

23

IN THE PRIVY COUNCIL

No. 7 of 1974

ON APPEAL
FROM THE COURT OF APPEAL (CIVIL SIDE) OF THE BAHAMA ISLANDS

BETWEEN :-

SECURITY TRUST COMPANY

Appellant
(Respondent)

- and -

THE ROYAL BANK OF CANADA

Respondent
(Appellant)

RECORD OF PROCEEDINGS

SIMMONS & SIMMONS,
14, Dominion Street,
London, EC2M 2RJ.

Solicitors for the Appellant

CLIFFORD-TURNER & CO.,
11, Old Jewry,
London, EC2.

Solicitors for the Respondent

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
(Respondent)

and

THE ROYAL BANK OF CANADA

Respondent
(Appellant)RECORD OF PROCEEDINGSINDEX OF REFERENCE

No.	Description of Document	Date	Page
	<u>IN THE SUPREME COURT OF THE COMMONWEALTH OF THE BAHAMA ISLANDS</u>		
1.	Amended Originating Summons No. 732 of 1971 (15.10.72)	23rd May 1972	1
2.	Affidavit of C.W. Minard	17th November 1971	7
3.	Exhibit C.W.M.1 - Debenture	4th June 1970	12
4.	Exhibit C.W.M.3 - Appointment of Receiver	20th November 1970	22
5.	Exhibit C.W.M.4 - Letter of Agreement	30th April 1971	23
6.	Affidavit of Burton V. Kelly	23rd May 1972	24
7.	Order	29th May 1972	28
8.	Amended Originating Summons No.812 of 1971 (19.11.71)	28th April 1972	30
9.	Affidavit of Burton V. Kelly	6th March 1972	33
10.	Part Exhibit B.V.K.6 - Contract and 3 Amendments	20th September 1968	39
11.	Part Exhibit B.V.K.7 - Conveyance and Mortgage	19th February 1970	51

No.	Description of Document	Date	Page
12.	Exhibit B.V.K.8 - Completion Statement	30th April 1971	70
13.	Affidavit of James A. Dixon	19th April 1972	72
14.	Ruling of Bryce C.J.	21st July 1972 ³	74
15.	Ruling of Bryce C.J. (continued)	3rd December 1972	82
16.	Order	28th December 1972	95
	<u>IN THE COURT OF APPEAL (CIVIL SIDE)</u> <u>OF THE BAHAMA ISLANDS</u>		
17.	Notice of Appeal	10th January 1973	96
18.	Order and Judgment of the Court of Appeal	2nd July 1973	97
	<u>IN THE PRIVY COUNCIL</u>		
19.	Order granting special leave to appeal to Her Majesty in Council	20th February 1974	122
	<u>DOCUMENTS TRANSMITTED TO THE PRIVY</u> <u>COUNCIL BUT NOT REPRODUCED</u>		

Description of Document	Date
Affidavit of James A. Dixon	15th October 1971
Exhibit C.W.M.2 - Guarantee	8th May 1970
Exhibit C.W.M.3 - Appointment of Receiver	20th November 1970
Summons regarding priority	23rd November 1971
Affidavit of James A. Dixon	19th May 1972
Exhibit B.V.K.1 - Letter	19th August 1970
Part Exhibit B.V.K.6 (Contract, Amendment and Option)	20th September 1968
Part Exhibit B.V.K.7 (Schedule & Plan to Conveyance and Schedule to Mortgage)	19th February 1970
Judge's Notes	

ON APPEAL
FROM THE COURT OF APPEAL (CIVIL SIDE) OF THE BAHAMA ISLANDS

B E T W E E N :-

SECURITY TRUST COMPANY	Appellant (Respondent)
- and -	
THE ROYAL BANK OF CANADA	Defendant (Appellant)

RECORD OF PROCEEDINGS

No. 1

AMENDED ORIGINATING SUMMONS

COMMONWEALTH OF THE BAHAMA ISLANDS
IN THE SUPREME COURT
Equity Side

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No. 1

BETWEEN

SECURITY TRUST COMPANY Plaintiff

AND

CARL G. FISHER COMPANY LIMITED
1st Defendant

AND

THE ROYAL BANK OF CANADA
2nd Defendant

AND

CHEE-A-TOW & COMPANY LIMITED
3rd Defendant

AND

RUSSELL PENNELL CAMPBELL
4th Defendant

AND

ELEUTHERA LIMITED
5th Defendant

AND

MAURA LUMBER COMPANY LIMITED
6th Defendant

Originating
Summons
1971 No. 732
dated 15th
October 1972
as amended
23rd May 1972

10

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In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

AND
BUTLER & SANDS COMPANY LIMITED
7th Defendant

Originating Summons

—
No. 1
Originating
Summons
1971 No. 732
dated 15th
October 1972
as amended
23rd May 1972
(continued)

TO:- Carl G. Fisher
c/o Messrs. Isaacs, Johnson & Thompson

The Royal Bank of Canada
c/o Messrs. Higgs & Johnson

Chee-a-Tow & Company Limited
c/o James M. Thompson, Esq.

Russell Pennell Campbell
c/o Richard Curry, Esq.

Eleuthera Limited
c/o Messrs. Higgs & Johnson

Maura Lumber Company Limited
c/o Messrs. Isaacs, Johnson & Thompson

Butler & Sands Company Limited
Bay & East Streets, Nassau, Bahamas.

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Let the 1st Defendant, Carl G. Fisher Company Limited, which is the Borrower under an Indenture of Mortgage dated the 19th day of February, 1970 and made between the 1st Defendant of the one part and the Plaintiff of the other part and the 2nd Defendant, The Royal Bank of Canada, a firm interested in the equity of redemption in the properties comprised in the said Mortgage the 3rd Defendant which is the Judgment Creditor under a Judgment against the 1st Defendant dated the 11th October, 1971 and the 4th Defendant who is a Judgment Creditor under a Judgment against the 1st Defendant dated the 11th November, 1971 and the 5th Defendant which is the Judgment Creditor under a Judgment against the 1st Defendant dated the 3rd September, 1971 and the 6th Defendant which is the Judgment Creditor under a Judgment against the 1st Defendant dated the 27th day of July, A.D. 1971 and the 7th Defendant who is the Judgment Creditor under a Judgment against the 1st Defendant dated

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the 16th day of February, 1972 and the 8th Defendant which is a mortgagee under an Indenture of Mortgage dated the 1st June, 1970 and made between the 1st Defendant of the one part and the 8th Defendant of the other part and recorded in the Registry of Records in the City of Nassau in the Island of New Providence one of the Bahama Islands in Volume 1653 at pages 342 to 354 within Fourteen (14) days after service of this Summons on them inclusive of the day of service, cause an Appearance to be entered for them respectively to this Summons which is issued on the application of the Plaintiff who claims to be the Lender under the said Mortgage hereinafter mentioned.

10

By this Summons the Plaintiff claims against the 1st Defendant or seeks the determination of the Court on the following questions:-

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 1

Originating
Summons
1971 No. 732
dated 15th
October 1972
as amended
23rd May 1972
(continued)

20

1. Payment of all moneys due to the Plaintiff under the respective covenants in a Mortgage dated the 19th day of February, 1970 and made between Carl G. Fisher Company Limited as the Borrower and the Plaintiff, Security Trust Company, as the Lender whereby the Borrower mortgaged to the Lender:-

PART ONE

ALL THAT piece parcel or tract of land containing Two hundred and Seventeen and Six hundred and Twenty-six thousandths (217.626) acres or thereabouts situate South of Coral Harbour Golf and Country Club West of Coral Waterways Section One Subdivision North of Flamingo Waterway and on the Southern coast of the Western District of the said Island of New Providence and comprising a portion of Tract Number Six (6) which was originally granted to Leonora Balsley Hopkins as of record at page 137 of Grant Book A² in the Lands and Surveys Department a portion of Tract Number Seven (7) which was originally granted to Joseph Garfunkel as of record at page 97 of Grant Book A² in the Lands and Surveys Department all of Tract Number Eight (8) originally granted to the said Joseph Garfunkel as of record

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In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 1

Originating
Summons
1971 No. 732
dated 15th
October 1972
as amended
23rd May 1972
(continued)

at page 97 of Grant Book A³ in the Lands and Surveys Department and a portion of Tract "A" which was originally granted to the said Joseph Garfunkel as of record at page 85 of Grant Book A³ in the Lands and Surveys Department the boundaries of which said piece parcel or tract of land are more particularly defined and set out in Part One of the Schedule to the said Indenture of Conveyance of even date herewith and which said piece parcel or tract of land has such position boundaries shape marks and dimensions as are shown and delineated on the diagram or plan thereto attached marked 'A' and thereon shown coloured Pink and Green.

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PART TWO

ALL THAT piece parcel or tract of land containing Fifty-nine and Seven hundred and Ninety-seven thousandths (59.797) acres or thereabouts situate on the Western side of Coral Harbour Road immediately North of and adjacent to Coral Waterways Section One subdivision in the Western District of the said Island of New Providence and comprising a portion of Tract Number Five (5) which was originally granted to Leonora Balsley Hopkins as of record at page 136 of Grant Book A³ in the Lands and Surveys Department a portion of Tract Number Six (6) which was originally granted to the said Leonora Balsley Hopkins as of record at page 137 of Grant Book A³ in the Lands and Surveys Department and a portion of Tract Number Seven (7) which was originally granted to the said Leonora Balsley Hopkins as of record at page 97 of Grant Book A³ in the Lands and Surveys Department the boundaries of which said piece parcel or tract of land are more particularly defined and set out in Part Two of the Schedule to the said Indenture of Conveyance of even date herewith and which said piece parcel or tract of land has such position boundaries shape marks and dimensions as are shown and delineated on the diagram or plan thereto attached marked 'B' and thereon coloured Pink and Green.

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PART THREE

ALL THAT piece parcel or tract of land containing One hundred and Sixty-eight and Seven hundred and Fourteen thousandths (168.714) acres or thereabouts

10 situate on the Eastern side of Coral Harbour Road
 and on the Southern coast of the Western District
 of the said Island of New Providence and comprising
 a portion of Tract "B" which was originally granted
 to Joseph Garfunkel as of record at page 85 of
 Grant Book A³ in the Lands and Surveys Department
 a portion of the Forty-five and Thirty-seven
 hundredths (45.37) acre tract originally granted to
 the Estate of Leonora Balsley Hopkins as of record
 at page 2 of Grant Book A⁶ in the Lands and Surveys
 Department a portion of the Sixty-seven and Forty-
 one hundredths (67.41) acre swamp tract originally
 granted to the said Estate of Leonora Balsley
 Hopkins as of record at page 35 of Grant Book A⁵
 in the Lands and Surveys Department a portion of
 Tract Number Three (3) which was originally
 granted to Leonora Balsley Hopkins as of record at
 page 196 of Grant Book A³ in the Lands and Surveys
 Department a portion of the Five hundred and Six
 20 and Seventy-two hundredths (506.72) acre tract
 originally granted to Joseph Harris as of record at
 page 221 of Grant Book A and a portion of the Coral
 Harbour Road Reservation which was originally
 granted to the said Leonora Balsley Hopkins as of
 record at page 132 of Grant Book A³ in the Lands
 and Surveys Department the boundaries of which
 said piece parcel or tract of land are more
 particularly defined and set out in Part Three of
 the Schedule to the said Indenture of Conveyance
 30 of even date herewith and which said piece parcel
 or tract of land has such position boundaries shape
 marks and dimensions as are shown and delineated on
 the diagram or plan thereto attached marked 'C' and
 thereon shown coloured Pink Green Brown Brown
 hatched Black and Blue.

