancelled . . . where it is satisfied that any registration . . . has been obtained . . . by fraud or mistake”. It may be said that

there are circumstances in which the Registrar could order a restriction under section 132(1) of the Ordinance so as to prohibit or restrict dealings with the land by the registered proprietor pending the outcome of proceedings for rectification of the register - that is to say, proceedings seeking cancellation of the entry of the proprietor as proprietor in the proprietorship register – although the more usual and appropriate course would be for the party seeking rectification to commence proceedings for rectification and apply to the court for the entry of an inhibition. But, assuming that the Registrar has power to order a restriction so as to prohibit dealings pending the outcome of proceedings for rectification of the register, it is difficult, if not impossible, to see (i) how the Registrar could properly exercise that power without being satisfied that such proceedings had been, or were about to be, commenced; and (ii) how the Registrar could have entered a restriction in the terms that she did if she had intended to prohibit dealings pending the outcome of proceedings for rectification.

42. There was nothing in the present case to suggest that the Registrar could have been, or was, satisfied that proceedings for rectification of the register had been, or were about to be, commenced; and nothing to suggest that she intended to prohibit dealings pending the outcome of such proceedings. It is pertinent to have in mind that section 132(2) of the Ordinance provides that a restriction may be expressed to endure (a) for a particular period, (b) until the occurrence of a particular event or (c) until the making of a further order. If the Registrar had intended to prohibit dealings pending the outcome of proceedings for rectification of the register, it could have been expected that she would have provided that the restriction (i) would be for a limited period until such proceedings were commenced and (ii) would continue thereafter (if such proceedings were commenced) until further order of the court in those proceedings. Entry No 5 – which imposed the restriction for a period ending only when the full amount of the stamp duty had been duly paid – was not an appropriate restriction to impose in the exercise of a power to prohibit dealings pending the outcome of proceedings to rectify the register.

43. For those reasons, even if the proposition on which the appellants seek to rely – that it is sufficient that there was material in the possession of the Registrar on which she could properly have decided to order a restriction – were established, there is no basis upon which the restriction in the terms of Entry No 5 could be upheld.

Conclusion

44. For those reasons the Board will humbly advise Her Majesty that the appeal from the Court of Appeal of the Turks and Caicos Islands should be dismissed. Subject to representations to the contrary, to be submitted in writing within 28 days, the costs of the appeal are to be paid by the appellant.

