

registered mortgage dated 4 March 1999. It was in the usual bank form securing payment of present and future advances without mentioning any specific sum. It was granted exemption from duty pursuant to the above provisions of the Act on 25 March 1999. Later, on a date not evident from the record, a further advance of \$11,750 was made for rebuilding her house and she applied for exemption from duty for that amount on 14 February 2000, lodging with the application the duplicate of the original mortgage and a statutory declaration that the conditions for entitlement were satisfied. The Commissioner requested that a variation of mortgage be provided for this transaction, but the respondent's solicitors maintained that she had no power to make such a requisition and demanded she stamp the documents as requested. She declined to do so, and the respondent took out an originating summons seeking declarations that the Commissioner had acted incorrectly in refusing to grant exemption, and that she was entitled to conditional exemption. Shameem J made these declarations and awarded costs of \$300 to the respondent.

The Act contains a broad definition of mortgage in s2, as security for the payment of money advanced or lent.... "or for the repayment of money to be thereafter lent, advanced, or paid, or which may become due upon an account current....". and the definition in the Land Transfer Act also includes provision for further advances. We mention this because it appears that in submissions in the High Court the Commissioner thought it her duty to foster transparency in the Land Transfer records by requiring a variation of mortgage to be executed in respect of such further advances. This proposition was roundly and rightly rejected by Her Ladyship, and it is evident from the definitions we have cited that no

variation is needed in respect of further advances made under a mortgage which includes them as part of the security. Transparency is assured by the notice of this fact given by that document to all the world by its registration and, as with any mortgage, a prudent enquirer can be expected to ascertain current indebtedness from the mortgagee. Furthermore, as Her Ladyship pointed out, even when an amount secured by a fixed sum mortgage is increased, a variation and registration thereof are optional (see s66(a) and (c) of the Land Transfer Act), although without it a mortgagee may lose the Act's protection in respect of the additional advance.

It became apparent on appeal that the real problem concerned the time within which the application for exemption must be made. Section 2(c) of Part III requires it and the prescribed declaration and the mortgage to be produced to the Commissioner within 6 months from the date the mortgage was executed, or within such longer period as the Minister might allow by reason of any special circumstances. In the present case the application in respect of the further advance was not made until 14 February 2000, well outside the six-month limit from the execution of the mortgage on 4 March 1999. No request for a longer period was made to the Minister. Mr Kumar submitted that in reality the Commissioner was helping mortgagors in the position of the respondent by asking for a variation evidencing the further advance, which then became a new instrument in respect of which the six-month time limit would run from its date of execution. This seems an unwieldy and expensive way of solving the problem presented by the requirement of s(2)(c).

We explored with counsel the possibility that a solution might be found in the provisions in Part I of the Schedule setting out rates and amounts of stamp duty. The entry under Mortgage reads (with the rate included for completeness):-

“Being the only or principal or primary security for the payment or repayment of money - For every \$100 or part of \$100 principal moneys - \$1.00

or

Where such a mortgage secures further or future advances or moneys due on account current - For every \$100 or part of \$100 of the principal indebtedness at any time owing - \$1.00

Where the principal indebtedness under such a mortgage at any time exceeds the amount covered by ad valorem duty already paid, the mortgage shall be liable to further duty as if it were a new instrument in respect of the amount of such excess.”

Under s37(2) of the Act there is a penalty on unstamped or insufficiently stamped instruments presented more than two months after execution. On consideration, we do not think this provision assists. Its language is clearly directed at cases where duty has already been paid and where further duty is to be assessed, and it is not amenable to a construction which could extend its deemed “new instrument” provision to mortgages on which no *ad valorem* duty is payable.

The relevant provisions of s1(1) of Part III describing the instruments in respect of which exemption from stamp duty shall be granted include in subpara (b) “a mortgage which is the only or principal or primary security for the payment or repayment of moneys, or which secures further or future advances of moneys due on account current.” The

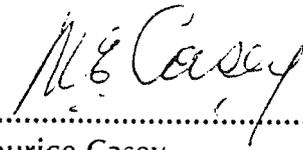
moneys secured by the mortgage in question were described in the very wide terms customarily used in Bank mortgages, and while further advances due on current account are no doubt included, it is obvious that the loan transactions between the respondent and the Bank involved two specific advances to her, and neither could be described as an advance due on current account. It is significant that the foregoing definition of mortgage qualifying for exemption omits the wider reference to "money to be thereafter lent, advanced, or paid" in s2 of the Act quoted earlier in this judgment, in addition to that which might become due on account current.

Accordingly, while the exemption of the mortgage in March 1999 might have extended to any further advances on current account (and we make no finding on this), it does not apply to the specific advance in question here, and application for exemption was required if payment of duty was to be avoided, as the respondent's advisers recognised. Unfortunately there seems to be no answer to the problem created by the absence of any provision in Part III for extension of time for making that application, apart from the practice devised by the Commissioner. She cannot require a variation, but is entitled to reject the application as out of time if it is not accompanied by such an instrument with an appropriate date evidencing the specific further advance.

For these reasons, which reflect the change of emphasis between the submissions made to us and those apparently advanced in the High Court, the appeal must be allowed.

Result

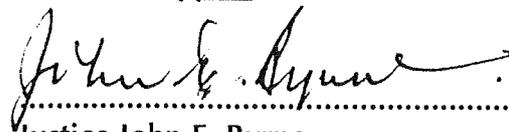
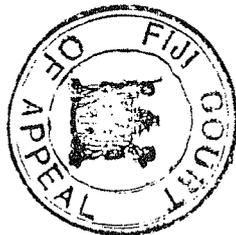
The appeal is allowed and the declarations and order for costs made in the High Court are set aside. The appellant will have costs in that Court of \$300 and costs in this Court of \$500 together with disbursements to be fixed by the Registrar if they are not agreed.



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Sir Maurice Casey
Presiding Judge



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Justice Gordon Ward
Justice of Appeal



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Justice John E. Byrne
Judge of Appeal

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