PART FOUR

40 ALL THAT piece parcel or part of a tract of land
 containing Fifteen and Forty hundredths (15.40)
 acres or thereabouts situate on the Eastern side of
 the Fifty (50) foot wide Coral Harbour Road
 Reservation immediately South of and adjacent to
 Coral Heights East Subdivision in the Western
 District of the said Island of New Providence and
 being the Southern Portion of Tract Number Two (2)
 which was originally granted to Leonora Balsley
 Hopkins as of record at page 134 of Grant Book A³
 in the Lands and Surveys Department the boundaries
 of which said piece parcel or part of a tract of

In the
 Supreme Court
 of the
 Commonwealth
 of the Bahama
 Islands

—
 No. 1

Originating
 Summons
 1971 No. 732
 dated 15th
 October 1972
 as amended
 23rd May 1972
 (continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 1

Originating
Summons
1971 No. 732
dated 15th
October 1972
as amended
23rd May 1972
(continued)

land are more particularly defined and set out in Part Four of the Schedule to the said Indenture of Conveyance of even date herewith and which said piece parcel or part of a tract of land has such position boundaries shape marks and dimensions as are shown and delineated on the diagram or plan thereto attached marked 'D' and thereon shown coloured Pink.

2. An account of what is due to the Plaintiff under and by virtue of the said Mortgage for principal and interest and costs. 10

3. An enquiry whether anything and if so what is due to the Plaintiff for any and what costs charges and expenses in respect of the said Mortgage beyond costs of this action.

4. An Order that the said Mortgage may be enforced by foreclosure or sale.

5. Further or other relief.

6. Costs.

If neither defendant does not enter an appearance, such judgment may be given or order made against or in relation to it as the Court may think just and expedient. 20

Dated the 15th day of October A.D. 1971

(Sgd.) ILLEGIBLE

REGISTRAR.

NOTE: This Summons may not be served more than 12 calendar months after the above date unless renewed by Order of the Court.

This Summons was taken out by CALLENDERS, ORR, PYFROM & ROBERTS Attorneys for the Plaintiff and whose address for service is Chambers, Mosmar House, Queen Street, Nassau, Bahamas. 30

Directions for Entering Appearance The Defendants may enter an appearance in person or by solicitor either (1) by handing in the appropriate form, duly completed, at the Registry of the Supreme Court of the Bahama Islands in the City of Nassau in the Island of New Providence, or (2) by sending them to that office by post. 40

No. 2

AFFIDAVIT OF C. W. MINARD

COMMONWEALTH OF THE BAHAMA ISLANDS 1971 No. 732
IN THE SUPREME COURT
Equity Side

In the
Supreme Court
of the
Commonwealth
of the
Bahama
Islands

B E T W E E N

No. 2

SECURITY TRUST COMPANY
Plaintiff

Affidavit of
C.W. Minard
17th November
1971

AND

10 CARL G. FISHER COMPANY LIMITED
1st Defendant

AND

THE ROYAL BANK OF CANADA
2nd Defendant

I, CLYDE WINTHROP MINARD of Bay Street in the
City of Nassau in the Island of New Providence one
of the Bahama Islands, Banker, make oath and say
as follows:

20 1. Until the 28th May 1971 I was manager of
the Second Defendant, and I am now District Manager
of the Second Defendant responsible for the Second
Defendant's affairs in the Bahamas, Cayman Islands
and British Honduras, and I am duly authorised by
the Second Defendant to make this affidavit.

30 2. By an Indenture dated the Nineteenth day
of February 1970 and made between the Plaintiff of
the one part and the First Defendant of the other
part and recorded in the Registry of Records in the
City of Nassau in the Island of New Providence in
Volume 1764 at pages 7 to 36 the Plaintiff conveyed
to the First Defendant in fee simple all the heredita-
ments described in clause 1 of the Originating Summons
herein dated the Fifteenth day of October 1971 being
a total of 461.537 acres for the price of US\$923,074
being at the rate of US\$2,000 per acre.

40 3. By an Indenture dated the Nineteenth day
of February 1970 and made between the First Defendant
of the one part and the Plaintiff of the other part
and recorded in the said Registry of Records in
Volume 1674 at pages 7 - 36 the First Defendant

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 2

Affidavit of
C.W. Minard
17th November
1971
(continued)

conveyed by way of Mortgage to the Plaintiff the hereditaments described in clause 1 of the Originating Summons herein dated the Fifteenth day of October 1971 to secure the payment by the First Defendant to the Plaintiff of the sum of Seven hundred and Twenty-three Thousand dollars (\$723,000) in the currency of the United States of America together with interest thereon in the meantime at the rate of Five percentum (5%) per annum in the said currency.

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4. Although the Indenture of Conveyance dated the 19th day of February 1970 referred to in Paragraph 2 hereof and the Indenture of Mortgage of the same date referred to in Paragraph 3 hereof bore those dates nevertheless the transaction covered by those two documents was not completed until the 30th April 1971. By agreement between the parties concerned completion took place on that date and as a result the Conveyance which had been executed in escrow was released from escrow on that date when completion took place. After the Conveyance had been released from escrow on the 30th April 1971 the Indenture of Mortgage would also be released from escrow and take effect. As soon as the Indenture of Conveyance referred to in Paragraph 2 hereof was released from escrow upon the completion of the transaction the legal estate in the hereditaments the subject matter of the Indenture vested in the First Defendant who thereby became the owner in fee simple of the said hereditaments. At that moment the Debenture dated the 4th day of June 1970 referred to in Paragraph 7 hereof took effect and a fixed charge was created upon the property and such charge takes priority over the Indenture of Mortgage dated the 19th day of February 1970 referred to in Paragraph 3 hereof on the following grounds:-

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1. The Indenture of Mortgage dated the 19th February 1970 cannot take effect until the legal estate in the hereditaments the subject matter of the Mortgage is vested in the Mortgagor.
2. As the Debenture dated the 4th June, 1970 was already recorded as soon as the legal estate in the said hereditaments vested in the Mortgagor, who is the First Defendant, the Debenture took effect and a fixed charge arose

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in favour of the Second Defendant under the terms of the Debenture.

3. Subject to the rights of the Second Defendant under the terms of the said Debenture the Indenture of Mortgage dated the 19th February 1970 referred to in Paragraph 3 hereof took effect in favour of the Plaintiff.

10 5. Alternatively, although the completion of the transaction referred to in the preceding paragraph hereof was completed on the 30th April 1971 the said Indenture of Conveyance and the said Indenture of Mortgage executed in escrow were received by Messrs. Higgs & Johnson who were acting for the First Defendant on the 27th April 1971 pending the completion of the matter. Although by agreement the matter was completed on the 30th April 1971 it was not until the 3rd May 1971 that Messrs. Higgs & Johnson returned the Conveyance and Mortgage (inter alia) to the office of Harry B. Sands, Esq., who was acting for the Plaintiff in that transaction. It is submitted therefore that the delivery of the Mortgage would not take place until the 3rd May 1971 although the delivery of the Conveyance had taken place on the 30th April 1971. It is further submitted that during the interval between 30th April 1971 and the 3rd May 1971 the Debenture dated the 4th June 1970 referred to in Paragraph 7 hereof took effect and under the terms of the said Debenture a fixed First Charge arose upon the property the subject matter of the said Conveyance dated the 19th February 1970 referred to in Paragraph 2 hereof and the property became charged to the Second Defendant under the terms of the Debenture. It is further submitted therefore that the Indenture of Mortgage dated the 19th February 1970 referred to in Paragraph 3 hereof takes effect in favour of the Plaintiff who is the Mortgagee subject to the rights of the Second Defendant under the said Debenture.

40 6. By an Indenture dated the Thirty-first day of August 1970 and made between the Plaintiff of the one part and the First Defendant of the other part and now recorded in the said Registry of Records in Volume 1769 at pages 350 to 357 the Plaintiff conveyed to the First Defendant in fee simple parts of the said hereditaments referred to in clause 2 hereof amounting in the aggregate to

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 2

Affidavit of
C.W. Minard
17th November
1971
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 2

Affidavit of
C.W. Minard
17th November
1971
(continued)

49.22 acres being described as follows:-

ALL THAT piece parcel or portion of a tract of land situate in the Western District of the said Island of New Providence comprising One and Sixty-seven hundredths (1.67) acres or thereabouts having such position boundaries shape marks and dimensions as are shown on the diagram or plan attached to the said Indenture dated the Thirty-first day of August 1970 and marked "A" and thereon coloured Pink

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ALL THAT piece parcel or portion of a tract of land situate as aforesaid comprising Forty-seven and Fifty-five hundredths (47.55) acres or thereabouts having such position boundaries shape marks and dimensions as are shown on the diagram or plan attached to the said Indenture dated the Thirty-first day of August 1970 and marked "B" and thereon coloured Pink.

7. By a Debenture dated the Fourth day of June 1970 and made between the First Defendant of the one part and the Second Defendant of the other part and recorded in the said Registry of Records in Volume 1681 at pages 387 to 400 the First Defendant as Beneficial Owner charged with the payment and discharge of all moneys and liabilities thereby secured all its undertaking goodwill and other property whatsoever and wheresoever both present and future including its uncalled capital for the time being. A true copy of the said Debenture is now produced and shown to me marked "C.W.M.1."

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8. Notice of the said Debenture was given by the Second Defendant to the Plaintiff.

9. By a Guarantee dated the Fourth day of June 1970 the First Defendant guaranteed to the Second Defendant the payment of all sums which might from time to time be due and owing to the Second Defendant from Hemisphere Resorts Corporation and by instrument under hand dated the Seventeenth day of November 1970 pursuant to the provisions of the said Guarantee the Second Defendant demanded payment by the First Defendant of the sum of US\$5,000,000 and interest amounting to US\$93,444.40 and all other moneys if any due and owing to the Second Defendant by the said Hemisphere Resorts Corporation. A true

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copy of the said Guarantee is now produced and shown to me marked "C.W.M.2."

10 10. By instrument under hand dated the Twentieth day of November 1970 Ronald Eric Strange of 284 Bay Street, Nassau, Bahamas, Chartered Accountant, was appointed by the Second Defendant to be Receiver of the property comprised in the said Debenture. A true copy of the said Appointment is now produced and shown to me marked "C.W.M.3."

20 11. The Second Defendant has loaned to the First Defendant through the said Receiver the additional sums of US\$590,170.72 and B\$76,734.00 as at the 31st day of October 1971, and these were used in part for the purchase of the property described in the Originating Summons herein and the purchase of the property described in paragraph 4 hereof and also the continued operation of the business of the First Defendant by the Receiver, and the said Receiver entered into an Agreement dated the 30th April 1971 for the First Defendant to grant a Mortgage to secure the loan. A true copy of the said Agreement is now produced and shown to me marked "C.W.M.4".

12. Having regard to the said release from the said Mortgage the hereditaments now subject thereto have a total acreage of 412.317 acres.

30 13. In view of the contents of this affidavit I submit that the Second Defendant's said Debenture creates a first charge on the said hereditaments hereto in priority to the Plaintiff's mortgage, and therefore the Plaintiff is not entitled to the relief prayed for.

14. I depose as above from information acquired by me in investigating and discussing with various persons (including officers of the First Defendant the said Receiver and Officers of the Plaintiff) the matters, facts and problem relating to the mortgaged property over the past 17 months.

