

## TACKING FURTHER ADVANCES IN SINGAPORE

Tacking is not unknown in Singapore. Different mortgagees (particularly banks) seem to advance different reasons in justification of their right to tack. There is some confusion. The confusion has arisen because of two reasons. First, there is a complete dearth of local legal materials on the subject. Secondly, the common law system of conveyancing exists concurrently with the Torrens system of land registration. The two systems are entirely different in their scope and application.

### I. TACKING UNDER THE COMMON LAW SYSTEM

The common law system of conveyancing is essentially regulated by two statutes—the Conveyancing and Law of Property Act<sup>1</sup> and the Registration of Deeds Act.<sup>2</sup> The former which is based on the English Conveyancing Act of 1881<sup>3</sup> is silent on tacking. The latter which is modelled on the Yorkshire Registries Act of 1884<sup>4</sup> has a section on tacking. As these two statutes derive their inspiration from English legislation, we should, perhaps, first look at the position in England. This is necessary for a proper understanding of the law on this subject in Singapore.

#### *The Position in England*

Tacking was prevalent in England prior to 1926. It was available only to legal mortgagees. Equitable mortgagees could not tack.<sup>5</sup> Second and third mortgages were necessarily equitable mortgages. The first mortgagee who had the legal estate was, therefore, in an advantageous position. He could tack subsequent advances made by him provided that he had no notice of the second or any subsequent mortgage. It was found that this worked unfairly against the second and subsequent equitable mortgagees. So an attempt was made to abolish tacking in 1874.<sup>6</sup> It was short-lived. Tacking was reinstated in 1875.<sup>7</sup> This position remained so till 1926.<sup>8</sup>

1. Singapore Statutes, Rev. Ed. 1970, Cap. 268.

2. Singapore Statutes, Rev. Ed. 1970, Cap. 281.

3. 44 & 45 Vict. c. 41.

4. 47 & 58 Vict. c. 54.

5. See *Emmett on Title*, 14th ed. p. 275.

6. Vendor and Purchaser Act, 1874, s. 7.

7. Land Transfer Act, 1875, s. 129.

8. The position was changed by the English Law of Property Act 1925 (15 & 16 Geo. 5 c. 20) which came into force on January 1, 1926.

Tacking prior to 1926 took two forms. There was tacking by estate. This form of tacking can be easily illustrated by an example. Suppose *A* is the owner of Blackacre and he mortgaged it to *B*, *B* had the legal estate. That will be a legal mortgage. *A* however needs more money. He, therefore, mortgages the same security (that is, his equity of redemption) to *C* by way of a second mortgage and to *D* by way of a third mortgage. Both these subsequent mortgages would be equitable mortgages. Now if *D* had no notice of *C*'s equitable mortgage, he could purchase *B*'s legal estate and squeeze *C* out. *D* on acquiring *B*'s legal estate had priority over *C*'s equitable mortgage. This type of tacking was resorted to by equitable mortgagees who found themselves in difficulties. It has, therefore, been described as a "plank to be snatched by the drowning equitable mortgagee." A good example of this type of tacking would be *Marsh v. Lee*.<sup>9</sup>

