

O N A P P E A L

FROM THE COURT OF APPEAL (CIVIL SIDE)

OF THE BAHAMA ISLANDS

B E T W E E N:

SECURITY TRUST COMPANY Appellant

- and -

THE ROYAL BANK OF CANADA Respondent

CASE FOR THE APPELLANT

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| 10 | 1. This is an appeal by special leave from an Order dated the 17th July 1973 of the Court of Appeal (Civil Side) of the Bahama Islands (Bourke P., Hogan J.A. and Archer J.A.) setting aside an Order dated the 28th December 1972 of the Supreme Court (Equity Side) of the Bahama Islands (Bruce C.J.). | p.122, 1.1 -
p.123, 1.39.
p.97, 1.21 -
p.98, 1.15.
p.95, 1.1 -
p.96, 1.8. |
| 20 | 2. The principal question arising on this appeal is as to which of two mortgages has priority. The Respondent claims under a Debenture (hereinafter called "the Debenture") issued to it by Carl G. Fisher Company Limited (hereinafter called "Fisher") on the 4th June 1970. It claims that the Debenture at the date of its issue upon the true construction thereof created a fixed charge on land at Coral Harbour New Providence comprising 461.537 acres (hereinafter called "the said land") and that such charge takes priority over the Appellant's mortgage because registered in priority to such mortgage under the Registration of Deeds Act (Cap. 193) (hereinafter called "the Act"). The Appellant claims under a mortgage (hereinafter called "the Mortgage") dated the 19th February 1970 but not in fact effectively executed until the 30th April 1971. The Appellant was the owner of the said land until the 30th April 1971 on which date it conveyed the said land to Fisher in consideration (inter alia) of the Mortgage which secured payment to the Appellant of the greater part of the purchase price due under the | p.12, 1.1 -
p.21, 1.38.

p.8, 11.30-34.

p.97, 11.10-16.

p.60, 1.3 -
p.69, 1.39

p.51, 1.1 -
p.60, 1.1. |
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p.23, 1.1 -
p.24, 1.10, and
p.71, 1.30 -
p.72, 1.10.

said conveyance. The Appellant contends that the Mortgage is a first mortgage on the said land and takes priority over the Debenture. It contends that the Debenture on its true construction created no fixed charge on the said land. It further contends that it conveyed the said land to Fisher upon the understanding, to the knowledge of the Respondent, that the Debenture should be subject to the Mortgage and that there is nothing in the provisions of the Act to operate to displace such understanding.

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3. Section 10 of the Act provides as follows :-

"10. If any person after having made and executed any conveyance, assignment, grant, lease, bargain, sale or mortgage of any lands or of any goods or other effects within the Colony, or of any estate right or interest therein, shall afterwards make and execute any other conveyance, assignment, grant, release, bargain, sale or mortgage of the same, or any part thereof, or any estate, right or interest therein; such of the said conveyances, assignments, grants, releases, bargains, sales or mortgages, as shall be first lodged and accepted for record in the Registry shall have priority or preference; and the estate, right, title or interest of the vendee, grantee or mortgagee claiming under such conveyance, assignment, grant, release, bargain, sale or mortgage, so first lodged and accepted for record shall be deemed and taken to be good and valid and shall in no wise be defeated or affected by reason of priority in time of execution of any other such documents: Provided that this section shall not apply to any disposition of property made with intent to defraud."

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4. The facts material to this appeal are shortly as follows.

p.51, 1.1 -
p.60, 1.1.

p.55, 1.40.

p.60, 1.3 -
p.69, 1.39.
p.62, 1.4-5.

5. On the 19th February 1970 the Appellant executed a Conveyance of the said land to Fisher (hereinafter called "the Conveyance") expressed to be in consideration of the sum of 923,074 U.S. Dollars and on the same day Fisher executed the Mortgage whereby it reconveyed the said land to the Appellants by way of security for the sum of 723,000 U.S. dollars, together with interest, until payment, such sum being expressed to be the unpaid balance of the said sum of 923,074. dollars. Both the Conveyance and the Mortgage were delivered as escrows. The