SWORN by the above-named
CLYDE WINTHROP MINARD at the
City of Nassau this 17th day
of November, 1971. } Sgd. C. W. Minard

Before me
Sd. ILLEGIBLE
REGISTRAR.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 2

Affidavit of
C.W. Minard
17th November
1971
(continued)

This affidavit is filed on behalf of the Second Defendant.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No. 3

DEBENTURE

COMMONWEALTH OF THE BAHAMA ISLANDS
New Providence

No. 3

DEBENTURE CREATED THIS Fourth DAY OF JUNE A.D. 1970

Debenture
(Exhibit
C.W.M.1)
4th June 1970

1. CARL G. FISHER COMPANY, LIMITED a Company incorporated under the laws of the Bahama Islands and having its Registered Office in the City of Nassau in the Island of New Providence one of the Bahama Islands and carrying on business within the Commonwealth (hereinafter called "the Company") will as and when the monies hereby secured come payable in accordance with the conditions hereinafter contained pay to The Royal Bank of Canada a Company incorporated in Canada and carrying on the business of banking in the Commonwealth and a copy of whose Act or Charter of Incorporation has been filed in the Registry of Records in the City of Nassau aforesaid in accordance with the provisions of The Foreign Companies Act (hereinafter called "the Bank") and discharge all monies and liabilities now or hereafter due from or incurred by the Company to the Bank on any account or in any manner whatever and whether actually or contingently alone or jointly with any other parties and whether as principal or surety or guarantor including and together with interest at the rate from time to time charged by the bank to the date of repayment commission banking charges law and other costs charges and expenses. 10 20 30

2. The Company will pay interest on the monies so due (whether under these presents or on any judgment which may be recovered therefore) as from the date when the security shall become enforceable at the rate from time to time charged by the bank (and if such rate is higher than the rate payable by law on a judgment debt then as well after as before any judgment) until actual payment And in any case where the liability of the Company shall arise as guarantor of the debt or liability of any other party then the Company shall pay interest on the monies so due at the rate at which such other party shall be liable to pay interest to the Bank in respect of such debt or liability. 40

3. The monies and liabilities hereby secured shall become due and the security hereby created shall become enforceable Twenty-one (21) days after demand in writing shall have been made by the Bank upon the Company or left at the Company's Registered Office or principal place of business provided that if the Bank or any one Director or General or Branch Manager of the Bank shall certify in writing that delay would in their or his judgment be prejudicial to the security then the said monies and liabilities shall become immediately payable on the making or leaving of such demand or at such shorter period than Twenty-one (21) days thereafter as the Bank or such Director or Manager shall fix by such certificate.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 3

Debenture
(Exhibit
C.W.M.1)
4th June 1970
(continued)

4. The Company as BENEFICIAL OWNER hereby charges with the payment and discharge of all monies and liabilities intended to be hereby secured (including any expenses and charges arising out of or in connection with the acts authorised by 8 hereof) all its undertaking goodwill and other property whatsoever and wheresoever both present and future including its uncalled capital for the time being.

The charge hereby created shall be:-

(a) A fixed first charge on the goodwill of the Company and uncalled capital for the time being of the Company; and

(b) a Fixed second charge on the real property of the Company described in the First Schedule hereto and the fixed plant and machinery thereon (subject only to an Indenture of Mortgage dated the twelfth day of March A.D. 1969 made between the Company of the one part and Paul Norris Gardner et al of the other part recorded in the Registry of Records in Volume 1597 at pages 113 to 119) until such Mortgage shall be discharged whereupon it shall become a fixed first charge on that real property; and

(c) A fixed second charge on the real property of the Company described in the Second Schedule hereto and the fixed plant and machinery thereon (subject only to an Indenture of Mortgage dated the Seventeenth day of April A.D. 1969 made between the Company of the one part and James Bradley Brown and

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 3

Debenture
(Exhibit
C.W.M.1)
4th June 1970
(continued)

Caroline Celeste Brown of the other part recorded in the Registry of Records in Volume 1417 at pages 318 to 325) until such Mortgage shall be discharged whereupon it shall become a fixed first charge on that real property; and

(d) A fixed first charge on all other the present freehold and leasehold property of the Company and the fixed plant and machinery thereon SAVE AND EXCEPT the freehold property brief particulars of which appear on Exhibit "A" hereunto annexed and purchase moneys payable in respect thereof or any part thereof; and 10

(e) A fixed first charge on all future leasehold property of the Company and the fixed plant and machinery thereon

and as to all other premises hereby charged shall be a floating security but so that the Company is not to be at liberty to create any mortgage or charge upon and so that no lien shall in any case or in any manner arise on or affect any part of the said other premises either in priority to or pari passu with the charge hereby created it being the intention that the Company shall have no power without the consent of the Bank (which will not be unreasonably withheld) to part with or dispose of any part of such other premises except by way of sale in the ordinary course of its business. Any debenture mortgages or charges hereafter created by the Company (otherwise than in favour of the Bank) shall be expressed to be subject to this debenture. The Company shall deposit with the Bank and the Bank during the continuance of this security shall be entitled to hold all deeds and documents of title relating to the Company's freehold and leasehold property which is the subject of this security (save that described in the First and Second Schedule hereto so long as the said Mortgages shall subsist) 20 30

5. The Security hereby given to the Bank shall be without prejudice and in addition to any other security whether by way of mortgage equitable charge or otherwise howsoever which the Bank may now or at any time hereafter hold on the property of the Company or any part thereof for or in respect of all or any part of the indebtedness of the Company to the Bank or any interest thereon. 40

6. During the continuance of this security the Company shall:-

(a) If requested by the Bank furnish to the Bank half-yearly or oftener if required a balance sheet profit and loss account and trading account showing the true position of the Company's affairs at a date not more than one month previously certified by the Auditors for the time being of the Company and also from time to time such other information respecting the assets and liabilities of the Company as the Bank may reasonably require.

(b) Maintain the aggregate value of the Company's book debts and cash in hand as appearing in the Company's books and of its stock according to the best estimate that can be formed without it being necessary to take stock for the purpose at a sum not less than the current indebtedness to the Bank and whenever required obtain from the Managing Director of the Company for the time being or if there shall be no Managing Director then from one of the Directors of the Company and furnish to the Bank a certificate showing the said aggregate value.

(c) Insure and keep insured in an office to be approved by and in the name of the Bank such of its property as is insurable against loss or damage by fire hurricane overflow of the sea aircraft burglary riot and civil commotion to the full insurable value thereof and produce to the Bank the receipts for the current premiums within Seven (7) days after their becoming due and payable failing which the Bank may at the expense of the Company effect or renew any such insurance as to the Bank shall seem fit.

7. With respect to any present or future uncalled capital of the Company the Company hereby covenants with the Bank as follows:-

(a) That the said uncalled capital of the Company shall not during the continuance of this security be called up or received in advance of calls without the consent in writing of the Bank first had and obtained.

(b) That the amount to be paid in respect of the said uncalled capital shall be paid to the Bank who may at any time apply a competent part thereof in or towards satisfaction of the monies intended to be hereby secured.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 3

Debenture
(Exhibit
C.W.M. 1)
4th June 1970
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No. 3

Debenture
(Exhibit
C.W.M. 1)
4th June 1970
(continued)

(c) That at all times during the continuance of this security the Company will permit the Bank or any persons authorised by the Bank to have access to and inspection free of all charges of the Share Register and Transfer Books of the Company and all Transfers of the Company's shares.

(d) That during the continuance of this security the Company will immediately after the presentation of any transfer of unpaid or partly paid share in the capital of the Company give to the Bank notice in writing containing full particulars of such proposed transfer and will not register any transfer of any such shares in the said capital until at least Fourteen (14) days after such notice as aforesaid shall have been given to the Bank and will not register such transfer at all if within the said period of Fourteen (14) days the Bank shall object to the proposed transferee on the ground that he is in the Bank's opinion of insufficient financial stability.

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20

(e) That if the principal monies hereby secured shall not be duly paid as and when they become payable the Company will at the request of the Bank call up or procure to be called up the uncalled capital hereby charged by such instalments and payable at such times (not being contrary to the present Memorandum and Articles of Association of the Company) as the Bank shall in writing request.

30

8. At any time after the Bank shall have demanded payment of any money hereby secured and whether or not they shall have become due the Bank may appoint by writing any person (whether an officer of the Bank or not) to be a Receiver of all or any part of the property hereby charged in like manner in every respect as if the Bank were Mortgagee within the meaning of The Conveyancing and Law of Property Act and had become entitled under that Act to exercise the power of sale thereby conferred and every Receiver so appointed shall be the Agent of the Company (which shall alone be personally liable for his acts defaults and remunerations) and shall have and be entitled to exercise all powers conferred by the said Act in the same way as if such Receiver had been duly appointed thereunder

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and in particular by way of addition to but without hereby limiting any general powers hereinbefore referred to every Receiver so appointed shall have power to do the following things namely:-

(a) To take possession of collect and get in all or any part of the property hereby charged and for that purpose to take any proceedings in the name of the Company or otherwise as may seem expedient.

10 (b) To carry on or concur in carrying on the business of the Company and to raise money from the Bank or others on the security of any property hereby charged.

20 (c) To sell or concur in selling let or concur in letting and to accept surrenders of leases or tenancies of any of the property hereby charged in such manner and generally on such terms and conditions as he shall think fit and to carry any such sale or letting into effect by conveying leasing or letting in the name and on behalf of the Company.

(d) To make any arrangement or compromise which the Bank or any Receiver shall think expedient.

(e) To make and effect all repairs improvements and insurances.

(f) To appoint Managers Officers and Agents for the aforesaid purposes at such salaries as the Receiver may determine.

30 (g) To do all such other acts and things as may be considered to be incidental or conducive to any of the matters or powers aforesaid and which the Receiver lawfully may or can do as Agent for the Company.

40 9. The Company hereby covenants with the Bank to execute a First Legal Mortgage in favour of the Bank over all or any of the property hereby subject to a first fixed charge and to execute a Second Legal Mortgage over all or any of the property hereby subject to a fixed second charge when called upon by the Bank to do so to secure all monies for the time being due or to become due to the Bank on this security with interest thereon as aforementioned.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 3

Debenture
(Exhibit
C.W.M. 1)
4th June 1970
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 3

Debenture
(Exhibit
C.W.M. 1)
4th June 1970
(continued)

10. The Company hereby declares and agrees that it will henceforth hold the said property as Trustee for executing such Mortgage as aforesaid in favour of the Bank and the statutory power of appointing a new Trustee in its place shall be exercisable by the Bank which shall have full power to make such appointment and to remove the Company from such Trusteeship at its sole and unfettered will and pleasure notwithstanding that none of the events referred to in the said statutory power as conditions precedent to its exercise shall have occurred and further that on any such exercise of the said statutory power the party exercising the same may appoint itself to be such new Trustee And that the Bank in consideration of the premises and any Receiver appointed by the Bank shall be and are hereby irrevocably appointed the Attorney and Attorneys of the Company in its and their name or names and on its and their behalf to vest the legal estate in the premises in any purchaser or other person in exercise of the statutory powers conferred on mortgagees free and discharged from all rights of redemption hereunder And in the Company's name or in their own names and on its behalf and as its act and deed or otherwise to sign seal and deliver and otherwise perfect any deed assurance agreement instrument or act which may be required or may be deemed proper for any of the purposes aforesaid.

10

20

11. All monies received by any Receiver appointed hereunder shall after providing for the matters specified in the first three paragraphs of sub-Section (8) of Section 26 of The Conveyancing and Law of Property Act be applied by him in or towards satisfaction of this Debenture and the Receiver shall pay the residue of the monies received by him to the Company.