Then there was tacking by contract. This was much more common. Here the mortgage was expressly made for the securing of a current account or other further advances. Further advances granted were tacked without further ado provided there was no notice of any subsequent encumbrance. It was felt that tacking was justified because the mortgage (which is but a contract<sup>10</sup>) provided for such further advances. A good example of this type of tacking is *Hopkinson v. Rolt*.<sup>11</sup> That was an exceptionally complicated case. A man called Mare started an account with the Commercial Bank of London. He was a shipbuilder and his account with that Bank was guaranteed by his father-in-law, one Rolt (the respondent). His overdraft account with the Bank (up to the limit of £20,000) proved unsatisfactory and he was called upon by the Bank to execute a legal mortgage of his properties to the Bank. Mare could not give the Bank a first legal mortgage of his properties at Chester and Cambridge as these properties were already mortgaged at that date, 5th January 1855. He, therefore, executed a second mortgage of his property at Blackwell and a further charge of his properties at Chester and Cambridge in favour of the Bank of the 26th January, 1855, to secure the balance of the loan of £20,000 granted to him by the Bank. The respondent Rolt was a surety to this second mortgage. Rolt was not happy with these developments. He, therefore, got Mare to execute a third mortgage of all the three properties in his favour on the 12th February, 1855. This third mortgage was to secure repayment from Mare of moneys which Rolt could be called upon to pay to the Bank. Soon afterwards Mare executed a fourth mortgage in favour of the Bank to secure further advances. This was in addition to the sum of £20,000 already secured by the second mortgage. Mare's encounter with high finance was a dismal failure. He was soon declared a bankrupt. His properties at Chester and Cambridge were sold but the proceeds of sale were not even sufficient to satisfy the first mortgagee. His property at Blackwell was then sold by auction and Rolt was declared (for reasons which are not relevant here) the purchaser of this property. Rolt then maintained that he was entitled to retain the balance of the proceeds of sale of the property at Blackwell after payment of moneys due

9. (1670) 2 Vent. 337.

10. See *Hopkinson v. Rolt* (1861) 9 H.L.C. 514, at 540.

11. (1861) 9 H.L.C. 514.

under the first mortgage, as he had paid all moneys advanced by the Bank under the second mortgage. He further contended that his third mortgage had priority over further advances made by the Bank after the date of third mortgage. The Bank (through its officers the appellants) opposed Rolt's contentions. The matter went up to the House of Lords. The Law Lords in upholding Rolt's contentions, held that the Bank could not claim priority over Rolt's third mortgage in respect of advances which the Bank had made after notice of his third mortgage despite the fact that the mortgage to the Bank had specifically provided for future advances. As Lord Campbell said:

The consequence certainly is that after executing such a mortgage.. the mortgagor, by executing another such mortgage, and giving notice of it to the first mortgagor may at any time give a preference to the second mortgagee as to subsequent advances, and, as to such advances, reduce the first mortgagee to the rank of *puisne* incumbrancer. But the first mortgagee will have no reason to complain, knowing that this is his true position, if he chooses voluntarily to make farther advances to the mortgagor. The second mortgagee cannot be charged with any fraud upon the first mortgagee in making the advances, with notice of the first mortgage; for, by the hypothesis, each has notice of the security of the other, and the first mortgagee is left in full possession of his option to make or to refuse farther advances as he may deem it prudent. This hardship upon bankers from this view of the subject at once vanishes when we consider that the security of the first mortgage is not impaired without notice of the second, and that when this notice comes, the bankers have only to consider.. what is the credit of their customer, and whether the proposed transaction is likely to lead to profit or to loss.<sup>12</sup>

*Hopkinson v. Rolt* was an unsatisfactory case. This became apparent with the decision of the House of Lords in *Deeley v. Lloyds Bank Ltd.*<sup>13</sup> So the law in England was changed in 1925. Under the Law of Property Act of 1925, a prior mortgagee, (that is, any prior mortgagee who need not be a first mortgagee or a legal mortgagee) has the right to make further advances.<sup>14</sup> Such further advances are to rank in priority to subsequent mortgages, whether legal or equitable —

- (a) if arrangements have been made to that effect with the subsequent mortgagees; or
- (b) if the prior mortgagee had no notice of such subsequent mortgages when the further advances was made; or
- (c) where the mortgage imposes an obligation on the prior mortgagee to make further advances.

The 1925 Act also dealt with the question of notice. Prior to 1926 the position as to notice was not very satisfactory. The Act now provides that mere registration of the subsequent mortgage did not by itself constitute sufficient notice. It was only good notice if the subsequent mortgage was already on the land register at the time the prior mortgage was created or when the last search was made. This amendment was

12. *Ibid.*, at p. 535.

13. [1912] A.C. 756.