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- condition of the escrow was in each case that Fisher should pay to the Appellant, the sum of 200,000 U.S. dollars within 90 days of the 19th February 1970. Such condition was not fulfilled. p.45, 11.35-42.
6. On the 4th June 1970 Fisher issued the Debenture in favour of the Respondent. By Clause 4 thereof, it charged all its undertaking both present and future with payment of all moneys and liabilities intended to be thereby secured and provided that the charge thereby created should be "a fixed first charge on all other the present freehold and leasehold property of the Company" subject to an exception not material hereto. Clause 4 further provided that as to such premises on which no fixed charge was created the charge should be a floating security but so that Fisher was not to be at liberty to create any mortgage charge or lien in priority to or pari passu with the charge thereby created. p.12, 1.1 -
p.21, 1.38.
p.13, 1.16 -
p.14, 1.38.
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7. The Debenture was recorded at the Registry of Records pursuant to the Act on the 30th July 1970. p.21, 11.22-24.
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8. By an Indenture dated the 31st August 1970 the Appellant conveyed to Fisher part of the said land comprising an area of 49.22 acres in consideration of the payment to the Appellant of a sum of 123,050 U.S. dollars. p.70, 11.30-35.
9. By instrument under hand dated the 20th November 1970 the Respondent appointed a receiver of the property comprised in the Debenture pursuant to a power therein contained. p.22, 11.1-30
p.16, 11.31-45.
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10. By letter dated and delivered on the 30th April 1971, the Receiver wrote to the Respondent saying that he was satisfied that it would be to the advantage of Fisher and of the Respondent for Fisher to buy the land at an agreed price as being much less than the market value and inviting the Respondent to advance the balance of the purchase price, since Fisher did not have such money. The Receiver undertook to procure a mortgage to secure the money advanced, such mortgage to be subject to the Mortgage. The Manager of the Respondent signed the said letter as evidence of the consent of the Respondent to make the advance requested upon the terms thereof. p.23, 1.1 -
p.24, 1.12.
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11. On the afternoon of the same day, the 30th April 1971, the Appellant agreed in consideration of receipt of the said balance of the purchase money advanced by the Respondent (together with other moneys paid in respect of the exercise of an option) and of the p.8, 11.17-24.

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p.37,11.16-18.

delivery to its attorney for registration of the Conveyance and the Mortgage that the Conveyance and the Mortgage should be "released from escrow". The Conveyance and the Mortgage were delivered as aforesaid to the Appellant's attorney and were duly registered under the Act on the 5th May 1971. It is submitted that the effect of the above transaction, the time for fulfilment of the condition of the escrow having already expired, was that the Conveyance and the Mortgage were effectively delivered for the first time on the 30th April 1971. It is further submitted that, to the knowledge of the Respondent, the Conveyance was made upon the understanding that the Mortgage should have priority over the Debenture.

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p.37, 1.30 -
p.38, 1.10

12. The Respondent subsequently claimed that the Debenture created a charge on the land in priority to that created by the Mortgage. Such claim, if correct, would result in the Mortgage being valueless and in the Appellant receiving only 323,124

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p.70, 1.1 -
p.71, 1.20.

U.S. dollars on account of the purchase price of 923,074 U.S. dollars in respect of the said land. Accordingly on the 15th October 1971 the Appellant issued an Originating Summons against Fisher and the Respondent claiming as the principal relief payment of the moneys secured by the Mortgage which Summons was amended on the 23rd May 1972. On 19th November 1971, the Respondent issued an Originating Summons against Fisher, the Appellant and others claiming payment of all moneys due under the Debenture, which Summons was amended on the 28th April 1972.

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p.1, 1.1 -
p.6, 1.40

p.30, 1.8 -
p.33, 1.20.

p.74, 1.32 -
p.94, 1.48.

13. The Originating Summonses were heard together before Bryce, C.J., who on the 3rd December 1972 delivered judgment in favour of the Appellant. In his view, the Debenture only created a charge over Fisher's interest in the said land subject to the Mortgage, and the Mortgage therefore had priority over the Debenture.

p.94, 11.18-24.

p.96, 1.10 -
p.97, 1.20.

14. The Respondent appealed against the said decision of Bryce, C.J., to the Court of Appeal (Civil Side) of the Bahama Islands (Bourke P., Hogan J.A. and Archer J.A.), who gave judgment on the 2nd July 1973 setting aside the said decision of Bryce C.J. and remitting the case to him for further hearing without prejudice to the questions whether the Respondent was precluded from relying on section 10 of the Act in respect of moneys advanced by it after it had notice of the Mortgage and whether the Appellant could rely on an unpaid

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p.97, 1.21 -
p.98, 1.16.

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vendor's lien.

15. The leading judgment was delivered by Hogan, J.A. with which judgment the other members of the Court agreed. The judgment proceeded upon the basis :-

p.98, 1.25 -
p.120, 1.44.

