

20, 1934

In the Privy Council.

No. 94 of 1933.

ON APPEAL FROM THE SUPREME COURT OF
ONTARIO (APPELLATE DIVISION).

BETWEEN

H. A. MORINE - - - - - (Defendant) Appellant

AND

LONDON LOAN ASSETS LIMITED AND THE LONDON
LOAN AND SAVINGS COMPANY OF CANADA -
(Plaintiffs) Respondents

AND BETWEEN

LONDON LOAN ASSETS LIMITED AND THE LONDON
LOAN AND SAVINGS COMPANY OF CANADA -
(Plaintiffs) Appellants

AND

G. A. P. BRICKENDEN, GEORGE G. McCORMICK AND
H. A. MORINE - - - - - (Defendants) Respondents.

(CONSOLIDATED APPEALS.)

CASE

FOR LONDON LOAN ASSETS LIMITED AND THE LONDON
LOAN AND SAVINGS COMPANY OF CANADA.

Respondents in the first and Appellants in the second of the above Appeals.

1. These consolidated appeals arise out of an action brought by the Respondent Companies, London Loan Assets Limited (herein called the "Assets Company") and The London Loan & Savings Company of Canada (herein called the "Loan Company") against H. A. Morine, a financial agent at Toronto, G. A. P. Brickenden, the Loan Company's solicitor, and George C. McCormick, its President. McCormick is the father-in-law of Brickenden. One Durno and the Consolidated Trust Corporation were also parties defendant but Durno did not defend the action and the Trust

RECORD.
p. 14, l. 27.
p. 21, l. 33.
p. 25, l. 15.

CASE FOR LONDON LOAN ASSETS
AND LOAN COMPANIES.

RECORD.
p. 23, l. 5.
p. 476, l. 12.

Corporation submitted its rights to the Court and by its counsel at the trial expressed its willingness to carry out any order the Court might make so far as applicable to it.

p. 476.

2. The action was tried by the Hon. Mr. Justice Wright who held Morine liable on covenants contained in three mortgages on a property known as "Buckingham Apartments" in Toronto—a first mortgage originally given to The Huron & Erie Mortgage Corporation and later assigned to the Loan Company to secure \$150,000 and interest, a second mortgage given to the Loan Company to secure \$35,000 and interest and a third mortgage given to the Loan Company to secure \$20,000 and interest. The learned Judge held that a discharge of the second mortgage and a conveyance to Durno under the power of sale contained in the third mortgage were ineffective to release Morine from his covenants, the transactions being fictitious and in fraud of the Loan Company. He held that Brickenden was a party to the fraud but that no substantial damages could be awarded against him as Morine's liability still existed on the covenants. He therefore ordered him to pay costs only. The action was dismissed as against McCormick on the ground that there was no evidence connecting him with the improper acts of Morine and Brickenden. 10

p. 486, l. 13.

p. 503.

3. The Court of Appeal for Ontario unanimously dismissed an appeal by Morine; allowed an appeal as to costs by Brickenden; and dismissed an appeal by the Respondent Companies against Morine, Brickenden and McCormick. An appeal from this judgment by Morine and a cross-appeal by the Respondent Companies have been consolidated. 20

p. 511, l. 20.

4. The Loan Company had its chief office in London, Ontario, where McCormick and Brickenden resided. It loaned money on real estate throughout Ontario, a large portion of its business being introduced to it by Morine. He obtained applications for loans addressed to himself and presented them to the Company receiving a commission, unless otherwise agreed, of 1 per cent. on accepted applications. He sometimes received commissions from the borrower. He was associated with the Company in this way from about 1911 and had great influence with its officers, consulting with and advising them from time to time. He made valuations of lands on which he asked loans which were acted on by the Company; was many times entrusted with the full amount loaned before the mortgage was executed or the titles examined and generally looked after the Company's business at Toronto. He was an agent of and stood in a fiduciary relationship to the Company. 30

p. 392, l. 1.

p. 391, l. 20.

p. 396, l. 7.

p. 534, l. 30.

p. 559, l. 14.

p. 560, ll. 7, 38.

p. 562.

p. 620, l. 30.

p. 31, l. 5.

p. 669.