14. S 94 of the 1925 Act, as amended by the Law of Property (Amendment) Act 1926. For an examination of the position in England, see Rowley, "Tacking Further Advances" (1958) 22 Conv. (N.S.) 44.

necessary because by this time the Land Charges Act, 1925 was already in force. Second and third mortgagees could register a land charge against the property. Further, this amendment absolved the prior mortgagee from the trouble of making a fresh search every time a further advance was made. Prior to the Act, a search was considered necessary because each cheque paid on a current account was treated as a separate advance under the mortgage.<sup>16</sup>

### *Position in Singapore*

The Registration of Deeds Act was introduced in its present form in 1886.<sup>17</sup> One of its principal objects is to ensure that only deeds that are registered shall have priority. Priority is based on the date of registration not on the date of the instrument or of its execution.<sup>18</sup> Deeds that are not registered are not admissible in evidence.<sup>19</sup> Both the Registration of Deeds Act and the Conveyancing and Law of Property Act were introduced into Singapore at about the same time.<sup>20</sup> This meant that unlike the difficulties encountered in England prior to 1926, an equitable interest could be converted into a legal registerable interest under the Registration of Deeds Act. Thus, second and subsequent mortgagees of the equity of redemption could register their mortgages as legal mortgages. An equitable mortgagee who failed to convert his equitable interest into a legal registerable interest did so at his own peril. Tacking (whether by estate or by contract) had no place in such a system of registration of deeds. It is, therefore, not surprising to find a provision in the Registration of Deeds Act to the effect that *no priority or protection shall be given to any estate or interest in land that is tacked.*<sup>21</sup> This is so even if the claimant is a purchaser for valuable consideration without notice.<sup>22</sup> This was the position of the law in Singapore in 1886. It is still so today. Changes which have been found necessary in England in 1925 have not been introduced into Singapore. There is no provision in the Singapore Conveyancing and Law of Property Act that in any way resembles section 94 of the English Law of Property Act of 1925. It would appear therefore that

15. See s. 94(2) thereof.

16. See Rowley, *op. cit.*, at p. 47.

17. See F.G. Stevens, *Commentary on the Registration of Deeds Ordinance* (1922), pp. 1-10.

18. See s. 15(1) of the Registration of Deeds Act, Cap. 281 and *Chung Khiaw Bank Ltd. v. United Overseas Bank Ltd.* [1968] 2 M.L.J. 85 F.C.; [1970] 1 M.L.J. 185 P.C.

19. S. 4 of the Registration of Deeds Act, Cap. 281; and see *Kasmeerah v. Haji Mookhamed Taib* (1901) 6 S.S.L.R. 104.

20. Both were introduced in 1886. However see F.G. Stevens, *op. cit.*, where the learned author stated that the 1886 Ordinance superseded the Indian Act XVI of 1839.

21. S. 16 thereof. Some doubts have been expressed as to whether s. 16 covers tacking by contract as well. It is submitted that it does. The word "interest" was quite clearly inserted to cover other forms of tacking apart from tacking by estate. See Koh Kheng Lian and others, *Credit & Security in Singapore* (1973), pp. 153 *et seq.*

22. S. 16 of Registration of Deeds Act, Cap. 281.

tacking of any sort is not available to a mortgagee of common law land in Singapore.<sup>23</sup> This raises a number of interesting practical problems. These problems can be posed in this way:

- (a) What is the efficacy of the practice in Singapore of having common law mortgages which do not specify a limit but which provide for further advances to the extent to which *ad valorem* duty has been paid and stamped on it, and
- (b) can such a mortgagee stamp up and re-register the mortgage in the Registry of Deeds to cover additional advances made and, if so, will such mortgagee have priority over a second mortgage registered after the advance was made and the first mortgage re-registered ?

There are two factors for consideration here: (a) the question of *priority* and (b) the question of *validity*. A mortgage must satisfy both these factors to be an effective security. Unfortunately, too much attention is often focussed on priority without regard to the validity of the security. Tacking is such an instance. What happens when a mortgage is stamped up is that the legal estate is enlarged to the detriment of the equity of redemption.<sup>24</sup> The equity of redemption has a definite value. The value of the equity of redemption diminishes with each stamping up. Such stamping up is clearly contrary to section 16 of the Registration of Deeds Act. The additional security obtained by stamping up cannot be a valid security because (as explained earlier) tacking is not available to a mortgagee of common law land in Singapore. Therefore the priority supposedly obtained by re-registering the stamped up mortgage is ineffective.<sup>25</sup> The registered first mortgage can only be good security for the original amount advanced and stamped. A subsequent mortgagee who registers his second mortgage (after the stamping up and re-registration of the first mortgage) will have priority over the additional amount tacked by the first mortgagee. This must be so if section 16 of the Registration of Deeds Act is to have any meaning.