30

12. During the continuance of this security no statutory or other power of granting or agreeing to grant or of accepting or agreeing to accept surrenders of leases or tenancies of the freehold and leasehold property hereby charged or any part thereof shall be capable of being exercised by the Company without the previous consent in writing of the Bank (which will not be unreasonably withheld) Provided Always that the Company shall be at liberty without the previous consent of the Bank to grant a tenancy or tenancies not exceeding

40

one year in possession of any of the Company's property and to accept a surrender or surrenders of any such tenancy or tenancies. Section 19 of The Conveyancing and Law of Property Act dealing with the consolidation of mortgages shall not apply to this security.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 3

Debenture
(Exhibit
C.W.M. 1)
4th June 1970
(continued)

10

13. Sub-Sections (1) and (2) of Section 22 of The Conveyancing and Law of Property Act shall not apply to this security but the statutory power of sale shall as between the Bank and a purchaser from the Bank be exercisable at any time after the execution of this security Provided that the Bank shall not exercise the said power of sale until payment of the money hereby secured has been demanded and the Company has made default in paying the same but this proviso is for the protection of the Company only and shall not affect a purchaser or put him upon inquiry whether such demand has been made.

20

14. A demand for payment or any other demand or notice hereunder may be made by any Manager or Officer of the Bank by letter sent by prepaid registered air post addressed to the Company or left at its Registered Office for the time being in the said Bahama Islands and its last known principal place of business and being 119 East Flagler Street, Miami, Florida 33131, U.S.A. and any notice shall be sufficiently served on the Bank if forwarded by prepaid registered air post to or left at its Registered Office for the time being in the said Bahama Islands and a demand or notice sent by post shall be deemed to have been given on the day after the envelope containing such demand or notice shall have been committed to the care of the postal authorities.

30

40

15. The Company may at any time give to the Bank Twenty-one (21) days' notice of its intention to discharge this security and upon the expiration of such notice the monies hereby secured shall become immediately payable.

16. All costs charges and expenses incurred hereunder by the Bank and all other money paid by the Bank or by any Receiver appointed by the Bank by reason of or in connection with these presents or in respect of the property hereby charged together with interest thereon as aforesaid shall

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 3

Debenture
(Exhibit
C.W.M. 1)
4th June 1970
(continued)

be charged on the premises comprised herein including (without prejudice to the generality of the foregoing) all costs of the Bank of all proceedings for the enforcement of the security hereby constituted or for obtaining payment or discharge of the monies hereby secured or arising out of or in connection with the acts authorised by Clause 8 hereof (whether or not such costs charges expenses and monies or part thereof would be allowable upon a party and party or solicitor and own client taxation by the Court).

10

17. In this Debenture where the context so requires or admits the expression "the Bank" shall include the Bank's assigns and the expression "the Company" shall include the Company's permitted assigns or assigns by operation of law.

THE FIRST SCHEDULE

ALL THAT piece parcel or part of a lot of land situate in the Western District of the said Island of New Providence being the Eastern half part of Lot Number Thirteen (13) on a plan of Section Number One (1) of the Subdivision called and known as Ocean Beach Colony which said plan is filed in the Crown Lands Office of the Colony as Number Four hundred and Forty-eight N.P. (448 N.P.)

20

THE SECOND SCHEDULE

ALL that piece parcel or lot of land situate as aforesaid and being part of Lot Number Fifteen (15) on the plan of Section Number One (1) of the Subdivision called and known as Ocean Beach Colony which said plan is filed in the Crown Lands Office of the Colony as Number Four hundred and Forty-eight N.P. (448 N.P.)

30

IN WITNESS WHEREOF the Company has caused its Common Seal to be affixed the day and year first hereinbefore written

Sd. ILLEGIBLE

Vice-President

40

The Common Seal of CARL G. FISHER COMPANY, LIMITED was affixed hereto by Jack S. Morse Vice President of the Company and the said Jack S. Morse affixed his signature hereto in the presence of:

Sd. Thomas M. L. Gillespie

Secretary.

EXHIBIT "A"

ALL THOSE Sub-divisions situate in the Western District of the said Island of New Providence and known as:-

- (1) Coral Heights West Addition C.L.O.Plan No. 416 N.P.
- (2) Coral Heights West C.L.O.Plan No. 413 N.P.
- (3) Coral Heights East C.L.O.Plan No. 469 N.P.
- (4) Coral Waterways Section 1 Phase 1 C.L.O. Plan No. 471 N.P.
- (5) Coral Waterways Section 1 Phase 2 C.L.O. Plan No. 317 N.P.

1680
Lodged for Record by
Higgs & Johnson
This 30th day of July A.D.1970

Sd. D.C. Thompson
for Registrar General

Bahama Islands
REGISTRAR GENERAL'S OFFICE

I certify the within to be duly proved and recorded in book 1621 pages 387 to 400 in accordance with the provisions of the Registration of Records Act, Chapter 193.

11th day of Aug. 1970

Sd. ILLEGIBLE
REGISTRAR GENERAL.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No. 3

Debenture
(Exhibit
C.W.M. 1)
4th June 1970
(continued)

10

20

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In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No. 4

APPOINTMENT OF RECEIVER

CARL G. FISHER COMPANY, LIMITED

No. 4
Appointment
of Receiver
(Exhibit
C.W.M. 3)
20th November
1970)

WE, THE ROYAL BANK OF CANADA, a foreign Company registered under The Foreign Companies Act whose registered office is at our premises on Bay Street in the City of Nassau in the Island of New Providence, one of the Bahama Islands, being the holder of a Debenture issued by Carl G. Fisher Company, Limited on the 4th day of June 1970, and recorded in the Registry of Records in the City of Nassau aforesaid in Volume 1621 at pages 387 to 400, in pursuance of the power conferred on us by Clause 8 of the said Debenture hereby appoint RONALD ERIC STRANGE of 284 Bay Street in the City of Nassau aforesaid to be Receiver of the undertaking and other property charged by the said Debenture upon the terms and with and subject to the powers and provisions in the said Clause 8 and Clause 10 of the said Debenture contained.

10

20

I N WITNESS whereof CLYDE WINTHROP MINARD of Bay Street aforesaid as Attorney of the said The Royal Bank of Canada and by virtue of a Power of Attorney under the seal of the said The Royal Bank of Canada dated the 23rd day of June, 1970 recorded in the Registry of Records aforesaid in Book 1612 at pages 355 to 364 has hereunto set his hand and seal this 20th day of November 1970.

SIGNED SEALED AND DELIVERED)
by the above-named CLYDE)
WINTHROP MINARD as the)
Attorney and in the name of)
the said The Royal Bank of)
Canada in the presence of:-)

The Royal Bank of
Canada by its
Attorney
C. W. MINARD

30

Leonard J. Knowles

Sandringham House,
83, Shirley Street,
Nassau, Bahamas,
Attorney-at-Law.

No. 5

LETTER OF AGREEMENT

30th April, 1971

The Manager,
Royal Bank of Canada,
Nassau, Bahamas.

Re: Security Trust Company et al to
Carl G. Fisher Company Limited -
Land at Coral Harbour

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 5

Letter of
Agreement
(Exhibit
C.W.M. 4)
30th April
1971

10 Dear Sir,

At the time of my appointment as receiver of Carl G. Fisher Company Limited, the Company was under contract to purchase 461 acres of land at Coral Harbour and had the benefit of an option to purchase a further 747 acres there. In January of this year it was agreed that the option should be exercised as to 92 acres and both transactions should be closed on or before the 30th April. The amount of cash required to close the transactions is \$465,813.80. I am satisfied that it will be to the advantage of the Company and its creditors to buy this land as the contract price is, so I am advised, much less than the market value.

As the Company does not have the sum required available, I am proposing to borrow it under my express and general power, and hereby apply to the Bank for a loan. I am not prepared to give my personal undertaking to repay the sum, but I am advised that I may authorise the Company to give a Mortgage on the property to be acquired to secure repayment of the sum advanced to purchase it. The Company will undertake to repay the loan on resale or on six months' notice, and I undertake to procure the execution of a Mortgage by the Company to rank immediately after the purchase mortgage. The Mortgage will be executed as soon as possible after the closing in a form to be settled by Higgs & Johnson. The Mortgage will be in addition to and not in lieu of any charge which the Bank may have in the debenture.

If the Bank is willing to advance the purchase

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

price on the terms of this letter, I would be
grateful if the Manager would sign this letter.

Yours faithfully,

(Sgd.) R. E. STRANGE

Receiver for
Carl G. Fisher Company,
Limited.

No. 5

Letter of
Agreement
(Exhibit
C.W.M. 4)
30th April
1971
(continued)

Witness:

Leonard J. Knowles

C. W. MINARD

10

Witness:

Leonard J. Knowles

No. 6

Affidavit of
B.V. Kelly
23rd May 1972

No. 6

AFFIDAVIT OF B. V. KELLY

COMMONWEALTH OF THE BAHAMA ISLANDS 1971 No. 732
IN THE SUPREME COURT
Equity Side

B E T W E E N:

SECURITY TRUST COMPANY Plaintiff

AND

20

CARL G. FISHER COMPANY LIMITED
1st Defendant

AND

THE ROYAL BANK OF CANADA 2nd Defendant

I. BURTON VINCENT KELLY of Bay Street, Nassau,
Bahamas, Bank Manager make oath and say as follows:

1. I refer to an affidavit of Clyde Winthrop
Minard sworn herein on the 15th day of November 1971,

and I wish to add the following information and submissions to those contained in the said affidavit.

2. I have been shown what purports to be a true copy of an affidavit of James Alexander Dixon sworn herein on the 19th day of April 1972, and I respectfully submit that the contents of paragraph 5 of the said affidavit are incorrect for the following reasons:

10. 3. The Debenture of the 4th June 1970 granted by the First Defendant (hereinafter called "the Company") to the Plaintiff granted a fixed charge on the existing freehold and leasehold property with some specified exceptions and on all future leasehold property, and a floating charge on all other property. On the appointment of a Receiver on the 20th November 1970 the floating charge crystallized and became fixed on the then property of the Company. Thus the property excepted from
20 the fixed charge became subject to a fixed charge on the appointment of the Receiver.

30 4. On the 20th September 1968, some two years before the date of the Debenture, the Company had contracted to purchase some land at Coral Harbour from Security Trust Company. This contract was due to be completed on the 20th December 1968, but the Company could elect to defer completion for up to 12 months from the completion date. On the same day, the 20th September 1968, the Company
30 was granted an option over other land at Coral Harbour belonging to Security Trust Company, to be exercised within five years from the completion date of the contract. As a result of this contract and option the Company obtained equitable interests in the land comprised in the contract and option.

5. The Company elected to defer completion but failed to complete the contract by the 20th December 1969, and by an amendment it was agreed to defer completion until the 19th February 1970.

40 6. On the 19th February 1970 a further deferment of 90 days was agreed to, and time was made of the essence. The necessary conveyance and mortgage were drawn up and executed in escrow. The contract was not completed within the 90 days period, and thus it would appear that the contract was at an

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 6

Affidavit of
B.V. Kelly
23rd May 1972
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 6

Affidavit of
B.V. Kelly
23rd May 1972
(continued)

end. Consequently when the Debenture was granted, the Company had no equitable interest in the contract land.

7. On the 19th August 1970 the contract and option were reinstated with modifications and the option was executed as to part. A true copy of this document is now produced and shown to me marked "B.V.K.l." Further deeds were drawn up and executed in escrow to await completion. The Company requested an extension of time for payment to the 19th September 1970. It was not stated that time was to be of the essence, and thus although this date was not kept, the contract continued after the 19th September 1970 and beyond the appointment of the Receiver in November 1970 as no party had taken any steps to terminate it. It follows that among the assets of the Company which were affected by the crystallization of the charge were the equitable interests of the Company under the reinstated contract and option.