5. N. J. Kent, the Managing Director of the Company for many years, had much to do with Morine but he was ill part of the time when the transactions in question were carried through. He took no part in completing them and protested to the Registrar of Loan Companies against the release of Morine's personal liability. He left the Company in 1927 after a contest for control and died before the action was commenced. 40

- 6.** Morine's relations with Brickenden were particularly intimate. Brickenden referred applicants for loans to Morine so that the applications would go to the Company through him. Morine superintended or secured the performance of much of the legal work that should have been done by or under the direction of Brickenden as the Company's solicitor and paid Brickenden fees or commission usually in cash and on a generous scale. RECORD.
pp. 548, 556.
p. 358, l. 10.
p. 608, l. 10.
- 7.** The first mortgage for \$150,000 was executed on 7th February, 1923, by Morine and Green as mortgagors in favour of The Huron and Erie Mortgage Corporation and was assigned to the Loan Company by Indenture dated 7th February, 1928. It contains the usual covenant for payment and has not been discharged or satisfied. The mortgagors were partners in the purchase and improvement of the lands on which Buckingham Apartments were erected. p. 516.
- 8.** After the first loan was secured, Green failed to implement a promise he made to Morine to provide additional money for their joint venture. Morine thereupon negotiated a second mortgage loan of \$35,000 and later a third mortgage loan of \$20,000 from the Loan Company. Green, in respect of the former, was to pay Morine 25 per cent. of the amount of the loan and for the latter was to release to Morine all his interest in the premises and superintend the building operations to completion free of charge. The applications for these loans were signed by Green, were addressed to Morine and were presented to the Company by Morine who agreed to "guarantee" the loans. No document in the nature of a guarantee was executed but the mortgages, one dated 13th February, 1923, and the other dated 23rd May, 1923, prepared under the direction of Morine, contained covenants for payment and were executed by Morine and Green as mortgagors. pp. 525, 537.
pp. 520, 523.
pp. 537, 542.
- 9.** Morine after he became sole owner negotiated a further loan of \$46,000 from one Renton representing a group of Scottish investors on terms that he would give Renton a half interest in his equity of redemption. Morine, to avoid giving a covenant for payment, transferred his equity of redemption to his son-in-law, Dyas, a man without any financial standing, and Dyas thereupon executed a fourth mortgage on the Apartments dated 10th August, 1923, for \$46,000 in favour of Renton, as Trustee. At this date the prior mortgages to the Loan Company were largely in arrear and several mechanics' liens had been registered. Morine received the entire proceeds of the Renton loan. p. 423, l. 25.
p. 424, l. 25.
p. 424, l. 18.
- 10.** For a time interest on the Renton mortgage was paid though large arrears were accumulating on the prior mortgages, even the first mortgage. On 24th March, 1924, Mr. J. J. Maclennan, a solicitor representing the Scottish investors, applied for a statement as to the amount due on the second and third mortgages. Correspondence followed but Mr. Maclennan was unable to obtain any information, the Company's letters of refusal being dictated by Morine. p. 439, l. 40.
p. 575.

RECORD.

11. On 27th October, 1924, Dyas executed in favour of Morine a fifth mortgage for \$23,000 which was taken to indemnify Morine against advances made to discharge the mechanics' liens.

12. The mortgages for \$35,000 and \$20,000 were in arrear for principal and interest almost from the beginning and in January, 1925, the Company placed them in the hands of Brickenden, its solicitor, for collection of the arrears. Morine, who was then well able to discharge the liability and if pressed would have done so, was never asked to pay. Brickenden and Morine instead, acting through one W. M. Wilson, a Solicitor in Toronto and a great friend of Morine's, carried on sale proceedings under the power of sale in the third mortgage. Wilson received his instructions from Morine.

13. The premises were advertised for sale in February, 1925, but by order of the Supreme Court made at the instance of the Scottish investors, the sale was postponed to afford them an opportunity to protect their security. Their solicitor proposed that they should pay the arrears of interest on the first and second mortgages, pay all principal and interest secured by the third mortgage and all costs incurred in the sale proceedings, provided time was extended for payment of the principal due on the second mortgage conditional on the prompt payment of interest in the future. The offer was refused by McCormick and Brickenden without consultation with the Directors. Baker, the Vice-President, said the matter was all in the hands of Brickenden and Morine. The property was accordingly brought to sale but no bid was received.

14. Morine was at the Company's office in London on 10th June, 1925. He says he then promised to discharge the mechanics' liens registered against the property and he gave the necessary instructions to his solicitors on 11th June, 1925. The certificates of discharge were dated 13th June, 1925, and were registered on 16th June, 1925. On the 16th or 17th June he introduced Durno to Wilson as a possible purchaser. Durno was a builder who had been known to Morine for some years and who had applied to him for two or three mortgage loans and possibly to sell mortgages. Morine knew Durno's covenant to pay any substantial sum would be worthless.

15. Wilson forwarded to the Company an offer to purchase signed by Durno which came before the directors on 23rd June, 1925. The price offered was \$227,500 made up as follows: \$147,000 by the assumption of the first mortgage; \$77,000 by giving a second mortgage and the balance \$3,500 to be paid in cash. Morine, Brickenden and McCormick were present at the meeting when the offer was accepted after considerable discussion but without disclosing that Durno was really the nominee of Morine, that he was financially worthless and that the proposed sale was for the benefit of Morine, the object being to release him from his obligation under the covenants contained in the second and third mortgages.