### Summary

- (a) Tacking whether by estate or by contract is not available to a mortgagee of common law land in Singapore. *No protection or priority* will be given to any *estate or interest* that is tacked.
- (b) A mortgage that is stamped up and re-registered to tack additional advances made by the first mortgagee cannot be an effect-

23. See *The British Commonwealth: The Development of Its Laws and Constitutions*, Vol. 9—*Malaya and Singapore, the Borneo Territories* (ed. by L.A. Sheridan) where at p. 336 the learned author states: "section 16 [of the Registration of Deeds Act] abolishes priority by acquisition of a legal estate including *tabula in naufragio* tacking." See also Baalman, *The Singapore Torrens System*, p. 146; and also *Halsbury's Statutes of England* (2nd ed.) Vol. 20, p. 1118.

24. *Deeley v. Lloyds Bank Ltd.* [1912] A.C. 756, at 781.

25. See comments of Bricknill C.J. in *Ng Boo Bee v. Khaw Joo Choe* (1916) 14 S.S.L.R. 90, at pp. 101 *et seq.*

ive security (in respect of the additional advance made) as it is in clear breach of section 16 of the Registration of Deeds Act.

- (c) Mere registration cannot convert an otherwise invalid security into a valid one. Validity, therefore, is as important as priority.

## II. TACKING UNDER THE TORRENS SYSTEM

The Torrens system of land registration was introduced in 1959 by the Land Titles Ordinance, 1956.<sup>26</sup> This legislation as amended and re-enacted now appears as the Land Titles Act.<sup>27</sup> The Land Titles Strata Act,<sup>28</sup> which deals with the issue of Subsidiary Strata Certificates of Title for flats, was only introduced in 1968. It is a prerequisite that the land be brought under the Land Titles Act before Strata Titles can be issued.<sup>29</sup> The Land Titles Act provides for the tacking of further advances to rank in priority to subsequent mortgages and charges. Section 70 of the Land Titles Act states:

- (1) Notwithstanding any other provision of this Act, a prior mortgagee of registered land has the right to make further advances to rank in priority to subsequent mortgages and charges :-
  - (a) if the prior mortgage expressly provides for the making of further advances, or for the giving of credit to the mortgagor on a current or continuing account; or
  - (b) if the subsequent mortgagee or chargee agrees to such further advances being made or credit given.
- (2) A subsequent mortgagee or chargee shall be deemed to have agreed to any further advances made or credit given before the date (if any) on which the prior mortgagee receives notice in writing of the execution of the subsequent mortgage.
- (3) Except as provided in this section, the right to tack does not apply to mortgages or charges of registered land.

Four things stand out in this section. First, section 70 seems to be a clear departure from the general tenor of Torrens legislation that priority is based on registration and registration alone.<sup>30</sup> Secondly, in order to have the amount tacked to rank in priority to subsequent mortgages, the first mortgage itself must provide for further advances and the account must be a current or continuing account as distinct from a fixed loan. Thirdly, a subsequent mortgagee can agree to further advances being made to the mortgagor by the first mortgagee. Fourthly, section 70(2) is of particular importance. Under this subsection a subsequent mortgagee or chargee shall be deemed to have agreed to any further advances made or credit given prior to written notice of the execution of the subsequent mortgage. It should be noted here that the word used in the sub-section is "execution" and not "re-

26. No. 21 of 1956.

27. Singapore Statutes, Rev. Ed. 1970, Cap. 276.

28. Singapore Statutes, Rev. Ed. 1970, Cap. 277.

29. See s. 6 of the Land Titles (Strata) Act, Cap. 277.

30. See s. 36 of the Land Titles Act, Cap. 276.

gistration". This is a further departure from the tenor of the whole Torrens legislation where it is the registration of the instrument that matters and not its execution or delivery.