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8. The Mortgage from the Company to Security Trust Company dated the 19th February 1970, was not in fact delivered until the 30th April 1971. There was a note at the time of the closing attached to a letter of the 30th April 1971 which contained this passage: "Security Trust Company acknowledges to have received the sum of \$465,813.80 on the understanding that the documents relate back and shall have effect from their respective dates to the intent that the powers vested in Security Trust Company as legal Mortgagee shall be exercisable on the dates of such respective Mortgages in accordance with the terms of the documents." This note could not affect the date of delivery and its only effect was to regulate the computation of interest and other payments under the Mortgages.

30

9. Putting on one side the note, we have the question as to whether the Mortgage has priority over the Debenture as is claimed by Security Trust Company. If the security given by the Debenture was still floating on the 30th April 1971, as it would have been if the Receiver had not been appointed in November 1970, the Mortgage would have had priority. The principle is set out in Fisher and Lightwood "Law of Mortgages" Eighth Edition, page 112 as follows:

40

"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."

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 6

Affidavit of
B.V. Kelly
23rd May 1972
(continued)

10 Under the contract of the 20th September 1968 by which these properties were purchased, it was a term that Security Trust would grant a purchase money Mortgage of \$700,000 so that the case would come within that principle.

10. However, the appointment of the Receiver on the 20th November 1970 crystallized the charge under the floating security so that at that date the Bank obtained a fixed charge on the equitable interest created by the contract of the 20th September 1968.

20 11. The principle from Fisher and Lightwood must be distinguished because our Registration of Records Act gives priority to a subsequent incumbrance which is recorded before a prior incumbrance. If the Debenture had not been recorded the principle from Fisher and Lightwood would apply, but, I respectfully submit, s.10 of the Act gives the Bank priority.

SWORN by the above-named)
BURTON VINCENT KELLY this } Sd. B. V. Kelly
23rd day of May 1972)

Before me,

30 LEONARD J. KNOWLES

NOTARY PUBLIC.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No. 7

ORDER

COMMONWEALTH OF THE BAHAMA ISLANDS
IN THE SUPREME COURT
Equity Side

No. 7

Order
1971 No.732
29th May 1972

B E T W E E N :

SECURITY TRUST COMPANY Plaintiff

AND

CARL G. FISHER COMPANY LIMITED 1st Defendant 10

AND

THE ROYAL BANK OF CANADA 2nd Defendant

AND

CHEE-A-TOW & COMPANY LIMITED 3rd Defendant

AND

RUSSELL PENNELL CAMPBELL 4th Defendant

AND

ELEUTHERA LIMITED 5th Defendant

AND

MAURA LUMBER COMPANY LIMITED 6th Defendant 20

AND

BUTLER & SANDS COMPANY LIMITED 7th Defendant

BAHAMA ISLANDS 1971 No. 812
IN THE SUPREME COURT
Equity Side

BETWEEN

THE ROYAL BANK OF CANADA Plaintiff

AND

30

- (1) CARL G. FISHER COMPANY, LIMITED
- (2) SECURITY TRUST COMPANY
- (3) CHEE-A-TOW & COMPANY LIMITED
- (4) ELEUTHERA LIMITED
- (5) RUSSELL PENNELL CAMPBELL

(6) MAURA LUMBER COMPANY LIMITED
 (7) BUTLER & SANDS COMPANY LIMITED
 (8) CORAL HARBOUR COMPANY LIMITED
 Defendants

In the
 Supreme Court
 of the
 Commonwealth
 of the Bahama
 Islands

—
 No. 7

Order
 1971 No. 732
 29th May 1972
 (continued)

10 Upon hearing Mr. W.E.A. Callender, Q.C. and
 Mr. C.E. Callender, Counsel for Security Trust
 Company, Mr. Leonard J. Knowles Counsel for the
 Royal Bank of Canada, Mr. Oswald Isaacs Counsel for
 Carl G. Fisher Company Limited, Mr. James Thompson
 Counsel for Chee-A-Tow & Company Limited, Mr.
 Nicholas Zervos Counsel for Eleuthera Limited and
 Butler & Sands Company Limited, Mr. Richard B. Curry
 Counsel for Russell Pennell Campbell, Mr. Oswald
 Isaacs Counsel for Maura Lumber Company Limited,
 and Mr. James F. Knowles Counsel for Coral Harbour
 Company Limited.

20 And Upon reading the affidavit of James
 Alexander Dixon sworn on the 15th day of October
 1971 and the affidavit of Burton Vincent Kelly
 sworn on the 6th day of March 1972

IT IS ORDERED as follows:

1. The property the subject-matter of the Mortgage
 and the Debenture be sold rather than
 foreclosed.
2. The firm of H.G. Christie Real Estate Agents
 or some other reputable real estate agent
 designated by the Royal Bank of Canada be
 instructed to sell the property.
- 30 3. The sale shall take place within a period of
 6 months and any sale shall be subject to the
 approval of the Court.
4. The costs of the sale shall be given priority
 over all other debts.
5. The matters of accounts and costs shall be
 adjourned sine die.
6. The question of priority as between the
 Mortgage of Security Trust Company and the
 Debenture of the Royal Bank of Canada is
 adjourned to the 21st June 1972 at 10 a.m.
- 40 7. The above-mentioned actions shall be
 consolidated.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No. 7

Order
1971 No. 732
29th May 1972
(continued)

No. 8

Originating
Summons
1971 No. 812
as amended
28th April
1972

8. There shall be liberty to any party to apply generally.

DATED this Twenty-ninth day of May, 1972.

(Sgd.) ILLEGIBLE
REGISTRAR.

No. 8

AMENDED ORIGINATING SUMMONS

BAHAMA ISLANDS
IN THE SUPREME COURT
Equity Side

1971
No.812 10

B E T W E E N :

THE ROYAL BANK OF CANADA Plaintiff

AND

- (1) CARL G. FISHER COMPANY, LIMITED
 - (2) SECURITY TRUST COMPANY
 - (3) CHEE-A-TOW & COMPANY LIMITED
 - (4) ELEUTHERA LIMITED
 - (5) RUSSELL PENNELL CAMPBELL
 - (6) MAURA LUMBER COMPANY LIMITED
 - (7) BUYLER & SANDS COMPANY LIMITED
 - (8) CORAL HARBOUR COMPANY LIMITED
- Defendants

- TO: (1) CARL G. FISHER COMPANY LIMITED
whose registered office is at the
Bernard Sunley Building,
Bay Street, Nassau, Bahamas.
- (2) SECURITY TRUST COMPANY
whose registered office is situate
at the Chambers of Harry B. Sands,
Esq., 330 Bay Street, Nassau, Bahamas.
- (3) CHEE-A-TOW & COMPANY LIMITED
whose registered office is situate

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30

at the Chambers of James M. Thompson,
Esq., Frederick Street , Nassau, Bahamas.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 8

Originating
Summons
1971 No.812
as amended
28th April
1972
(continued)

- (4) **ELEUTHERA LIMITED**
whose registered office is situate at
Sandringham House, 83, Shirley Street,
Nassau, Bahamas.
- (5) **RUSSELL PENNELL CAMPBELL**
or his Attorney Richard J.B. Curry, Esq.,
Nassau, Bahamas.
- 10 (6) **MAURA LUMBER COMPANY LIMITED**
whose registered office is situate at
the Chambers of Messrs. Isaacs, Johnson
& Thompson, Nassau, Bahamas.
- (7) **BUTLER & SANDS COMPANY LIMITED**
whose registered office is situate at
the corner of Bay Street and East Street,
Nassau, Bahamas.
- 20 (8) **CORAL HARBOUR COMPANY LIMITED**
whose registered office is situate at
the Chambers of Harry B. Sands, Esq.,
330 Bay Street, Nassau, Bahamas.

Let the First Defendant who is the Chargor
under the Debenture dated the Fourth day of June
1970 and made between the First Defendant of the
one part and the Plaintiff of the other part and
recorded in the Registry of Records in the City of
Nassau in the Island of New Providence one of the
Bahama Islands in volume 1681 at pages 387 to 400
the Second Defendant a Corporation interested in
30 the equity of redemption in the properties comprised
in the said Debenture the Third Defendant who is the
Judgment Creditor under a judgment against the First
Defendant dated the 15th October 1971 and the
Fourth Defendant who is the Judgment Creditor under
a Judgment against the First Defendant dated the
3rd September, 1971, and the Fifth Defendant who is
the Judgment Creditor under a Judgment against the
First Defendant dated the 11th day of November,
A.D. 1971, and the Sixth Defendant who is the
40 Judgment Creditor under a Judgment against the First
Defendant dated the 27th day of July, A.D. 1971, and
the Seventh Defendant who is the Judgment Creditor
under a Judgment against the First Defendant dated
the 16th day of February, A.D. 1972 and the Eighth

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 8

Originating
Summons
1971 No. 812
as amended
28th April
1972
(continued)

Defendant who is a mortgagee under an Indenture of Mortgage dated the 1st of June, 1970, and made between the First Defendant of the one part and the Eighth Defendant of the other part and recorded in the Registry of Records in the City of Nassau in the Island of New Providence one of the Bahama Islands in volume 1653 at pages 342 to 354 within 14 days after the service of this Summons on them, inclusive of the day of service cause an appearance to be entered for them respectively to this Summons which is issued on the application of the Plaintiff the Royal Bank of Canada whose registered office is at Bay Street, Nassau, Bahamas, which claims to be the Chargee under the said Debenture.

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By this Summons the Plaintiff claims against the Defendants or seeks the determination of the Court on the following questions:

1. Payment of all money due to the Plaintiff under the covenants contained in clauses 1 and 2 of the said Debenture dated the Fourth day of June 1970 and such costs as would be payable if this claim were the only relief granted.

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2. An account (1) of what is due to the Plaintiff under and by virtue of the said Debenture for principal, interest and costs and otherwise making due allowance for any money paid pursuant to Judgment under paragraph 1 hereof.

3. An enquiry (1) whether anything and if so what is due to the Plaintiff for any and what costs, charges and expenses in respect of its said Debenture beyond the costs of this action.

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4. An order that the said Debenture may be enforced by foreclosure or sale of the property comprised in the said Debenture.

5. Further or other relief.

6. Costs.

If any Defendant does not enter an appearance, such Judgment may be given or order made against or in relation to it as the Court may think just and expedient.

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DATED the 28th day of April A.D. 1972. In the
(Sgd.) ILLEGIBLE Supreme Court
REGISTRAR. of the Commonwealth
of the Bahama Islands

No. 8

NOTE: This Summons may not be served later than
12 calendar months beginning with the above
date unless renewed by order of the Court.

Originating
Summons
1971 No. 812
as amended
28th April
1972
(continued)

This Summons was taken out by Higgs &
Johnson of Sandringham House, 83 Shirley
Street, Nassau, Bahamas, Attorneys for the
Plaintiff whose registered office is at
Bay Street, Nassau, Bahamas.

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DIRECTIONS FOR ENTERING APPEARANCE

A Defendant may enter an appearance in
person or by an attorney either (1) by
handing in the appropriate forms, duly
completed at the Registry of the Supreme
Court of the Bahama Islands, Public Square,
Nassau, Bahamas, or (2) by sending them to
that office by post.