- 10 (1) That the Conveyance and the Mortgage were delivered on the 19th February 1970 as escrows, the conditions of which were fulfilled on the 30th April 1971, and that for purposes of title both must be treated as having been delivered on the 19th February 1970. p.105,11.29-40.
- (2) That the Debenture, although prior in date to the fulfilment of the said condition upon which the Conveyance was delivered, nevertheless created a fixed charge on the said land, which must be deemed to have been previously conveyed to Fisher at the date of the Debenture. p.106,11.21-36.
- 20 (3) That although the Mortgage operated by way of reconveyance of the said land, the Conveyance and the Mortgage could not be treated as a single transaction and there remained a punctum temporis during which Fisher owned the legal estate in the said land and the Debenture operated to charge such legal estate and p.115,11.29-35.
- 30 (4) That, as between the Debenture and the Mortgage, the Debenture created the prior charge on the said land by virtue of section 10 of the Act, because it was first registered thereunder. p.115,11.36-42.

16. On the 20th February 1974 the Appellant was granted special leave by Her Majesty in Council to appeal against the said judgment of the Court of Appeal. p.122, 1.1 -
p.123, 1.39.

17. The Appellant hereby submits that this appeal should be allowed with costs here and below and that the said judgment of the Court of Appeal should be reversed and the order made by Bryce C.J. restored for the following amongst other

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R E A S O N S

- (1) Because, upon the true construction of the Debenture, the Respondent did not, as was held by the Court of Appeal, acquire a fixed charge over the said land at the date thereof by virtue

of clause 4(d) thereof. At such date the said land was not "present freehold property of the Company" within the meaning of the said clause 4(d). At such date the Conveyance had been delivered as an escrow and the condition of such escrow had failed. It had not been re-delivered. The said land remained the freehold property of the Appellant.

- (2) Because, even if at such date the said land has been subject to a Conveyance to Fisher delivered by way of escrow the condition of which remained open, the said land would not have been present freehold land of Fisher at the date of the Debenture. An escrow does not operate to pass any estate until fulfilment of its condition. See per Farwell L.J., in Foundling Hospital (Governors and Guardians) v. Crane [1911] 2 K.B. 367 at p.377. The construction of the Debenture must be determined at the date of its execution in the light of the then existing circumstances and cannot vary according as to whether or not the condition of an escrow is subsequently fulfilled. Cf. Thompson v. McCullough [1947] K.B. 447. 10
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- (3) Because on any view of the construction of the Debenture the only beneficial interest which Fisher acquired in the said land was the equity of redemption therein or the right to the said land subject to the discharge of the Mortgage. The law is correctly stated in Fisher and Lightwood on Mortgages (8th Edtn.) at p.112 as follows :- 30

"Where a company which has issued floating debentures purchases property with money advanced by a person who is to have a charge on the property, the purchase is in effect the purchase of an equity of redemption, and the charge has priority over the debenture."

Such passage is not, as wrongly stated by the Court of Appeal, in conflict with Palmer's Company Law (21st Edtn. p.400). 40

- (4) Because if, as a matter of construction, the Debenture created no charge upon the said land other than the equity of redemption therein the Debenture and the Mortgage do not create simultaneous charges over the same property and there is no room for the application of section 10 of the Act.

(5) Because in any event the Court of Appeal misconstrued section 10 of the Act. The policy of the Act is like that of the Irish Registration Act (6 Anne Cap 2) and the Middlesex Deeds Registry Act (7 Anne Cap 20) to protect a purchaser who purchases under a document in ignorance of a prior unregistered document where the two documents effect conflicting dispositions. In the present case there was no conflict since all the parties understood that the Mortgage was to take priority over the Debenture and the said land was conveyed to Fisher by the Appellant on such understanding. The Debenture was not granted on the faith of a charge over the said land free from the Mortgage. If a freeholder granted a term of years to A by an unregistered disposition and then the freehold reversion subject to the term of years to B by a registered disposition, B could not by virtue of section 10 of the Act take free from A's term of years. There would be no conflict between the two dispositions. The Court of Appeal placed a different construction on the Act in reliance on the analogy of Chung Khiaw Bank Ltd. v. United Overseas Bank Ltd. /1970/ A.C. 767. But that was a decision on the very different language of the Registration of Deeds Ordinance of Singapore and is distinguishable.

p.116,1.24 -
p.118,1.25.

(6) Because the construction placed upon the Act by the Court of appeal would prove extremely unjust and inconvenient in practice. In the present case it would enable the Respondent to disregard the Mortgage on the faith of which the Appellant was induced with the connivance of the Respondent to convey the said land to Fisher. It would also make it impossible, once a floating mortgage had been registered, for the mortgagor ever to grant a subsequent purchase mortgage, since such purchase mortgage must inevitably be registered subsequently to the floating mortgage.

MICHAEL ALBERRY.

ALAN SEBESTYEN.

No. 7 of 1974

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- and -
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CASE FOR THE APPELLANT

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