An examination of section 70 seems to indicate that it has an English rather than an Australian parentage. Section 94 of the English Law of Property Act, 1925, states:

- (1) After the commencement of this Act, a prior mortgagee shall have a right to make further advances to rank in priority to subsequent mortgages (whether legal or equitable):
  - (a) if an arrangement has been made to that effect with the subsequent mortgagees; or
  - (b) if he had no *notice* of such subsequent mortgages at the time when the further advance was made by him or
  - (c) whether or not he had such notice as aforesaid, where the mortgage imposes an obligation on him to make such further advances.

This sub-section applies whether or not the prior mortgage was made expressly for securing further advances.

- (2) In relation to the making of further advances after the commencement of this Act a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered as a land charge or in a local deeds registry, if it was not so registered at the time when the original mortgage was created or when the last search (if any) by or on behalf of the mortgagee was made, which ever last happened. This sub-section only applies where the prior mortgage was made expressly for securing a current account or other further advances.
- (3) Save in regard to the making of further advances as aforesaid, the right to tack is hereby abolished:  
Provided that nothing in this Act shall affect any priority acquired before the commencement of this Act by tacking, or in respect of further advances made without notice of a subsequent incumbrance or by arrangement with subsequent incumbrancer.
- (4) This section applies to mortgages of land made before or after the commencement of this Act but not to charges registered under the Land Registration Act 1925 or any enactment repealed by that Act.

Though it is true that both section 70 of the Land Titles Act and section 94 of the English Law of Property Act, 1925, provide for the tacking of further advances, and the language used in both sections bear some resemblance, it may be said that the similarity ends there. The Singapore section differs from the section of the English Act in three material particulars:

- (a) Under section 70 of the Singapore Act a prior mortgagee can only safely tack where the prior mortgage "expressly provides for the making of further advances" whereas under section 94 of the English Act a prior mortgagee can tack "whether or not the prior mortgage was made expressly for securing such further advances."
- (b) Under section 70 of the Singapore Act a subsequent mortgagee shall be "*deemed*" to have agreed to further advances before the date of receiving written notice of the "execution" of the subsequent mortgage whilst under section 94 of the English

Act it is not the execution that matters but the "creation" of the mortgage. If the subsequent mortgage was not created or...on the register when the last search was made (before the first mortgagee advanced further moneys) then the first mortgage would have priority in respect of the further advances made or granted to the mortgagor.

- (c) Whilst section 70 of the Singapore Act seems to apply to legal mortgages only, section 94 of the English Act applies to both legal and equitable mortgages.

The question then arises whether there are any provisions in any of the Australian Torrens statutes which are similar or identical to section 70 of our Land Titles Act. An examination shows that no corresponding provision exists in the statutes of the Australian States examined.<sup>31</sup> However, this has not precluded the question of tacking being raised in the courts. It was, for example, raised in the Victorian courts in 1915 by *Wilson v. Holland*.<sup>32</sup> In that case one *E* mortgaged his property to Holland to secure a debt and also such "further advances" as Holland might thereafter make to *E*. At that time Holland had given a guarantee to the Bank to secure *E*'s overdraft facilities. The guarantee was intended to be covered by the mortgage. *E* incurred overdraft to the extent of £298 and Holland received a demand from the Bank for payment under the guarantee. Subsequently (some four months later) *E* assigned all his estates including the land mortgaged to Holland (but subject to the mortgage) to Wilson in trust for his creditors. Holland only received the notice of assignment about a month after the assignment. He then paid to the Bank £298 as provided under the guarantee. In an action by Wilson for redemption of the mortgage the court held that although a mortgagee cannot make further advances after notice of assignment, in the circumstances of this case, he was obliged to pay the sum of £298 under the guarantee on behalf of the mortgagor. He was therefore entitled to the benefit of such further advances under the mortgage. Wilson therefore was required to pay the sum of £298 before he could redeem the mortgage.