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No. 9

No. 9

AFFIDAVIT OF B. V. KELLY

Affidavit of
B.V. Kelly
6th March
1972

BAHAMA ISLANDS
IN THE SUPREME COURT
Equity Side

1971 No. 812

B E T W E E N:

THE ROYAL BANK OF CANADA Plaintiff

And

- (1) CARL G. FISHER COMPANY, LIMITED
- (2) SECURITY TRUST COMPANY
- (3) CHEE-A-TOW & COMPANY LIMITED
- (4) ELEUTHERA LIMITED

Defendants

30

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 9

Affidavit of
B.V. Kelly
6th March
1972
(continued)

I, BURTON VINCENT KELLY of Bay Street, Nassau, Bahamas, Bank Manager make oath and say as follows:

1. I am a manager in Nassau of The Royal Bank of Canada (hereinafter called "the Bank") and am authorised to make this affidavit on behalf of the Bank.

2. By a Debenture (hereinafter called "the Debenture") dated the Fourth day of June A.D. 1970 and recorded in the Registry of Records in the City of Nassau in Volume 1621 at pages 387 to 400 the above-mentioned Carl G. Fisher Company, Limited (hereinafter called "the Company") chargd its property to the Bank. The Debenture contains the following provisions material to these proceedings:

- (a) An undertaking by the Company that as and when the moneys thereby secured become payable to pay the Bank and discharge all moneys and liabilities then or thereafter due from or incurred by the Company to the Bank on any account or in any manner whatever and whether actually or contingently or alone or jointly with any other parties and whether as principal or surety including and together with interest at the rate therein mentioned to the date of repayment commission banking charges law and other costs charges and expenses. 20
- (b) An undertaking to pay interest on the moneys from time to time owing to the Bank under the Debenture on the Fifteenth day of each month at the rate which is Two (2) per centum over the cost of raising Six (6) month Eurodollars on the Eurodollar Market in London such rate to be adjusted (if at all) at the expiration of every Six (6) months (calculated from the date thereof) during the continuance of this security in accordance with any fluctuation in the cost of raising Six (6) month Eurodollars on the Eurodollar Market in London. 30
- (c) A declaration that the moneys and liabilities thereby secured should become due and the security thereby created should become enforceable Twenty-one (21) days after demand in writing should have been made by the Bank upon the Company. 40

(d) The Company thereby charged its undertaking and property with the payment of the monies and liabilities thereby secured. The charge (inter alia) was

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 9

Affidavit of
B.V. Kelly
6th March
1972
(continued)

10

(i) A fixed second charge on the real property of the Company described in the First Schedule thereto (subject to a Mortgage dated the Twelfth day of March, A.D. 1969 made between the Company of the one part and Paul Norris Gardner and others of the second part, but no evidence of the existence of this Mortgage has been discovered).

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(ii) A fixed second charge on the real property of the Company described in the Second Schedule thereto (subject to a Mortgage dated the Seventeenth day of April, A.D. 1969 made between the Company of the one part and James Bradley Brown and Caroline Celeste Brown of the other part, but no evidence of the existence of this Mortgage has been discovered).

(iii) A fixed first charge on all other the present freehold and leasehold property of the Company save and except the freehold property of which particulars appeared on Exhibit "A" thereto annexed.

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(iv) A fixed first charge on all future leasehold property of the Company.

As to all other property the charge was a floating charge but so that the Company should not be at liberty to create a charge either in priority to or pari passu with the charge thereby created.

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(e) A power after the Bank should have demanded payment of any moneys thereby secured whether or not the same should have become due to appoint a Receiver.

A true copy of the Debenture is now produced and is shown to me marked "B.V.K. 1".

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 9

Affidavit of
B.V. Kelly
6th March
1972
(continued)

3. At the date of the Deenture the Company owned the two pieces of land described in the First and Second Schedules.

4. Also at the date of the Debenture the Company owned a number of lots and roadways and the beds of waterways and other areas in six subdivisions at Coral Harbour in the Island of New Providence. The said roadways and certain of the said waterways are subject to certain easements and rights of way. There are now produced and shown to me marked "B.V.K. 2" a bundle containing plans of the said subdivisions on which are coloured pink the said lots and other areas thereof and on which are coloured brown the said roadways, and on which are coloured yellow certain roadways over which the Company has a right of way under a Grant from the Crown dated the 21st February 1963 and recorded in the said Registry of Records in Volume 584 at pages 357 to 360, and on which are coloured blue the beds of the said waterways. There is also produced and shown to me marked "B.V.K. 3" a bundle of lists of the lots in the said subdivisions owned at the date hereof by the Company.

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5. Also at the date of the Debenture the Company owned further freehold parcels of land at Coral Harbour, and two leasehold parcels. There is now produced and shown to me marked "B.V.K. 4" a list of the Conveyances and Lease of such land to the Company. All such freehold land is still owned by the Company, and the Lease is still subsisting. Copies of the Conveyances and the Lease with the annexed plans which are voluminous will be available in Court at the hearing hereof.

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6. At the date of the Debenture and at the date of the appointment of the Receiver as hereinafter mentioned the Company was entitled to the benefit of certain options to purchase further land and to certain rights and easements. A bundle containing copies of these options and of the grants of the said rights and easements is now produced and shown to me marked "B.V.K. 5".

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7. At the date of the appointment of the said Receiver the Company was entitled as purchasers under a Contract dated the Twentieth day of September A.D. 1968 and subsequently varied to purchase another 461 acres of land at Coral Harbour.

The said Contract was completed on the Thirtieth day of April, A.D. 1971 by a Conveyance to the Company. The purchase price was \$923,074.00 of which \$200,074.00 was paid in cash advanced by the Bank and the balance of \$723,000.00 was left on mortgage by the Vendor, Security Trust Company. A bundle containing copies of the said Contract with the subsequent amendments is now produced and shown to me marked "B.V.K. 6". Copies of the said Conveyance and Mortgage are now produced and tied together shown to me marked "B.V.K. 7" and a completion statement is now produced and shown to me marked "B.V.K. 8". The Debenture was recorded at the Registry of Records on the 30th day of July A.D. 1970, the appointment of the Receiver on the 3rd day of December A.D. 1970 and the Mortgage to Security Trust Company on the 5th day of May, A.D. 1971.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 9

Affidavit of
B.V. Kelly
6th March
1972
(continued)

8. On the Seventeenth day of November A.D. 1970 the Bank demanded payment of the moneys secured by the Debenture. A copy of the said demand is now produced and shown to me marked "B.V.K. 9".

9. On the Twentieth day of November A.D. 1970 the Bank appointed Ronald Eric Strange to be a Receiver of the undertaking and property of the Company comprised in the Debenture. A copy of the instrument appointing the said Receiver is now produced and shown to me marked "B.V.K.10".

10. The state of the account between the Bank and the Company is as follows:

(a) Amount due at date of demand -

principal	U.S.\$5,000,000.00
interest	<u>U.S.\$ 93,444.40</u>
	<u>U.S.\$5,093,444.40</u>

Interest from date of demand to the 31st January 1972 -	U.S.\$ 563,888.48
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Total of (a)	U.S.\$5,657,332.88
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(b) Additional sums advanced since date of demand	U.S.\$ 590,170.72
Interest thereon to 31st January 1972	U.S.\$ 34,410.96
Total of (b)	U.S.\$ 624,581.68

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No. 9

Affidavit of
B.V. Kelly
6th March
1972
(continued)

(c) Additional sums advanced since date of demand	B\$76,734.00
Payment on account	B\$42,734.00
Balance owing	B\$34,000.00
Accrued interest thereon unpaid to 31st Jan. 1972	B\$ 1,693.92
Total of (c)	B\$35,693.92

11. No sums in repayment of principal or interest have been received by the Bank from the said Receiver except as shown above. 10

12. The amount of a day's interest is under 10(a) at the current rate U.S.\$1,201.24 and under 10(b) U.S.\$132.38 and under 10(c) B\$93.16 (at 10%).

Interest on the additional sums advanced has been received by the Bank from the Receiver up to the 15th September 1971.

13. The Bank has not received nor to my knowledge information and belief has any other person by the Bank's order or to the Bank's use received the sums or any part thereof stated in paragraph 10 to be due under the Debenture or any security other than the Debenture or any thing of value in or towards satisfaction of the said sums. 20

14. Maura Lumber Company Limited obtained a judgment against the Company on the Twenty-seventh day of July 1971 for \$2,964.31; the Defendant Eleuthera Limited obtained a judgment against the Company on the Third day of September 1971 for the sum of \$3,949.26; the Defendant Chee-A-Tow & Company Limited obtained a judgment against the Company on the Fifteenth day of October 1971 for the sum of \$16,859.29 plus costs; and Russell Pennell Campbell obtained a judgment against the Company on the Eleventh day of November 1971 for \$8,150 plus costs to be taxed. 30

15. My means of knowledge sufficiently appears.

SWORN by the above-named)
BURTON VINCENT KELLY at) Sd. B. V. Kelly
Nassau, Bahamas, this 6th)
day of March A.D. 1972, 40

Before me,
(Sgd.) P.J. Richardson
DESIGNATED CLERK, SUPREME COURT.

No. 10

CONTRACT AND 3 AMENDMENTS

Vol. 1328 Page 367

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968

CONTRACT OF SALE made this 20th day of
September, 1968, by and between SECURITY TRUST
COMPANY OF MIAMI, FLORIDA, Trustee under the Will
of LEONORA B. HOPKINS, deceased, whose address is
Security Trust Building, Miami, Florida, and SARA
H. MCKILLIPS and LINDSEY HOPKINS, as Executors of
the Last Will and Testament of LEONORA B. HOPKINS
(hereinafter described as the Sellers) and CARL G.
FISHER COMPANY, LIMITED, a Bahamian corporation
whose address is Box 1236, Nassau, Bahamas (here-
inafter described as the Purchaser)

10

W I T N E S S E T H :

1. Sellers agree to sell and Purchaser agrees to
purchase certain real property consisting of land,
having an area of 450 acres more or less, and any
improvements thereon, located at Coral Harbour, New
Providence Island, Bahamas, and more particularly
described in the Schedule hereto annexed and made a
part hereof, together with all of Sellers' right
title and interest in and to the roads, roadbeds,
canals, waterways and land thereunder.

20

2. The purchase price for the said land and
improvements is the sum of \$2,000 per acre aggre-
gating \$900,000.

3. Said purchase price shall be paid as follows:
\$200,000 in cash or good certified cheque at the
closing hereof: the balance by Purchaser or
assigns executing, acknowledging and delivering to
Sellers a Purchase Money Mortgage in the sum of
\$700,000 on the above premises.

30

4. Said Mortgage shall become due eight years
after the day of closing. No amortization payment
shall be due for the first two years of said
Mortgage. Interest at the rate of 5% per annum
shall be payable during said first two years, said
interest to be payable semi-annually. For the
third through seventh years of said Mortgage,
Purchaser or its assigns shall make constant pay-
ments of interest and amortization aggregating to

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In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

\$70,000 per annum, representing interest at the rate of 5% per annum and the balance to be amortization, such constant payments to be made semi-annually; interest to be computed on the unpaid balances. The balances of principal remaining after the making of the above payments shall be paid at the end of the eighth year of the said Mortgage.

Said Mortgage may be prepaid in whole or in part at any time or times, upon ten (10) days written notice, without premium or penalty.