16. The sale was in due course completed. The lands were conveyed to Durno subject to the first mortgage which was reduced to \$147,000 by payments made by the Loan Company. A mortgage was given by Durno to secure \$77,000 made up of the balances due on the former second and third mortgages, advances made to pay arrears on the first mortgage, over-due taxes and other items. Durno then conveyed the equity to Consolidated Trusts Corporation in trust but the trusts were not declared and were not satisfactorily disclosed in evidence. A certificate of discharge of the former second mortgage was executed but not by persons authorized to sign for the Company. All these documents were registered. Another document was produced which was not registered—an Indenture dated 8th July, 1925, whereby Durno on a recital that he had no further interest in or claim upon the lands released the Consolidated Trusts Corporation from any share or interest in the lands and declared that the Company did not hold the lands in trust for him. The evidence does not satisfactorily account for the origin, custody or purpose of this document. Durno did not pay anything in connection with the purchase. His cheque for \$500 which purported to cover the deposit was never cashed or used and the balance of the cash payment of \$3,500 was never in fact paid. All registration fees, transfer taxes, solicitors' charges, taxes and other outgoings were paid by the Loan Company by cheques authorized or signed by McCormick.

RECORD.

p. 628.

p. 631.

p. 647, l. 25.

p. 650.

pp. 625, 626.

pp. 648, 649.

17. Durno never entered into possession of the lands or collected any of the rents or appeared in the transaction beyond executing the offer to purchase and the documents necessary to complete the transaction. Morine remained in possession and collected the rents until a change in control of the Loan Company took place in 1929 and McCormick and Brickenden were deposed.

18. On 3rd July, 1929, the Loan Company entered into an agreement with The Huron and Erie Mortgage Corporation to which all its assets were transferred on terms that part of them, which included those in question herein, were to be transferred to a company to be incorporated, therein referred to as the "new Company" but now known as the "Assets Company." Rights of action not capable of assignment were to be realized by the Loan Company. The agreement was ratified by shareholders and was assented to by the Lieutenant-Governor in Council in compliance with Section 60 of The Loan and Trust Corporation Act (R.S.O. 1927 cap. 223). The Minister under whose direction that Act is administered thereupon issued his certificate pursuant to Section 61 of the Act and the agreement became binding and effective from and after 1st September, 1929.

p. 857.

p. 855.

p. 859, l. 20.

p. 862.

p. 863.

19. Wright J., in the course of his judgment found that there was a fraudulent agreement or conspiracy between Morine and Brickenden to put through the Durno transaction; that it was not a real or genuine sale but was fictitious; that the discharge of the second mortgage was void; that the evidence of Morine and Brickenden was not to be believed and that

RECORD. McCormick though not a party to the fraud was guilty of negligence. The Court of Appeal unanimously affirmed the findings of fact as to Morine and agreed that though the circumstances created suspicion, the evidence fell short of proof of impropriety on the part of McCormick.

20. The Respondent Companies submit that the appeal should be dismissed and the cross-appeal should be allowed for the following amongst other

REASONS.

1. Because the finding of fraud and conspiracy against Morine and Brickenden was amply justified and both should have been held liable for all loss sustained by the Company. 10
2. Because the evidence discloses that McCormick was a party to the wrongful acts of Morine and Brickenden.
3. Because Morine, Brickenden and McCormick each occupied a fiduciary relationship to the Company and sought to benefit Morine at the expense of the Company.
4. Because Morine, Brickenden and McCormick conspired together to protect Morine against personal liability to the Company by depriving the Company of the benefit of his covenants in the mortgages. 20
5. Because Morine was liable under covenants contained in all three mortgages and no steps were taken that effectively discharged him from any of them.
6. Because Morine should be held liable under the covenant in the first mortgage for all moneys paid by the Loan Company to The Huron and Erie Mortgage Corporation on account of the mortgage.
7. Because the discharge of the second mortgage and the Conveyance to Durno were not executed so as to bind the Company.
8. Because the proceedings taken under power of sale contained in the third mortgage were fictitious and fraudulent, Durno not being a real purchaser but lending his name to Morine. 30
9. Because the transaction with Durno was carried through with the active assistance and co-operation of Morine, Brickenden and McCormick.
10. Because the loss, if not intentionally brought about by Brickenden and McCormick, resulted from their negligence.

11. Because Brickenden and McCormick by their action prevented the Company from enforcing its rights against Morine at a time when he was solvent and well able to pay.
12. Because declaring the liability of Morine under his covenant at this date does not afford full indemnity for the damage sustained.
13. Because the Court of Appeal should not have interfered with the exercise of discretion by the Trial Judge in awarding costs against Brickenden.
14. Because under the agreement of 3rd July, 1929, and The Loan and Trust Corporation Act, the rights of action are now vested in the Assets Company, or if any are not, they remain vested in the Loan Company.

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W. N. TILLEY.

G. T. WALSH.

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