A more recent case is *Network Finance Limited v. Deposit and Investment Co. Ltd.*<sup>33</sup> This was a contest between two registered mortgagees. A mortgagor executed in a bill of mortgage of certain land to the defendant for securing repayment of a sum not exceeding \$75,000. It was one of the terms of the mortgage that if the mortgagor did not complete the building (consisting of ten home units) in accordance with the plans and specifications the defendant could enter on the land and complete the building. It was also provided in the mortgage that the

31. No corresponding provisions exist in New South Wales, Victoria, Queensland, Southern Australia, Tasmania and Western Australia. However see New South Wales Real Property Act 1900-1970, s. 56; Victoria Transfer of Land Act, s. 74(1); Queensland Real Property Act, s. 56, 1861; Southern Australia Real Property Act 1886-1969, s. 186; Tasmania Real Property Act, 1862, s. 52; and Western Australia Transfer of Land Act, 1893-1969, s. 105.
32. (1915) V.L.R. 46; 36 A.L.T. 130, 21 A.L.R. 35. See also *Nootiah Chitty v. Mootoo Curpen Chitty* (1905) 9 S.S.L.R. 123.
33. [1972] Q.W.N. 19. See comments in (1972) 46 A.L.J. 413.



defendant could advance further moneys to the mortgagor and any such sums so advanced were to be deemed to be “part of and recoverable in like manner as the principal moneys”. The bill of mortgage was registered in January 1968. The mortgagor subsequently obtained a sum of \$15,000 from the plaintiff in September 1968 with the knowledge of the defendant. A second mortgage was created to secure repayment to the plaintiff of the \$15,000. The second mortgage was also registered. The second mortgage was created so that the mortgagor could complete the home units with the moneys. The mortgagor however used the \$15,000 for purposes not connected with the completion of the home units. By early 1969 it was clear that the mortgagor would never be in a position to complete the project. The project was therefore brought under official management. During the period of official management the manager entered into a contract to sell the land together with the home units. The manager then terminated his official management and handed the securities to the defendant to complete the sale of the land and the home units at \$105,000. Under the contract, however, the defendant was obliged to have certain works performed on the building in order to complete it as a block of flats. The costs of this extra works were just over \$9,000. On the sale being completed a dispute arose as to the order in which the two mortgagees were to be repaid. Campbell J, held *inter alia* that (i) the plaintiff was in breach of an implied term of their agreement in that they had failed to take reasonable steps to ensure that the \$15,000 advanced was in fact used towards completion of the home units. The plaintiff thus lost any priority over the sum of \$75,000 advanced by the defendant under the first mortgage, and (ii) all that had been done pursuant to the contract of sale was necessary and reasonable in order to enable the defendant to sell the unfinished building as a completed building. Such works had enhanced the value of the building and were contemplated by the express provisions of the mortgage as “further advances”. Such payments by the defendant had priority over the plaintiff’s second mortgage.

The Australian courts in these two cases faced some difficulties. The question was whether *Hopkinson v. Rolt*<sup>34</sup> should be applied in Australia. The courts felt otherwise. The courts, therefore, sought to justify the additional payments made by the first mortgagee on a different footing, namely, the mortgage document itself. The courts took the view that the payments made by the first mortgagee were “expenses” rather than “advances”. Such payments, the courts held, were necessary before the first mortgagee could effectively recoup the original amount advanced under the mortgage.

It will be noticed from what has been said above that section 70 of the Singapore Act is different from the corresponding English provision. The Australian statutes examined do not contain a similar provision. English and Australian cases must therefore be carefully scrutinized before they are applied. When considering authorities from foreign jurisdictions it may perhaps be worthwhile remembering that the Singapore section stands very much on its own.

34. (1861) 9 H.L.C. 514.

*Summary*

1. A mortgagee of land under the Torrens system in Singapore can tack further advances provided section 70 of the Land Titles Act is complied with.
2. Although section 70 of the Land Titles Act appears to be similar to section 94 of the English Law of Property Act, 1925, the two statutes are different in their scope and operation.
3. The Australian Torrens statutes examined do not contain a provision similar or identical to section 70 of the Land Titles Act.

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