10

Said Mortgage shall contain a release clause permitting the Mortgagor to obtain releases of portions of the land conveyed herein free from the lien of said Mortgage upon the making of any down payment and additional payments in reduction of the principal of the Mortgage. Releases shall be based upon the proportion of One hundred and Twenty-five percent (125%) of payment to One hundred percent (100%) of acreage, that is to say upon the basis of \$2,000 an acre, a payment of \$2,500 will be required to obtain the release of one acre. All such payments by Mortgagor will be credited against the principal amount due on said Mortgage. Mortgagor shall not be required to request any release at the time of the making of any payment, but may elect to require a release at any time on five days written notice and may use all or any part of its credit based upon previous payments on account of principal. However no releases will be requested which would cause the remaining area to become landlocked.

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5. Said Mortgage shall be drawn on the forms approved by Title Insurance Corporation of Pennsylvania for mortgages or like liens and shall be drawn by the attorney for CARL G. FISHER COMPANY, LIMITED at the expense of the said Corporation, which shall pay the mortgage recording tax, if any, and recording fees, and pay for and affix any revenue stamps which may be necessary.

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6. In the event of the imposition of any ad valorem real estate tax by the local taxing authorities before the closing hereunder, the amount of any such tax up to the time of closing shall be added to the purchase price hereinabove

recited to the extent that such tax has previously been paid by the Sellers or shall be paid directly by the Purchaser.

7. Said premises are sold and are to be conveyed subject to:

- (a) Any zoning regulations and ordinances of the town or village in which the premises lie, which, however, are not violated by any existing structures on the premises herein to be conveyed.
- (b) Any and all restrictions, covenants and easements of record which do not prevent the existence and maintenance of any present structures.
- (c) Any and all existing utility easements for water, electricity and telephone.

8. The following shall be apportioned at the time of closing:

- (i) Water charges, if any.

9. The Deed shall contain the usual assurances conveying the absolute unincumbered fee simple interest in possession and shall be duly executed, acknowledged and have any necessary revenue stamps in the proper amount affixed thereto by the Sellers, at Sellers' expense, so as to convey to the Purchaser the fee simple of the said premises, free of all encumbrances, except as herein stated.

10. All fixtures and articles of personal property attached or appurtenant to or used in connection with said premises are represented to be owned by the Sellers, free from all liens and encumbrances except as herein stated, and are included in this sale.

11. The Deed shall be delivered upon receipt of said payments at the Registered Office of CARL G. FISHER COMPANY, LIMITED, Nassau, Bahamas, at 2.00 o'clock in the afternoon on December 20, 1968.

12. Purchaser, at its option, may defer the closing herein for a period of time not to exceed twelve (12) months from the proposed closing date. Such

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

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20

30

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

election to defer shall be required to be made at least 45 days prior to such closing date and the notice of such election shall be given to the Sellers by the Purchaser by registered or certified mail to the address set forth hereinabove.

13. The parties agree that no broker brought about this sale, and Sellers shall indemnify and hold Purchaser harmless from any claims based upon a broker's or finder's commission. 10

14. Sellers in their respective capacities, either individually or jointly warrant and represent that they have the right to enter into this Agreement and grant the option herein recited.

15. This Agreement may not be changed or terminated except in writing signed by both parties hereto. The stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors and assigns of the respective parties.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties hereto as of the day and year first above written. 20

ATTEST: SECURITY TRUST COMPANY,
Trustees under the Will of
Leonora B. Hopkins, Deceased.

Speakman By
Assistant Secretary Exec. Vice Pres. &
Treasurer.

ILLEGIBLE

ILLEGIBLE 30

As Executors of the
Estate of Leonora B.
Hopkins, Deceased.

CARL G. FISHER COMPANY,
LIMITED

By: ILLEGIBLE

THE SCHEDULE HEREINBEFORE REFERRED TO

ALL THOSE TRACTS OR PARCELS of land together containing Four Hundred and Fifty-four (454) acres more or less and situate in the Coral Harbour Development to the East of Fleeming Point on the Southern Coast of the Western District of the Island of New Providence one of the Bahama Islands which said tracts or parcels of land have such positions, boundaries, shapes, marks and dimensions as are shown on the diagrams or plans hereto attached and thereon shown edged in Pink.

10

1st AMENDMENT 16 DEC. 1970

AMENDMENT TO CONTRACT OF SALE made this 16th day of December, 1969, by and between SECURITY TRUST COMPANY OF MIAMI, FLORIDA, Trustee under the Will of LEONORA B. HOPKINS, deceased, whose address is Security Trust Building, Miami, Florida, and SARA H. MCKILLIPS and LINDSEY HOPKINS, as Executors of the Last Will and Testament of LEONORA B. HOPKINS (hereinafter described as the Sellers) and CARL G. FISHER COMPANY, LIMITED, a Bahamian corporation whose address is Box 1236, Nassau, Bahamas (hereinafter described as the Purchaser)

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W I T N E S S E T H:

1. The Contract of Sale made the 20th day of September, 1968, between the parties hereto with respect to the purchase of certain real property, having an area of 450 acres more or less, and any improvements thereon, located at Coral Harbour, New Providence Island, Bahamas, as more particularly described in said Contract of Sale, is hereby amended to extend the closing date from December 20, 1969 to February 19, 1970, at the time and place specified in said Contract.

30

2. Except as herein specifically modified, said Contract of Sale dated the 20th day of September, 1968, is hereby ratified, approved and confirmed.

IN WITNESS WHEREOF, this Agreement has been duly executed by the parties hereto as of the day and year first above written.

40

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

ATTEST:

SECUTIRY TRUST COMPANY,
Trustee under the Will of
Leonora B. Hopkins,
Deceased.

ILLEGIBLE

By:

Exec. Vice Pres. &
Treasurer.

S E A L

As Executors of the
Estate of Leonara B. Hopkins,
Deceased.

10

CARL G. FISHER COMPANY, LIMITED

by:

Vice President &

2nd AMENDMENT 19 FEB 1970

AMENDMENT TO CONTRACT

THIS AGREEMENT entered into this 19th day of
February, 1970 by and between SECURITY TRUST
COMPANY OF MIAMI, FLORIDA, Trustee under the Will
of LEONORA B. HOPKINS, deceased, whose address is
Security Trust Building, Miami, Florida, and SARA
H. McKILLIPS and LINDSEY HOPKINS, as Executors of
the Last Will and Testament of LEONORA B. HOPKINS
(hereinafter described as the Sellers) and CARL G.
FISHER COMPANY, LIMITED, a Bahamian corporation
whose address is Box 1236, Nassau, Bahamas
(hereinafter described as the Purchaser).

20

W I T N E S S E T H

THAT, WHEREAS, the above named parties entered
into a certain Contract of Sale on the 20th day of
September, 1968 under the terms of which the Sellers
agreed to sell and the Purchaser agreed to buy
certain real property consisting of land having an

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area of 450 acres more or less located at Coral Harbour, New Providence Island, at an agreed purchase price of TWO THOUSAND (\$2,000) DOLLARS per acre of which TWO HUNDRED THOUSAND (\$200,000) DOLLARS was due and payable on the date of closing and the unpaid balance to be represented by a first mortgage, all as stated and recited in the aforesaid Contract of Sale of September 20, 1968; and

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.10

10 WHEREAS, the aforesaid parties amended said Contract of Sale by an instrument dated December 16, 1969 whereby it was mutually agreed to extend the closing date from December 20, 1969 to February 19, 1970; and,

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

WHEREAS, the Purchaser has requested an additional period of time not to exceed (90) ninety days from February 19, 1970 to pay to the sellers the initially agreed down payment of \$200,000.

20 NOW, THEREFORE, in consideration of certain mutual covenants agreed to by the parties, the Sellers hereby agree to further amend said Contract of September 20, 1968 subject to and in accordance with the following terms and conditions:

1. The Security Trust Company, as Trustee, agrees to execute as of this date, February 19, 1970, a deed of conveyance to the Purchaser conveying unto the Purchaser 461,537 acres of the aforesaid acreage as more fully described in the recent survey made by Chee-A-Tow & Company, Limited.
- 30 2. That the Purchaser will execute as of this date, February 19, 1970, a purchase money mortgage covering the unpaid balance as more particularly described in the Contract of Sale of September 20, 1968.
- 40 3. That the executed deed of conveyance and the executed mortgage will be held in the possession and custody of Security Trust Company as escrow agent until such time as the Purchaser pays and deposits with Security Trust Company the sum of \$200,000.00 U.S. and the Purchaser agrees to make such payment and deposit on or before ninety (90) days from February 19, 1970.
4. Purchaser further agrees to pay to Security Trust Company, as Trustee, eight per cent (8%)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

on \$200,000.00 to be computed on a per diem basis from February 19, 1970 until the date that the Purchaser deposits and pays to Security Trust Company the sum of \$200,000.00.

5. Time is of the essence, and except as herein specifically modified, said Contract of Sale dated September 20, 1968, as amended December 16, 1969, is hereby ratified, approved and confirmed.

IN WITNESS WHEREOF this agreement has been duly executed by the parties hereto as of the day and year first above-written.

10

ATTEST:

SECURITY TRUST COMPANY,
Trustee under the Will of
Leonora B. Hopkins,
deceased

.....
Assistant Secretary

By _____

As Executors of the
Estate of Leonora B.
Hopkins, Deceased.

20

CARL G. FISHER COMPANY,
LIMITED

By _____

HEMISPHERE HOTELS CORPORATION
(formerly)
CARL G. FISHER CORPORATION

SECURITY TRUST
COMPANY BUILDING
119 East Flagler Street,
Miami, Florida 33131 30

3rd amendment

August 19, 1970

Security Trust Company
119 East Flagler Street
Miami, Florida 33131

Gentlemen:

We are writing to you in your capacity as Trustee under the Will of Leonora Balsley Hopkins, deceased. We are about to enter into an agreement for the sale of the Coral Harbour Hotel and the addition thereto currently under construction, the Coral Harbour Golf Course, the site of approximately 23 acres on which certain utilities for the Coral Harbour development are being constructed, and the site of approximately 46 acres upon which certain preliminary construction work and dredging for the proposed Aquatel was done (the "Sale Agreement").

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

In order for us to enter into the Sale Agreement, it is necessary for us to make the following agreements with you:

(a) 461 Acre Closing

The Deed and Mortgage with respect to the 461 acres at Coral Harbour has been placed in escrow pending payment of the sum of \$200,000 plus interest to you. We request an extension of time for said payment to September 19, 1970. At the Closing under the Sale Agreement, we will pay you said sum of \$200,000 plus interest thereon to the date of said Closing. We will also pay you at that time any amounts due you under the said mortgage by reason of the occurrence of interest payment dates under said mortgage between February 19, 1970 and the date of the Closing under the Sale Agreement.

At the Closing, you will release from the lien of the mortgage covering said 461 acre parcel, a portion of the land lying in Tract 2 consisting of 1.67 acres, being a part of the Utility Site, and the approximately 46 acres of land comprising the Aquatel Site, upon payment to you of the amount required to be paid for said release under said mortgage, computed at the rate of \$2,500 per acre.

(b) 747 Acre Option (Sale of 92.288 Acres)

You have heretofore granted an option to Carl G. Fisher Company, Limited, a wholly owned subsidiary of our Company, to purchase approximately 747 acres of land at Coral Harbour, said option running for a period of five years from February 19, 1970. On behalf of Carl G. Fisher

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

Company, Limited, we hereby request your permission to exercise said option in part, to the extent of 92.288 acres, and agree to pay the option exercise price to you at the Closing. You agree to permit the partial exercise of said option and confirm that the option with respect to the remaining approximately 655 acres is continued in full force and effect. The option price payable by us and the terms of the purchase money mortgage to be delivered by us at the Closing shall be as set forth in the option dated September 20, 1968, except the terms shall be 10% payable at closing and the balance represented by a purchase money mortgage maturing September 1, 1971 and bearing interest at the rate of 6%, payable at maturity. The mortgage shall contain a clause permitting release of land from the lien of the mortgage upon payment of \$2,500 per acre.

10

20

We understand that your consent to a partial exercise of said option in respect of the 92.288 acres, is an accommodation to us, and that the remaining acreage subject to the option must be purchased in one tract.

At the Closing, there will be released from the lien of the mortgage to be given with respect to the purchase of 92.288 acres, the remaining portion of the Utility Site tract being the northeasterly portion of Tract 3 and the westerly portion of Tract 9, containing approximately 20 acres against payment to you of the sum of \$2,500 per acre. The cost of all surveys will be our obligation.

30

(c) \$1,300,000 Mortgage

We have been requested by the purchaser to obtain your consent as holder of a \$1,300,000 mortgage on the Hotel and Marina to the described transfer of the Hotel and a substantial part of the Marina under the Sale Agreement, and your agreement to the foregoing will constitute your consent to said transaction. This consent will in no wise be construed as releasing us as mortgagor on said mortgage.

40

(d) Closing Date

The Closing referred to herein is the closing under the Sale Agreement. We agree that said Closing shall occur not later than September 19, 1970, and we will advise you of the date, time and place of said Closing at least three business days prior thereto.

10 At the Closing, we will also be required to obtain an underground easement from Coral Harbour Company, Limited, the owner of the shopping center located on Coral Harbour Road for running water and sewage lines through the rear of the shopping center, so as to permit the utility lines to run from the Utility Site southerly through the rear portion of the shopping center site to a point where they branch off to the Hotel and other sites. We should appreciate your using your good offices to secure the agreement of 20 Coral Harbour Company, Limited, to the grant of said easement. We will pay the costs of the necessary surveys and legal expenses.

In consideration of granting us the aforesaid easement, we agree to the termination of that exclusive sales contract between us and Coral Harbour Company, Limited, dated September 20, 1968.

30 We grant unto the Security Trust Company, Trustee, and the Coral Harbour Company, Limited and their successors or assigns, the right to obtain all utility services.

We have written this letter on behalf of ourselves and our wholly owned subsidiaries, Hemisphere Resorts Corporation and Carl G. Fisher Company, Limited, and our said subsidiaries join in the agreement hereby made.

40 If the foregoing represents our understanding as discussed between us, please confirm by having this instrument executed at the places indicated, at which time this instrument will become a binding agreement between us.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.10

Contract and
3 Amendments
(Part)
(Exhibit
B.V.K. 6)
20th September
1968
(continued)

Thank you for your kind courtesies in this
matter.

Very truly yours,

HEMISPHERE HOTELS CORPORATION

By _____
Vice-Pres. & Treasurer.

The undersigned hereby join in the agreements
made by Hemisphere Hotels Corporation and by the
undersigned as set forth in the foregoing letter.

HEMISPHERE RESORTS CORPORATION

10

By _____
Vice-Pres. & Treasurer

CARL G. FISHER COMPANY, LIMITED

By _____
Vice-President & Secretary

The undersigned hereby confirm their agreement
as set forth in the above letter, subject to our
approval of closing documents.

SECURITY TRUST COMPANY

By _____
Vice-President

20

The undersigned hereby agrees to grant the
easement described in the foregoing letter, subject
to our approval of closing documents.

CORAL HARBOUR COMPANY, LIMITED

By _____
Vice-President

/j

No. 11

CONVEYANCE

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No.11

COMMONWEALTH OF THE BAHAMA ISLANDS
New Providence

Conveyance
(Part)
(Exhibit
B.V.K.7)
19th February
1970

10

THIS INDENTURE is made the Nineteenth day of February in the year of Our Lord One thousand nine hundred and Seventy B E T W E E N SECURITY TRUST COMPANY a Corporation incorporated under the laws of the United States of America a copy of whose Act or Charter of Incorporation has been filed in the Registry of Records in the City of Nassau in the Island of New Providence aforesaid in accordance with the provisions of The Foreign Companies Act and whose Registered Office in the Commonwealth of the Bahama Islands aforesaid is situate in the City of Nassau aforesaid (hereinafter called "the Vendor") of the one part and CARL G. FISHER COMPANY, LIMITED a Company incorporated under the laws of the said Commonwealth of the Bahama Islands and having its Registered Office in the said City of Nassau (hereinafter called "the Purchaser") of the other part

20

W H E R E A S

30

A. Leonora Balsley Hopkins late of the County of Fulton in the State of Georgia one of the United States of America aforesaid was at the date of her death seised (inter alia) of the hereditaments and premises hereinafter described in the Schedule hereto (hereinafter called "the said hereditaments and premises") for an estate in fee simple in possession free from incumbrances

B. Various parts of the said hereditaments and premises are now subject to certain rights of way as follows:-

40

- (i) as to the part of the said hereditaments and premises described in Part One of the said Schedule as to the portion of the same coloured Green on the

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Conveyance
(Part)
(Exhibit
BV.K.7)
19th February
1970
(continued)

diagram or plan hereto attached marked
"A" to the rights of way set out in the
following documents:-

1. an Indenture of Conveyance dated the
Seventeenth day of August A.D.1966
made between Lindsey Hopkins Junior
and Sara Hopkins McKillips of the one
part and Coral Harbour Golf and
Country Club, Limited of the other
part and now of record in the Registry
of Records aforesaid in Volume 1034 at
pages 74 to 83. 10
 2. an Indenture of Conveyance also dated
the Seventeenth day of August A.D.1966
made between the said Lindsey Hopkins
Junior and the said Sara Hopkins
McKillips of the one part and the said
Coral Harbour Golf and Country Club,
Limited of the other part and now of
record in the said Registry of Records
in Volume 1034 pages 84 to 95. 20
 3. (as to part thereof) an Indenture
dated the Twenty-third day of March,
A.D.1966 made between the said Lindsey
Hopkins Junior and the said Sara
Hopkins McKillips of the one part and
the Purchaser of the other part and now
of record in the said Registry of
Records in Volume 1044 at pages 525
to 532 30
- (ii) as to part of the said hereditament and
premises described in Part Two of the
said Schedule as to the portion of the
same coloured Green on the diagram or
plan hereto attached marked 'B' to the
rights of way set out in the said two (2)
Indentures of Conveyance dated the
Seventeenth day of August A.D.1966 and
(as to part thereof) to the said
Indenture dated the Twenty-third day of
March A.D. 1966. 40
- (iii) as to part of the said hereditaments and
premises described in Part Three of the
said Schedule as follows:-

(a) as to the portion of the same coloured Green on the diagram or plan hereto attached marked 'C' to the rights of way set out in the following documents:-

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands .

—
No.11

Conveyance
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

10

1. an Indenture dated the Eighth day of July A.D. 1969 made between the Vendor of the first part Coral Harbour Company, Limited of the second part and the owners of lots in "Ocean Beach Colony" of the third part and now of record in the said Registry of Records in Volume 1466 at pages 406 to 411

20

2. an Indenture also dated the Eighth day of July A.D. 1969 made between the Vendor of the first part the said Coral Harbour Company, Limited of the second part and the owners of lots in "Subdivision Number One of Coral Harbour" of the third part and now of record in the said Registry of Records in Volume 1466 at pages 422 to 427.

30

3. an Indenture also dated the Eighth day of July A.D. 1969 made between the Vendor of the first part the Purchaser of the second part and the owners of lots in "Coral Waterways" of the third part and now of record in the said Registry of Records in Volume 1466 at pages 428 to 433

4. an Indenture dated the Twenty-sixth day of November A.D. 1969 made between the Vendor of the one part and Hemisphere Hotels Corporation of the other part and now of record in the said Registry of Records in Volume 1532 at pages 224 to 229 and

5. Indentures of Conveyance (if any) of lots in any Subdivision forming

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Conveyance
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

part of "Coral Harbour" as here-
inafter defined which may contain
rights of way over the same
express or implied

(b) as to the portion of the same coloured
Brown hatched Black on the said diagram or
plan marked 'C' to the rights of way set out
in the following documents:-

1. (as to part thereof) an Indenture
of Conveyance dated the Sixteenth
day of March A.D. 1965 made between
the said Lindsey Hopkins Junior and
the said Sara Hopkins McKillips of
the one part and Esso Standard Oil
S.A. Limited of the other part and
now of record in the said Registry
of Records in Volume 866 at pages
142 to 147 and 10
2. an Indenture of Conveyance dated
the Twelfth day of April A.D. 1968 20
made between the said Lindsey
Hopkins Junior and the said Sara
Hopkins McKillips of the one part
and the said Coral Harbour Company,
Limited of the other part and now
of record in the said Registry of
Records in Volume 1259 at pages
371 to 377.
- C. By her last Will and Testament dated the
Twenty-eighth day of September A.D.1953 the said
Leonora Balsley Hopkins appointed the said Lindsey
Hopkins Junior and the said Sara Hopkins McKillips
(therein called Sara Hopkins Ludwig) to be the
executors thereof 30
- D. The said Leonora Balsley Hopkins died on
the Fourth day of March A.D. 1964 without having
revoked her said last Will and Testament Probate
of which together with a Codicil thereto dated
the Second day of November A.D. 1962 was granted
by the Court of Ordinary in and for the County of
Fulton in the State of Georgia aforesaid on the
Fourteenth day of April A.D. 1964 to the said
Lindsey Hopkins Junior and the said Sara Hopkins
McKillips 40

E. Probate of the said last Will and Testament and Codicil thereto of the late Leonora Balsley Hopkins was Sealed with the Seal of the Supreme Court of the said Commonwealth of the Bahama Islands on its Probate Side on the Twenty-second day of December A.D. 1964.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

F. By the said Codicil to her last Will and Testament the said Leonora Balsley Hopkins gave devised and bequeathed all the rest residue and remainder of her estate which included the said hereditaments and premises to the Vendor upon the trusts therein mentioned.

No.11

Conveyance
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

G. By a Deed of Assent dated the Twenty-second day of July A.D. 1968 and now of record in the said Registry of Records in Volume 1305 at pages 470 to 473 the said Lindsey Hopkins Junior and the said Sara Hopkins McKillips assented to the said gift devise and bequest contained in the said Codicil to the said last Will and Testament .

H. By her said last Will and Testament the said Leonora Balsley Hopkins directed that her trustee should have power (inter alia) to sell and convey any part or all of the assets of that her trust at public or private sale with or without notice as it might deem advisable and without any order of the Court.

I. The Vendor has agreed to sell the said hereditaments and premises to the Purchaser for an estate in fee simple in possession free from incumbrances at the price of Nine hundred and Twenty-three thousand and Seventy-four dollars in the currency of the said United States of America (\$923,074.00 U.S.) subject only to the said rights of way

NOW THIS INDENTURE WITNESSETH as follows:-

1. In pursuance of the said agreement and in consideration of the said sum of Nine hundred and Twenty-three thousand and Seventy-four dollars in the currency aforesaid (\$923,074.00 U.S.) now paid by the Purchaser to the Vendor (the

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Conveyance
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

receipt whereof the Vendor hereby acknowledges) the Vendor in execution of the aforesaid power and of every other power it hereunto enabling and as TRUSTEE hereby grants and conveys unto the Purchaser ALL THAT the said hereditaments and premises TOGETHER with the appurtenances thereunto belonging AND TOGETHER ALSO with the following rights namely:-

- (i) as to the portion of the said hereditaments and premises described in parts One and Two of the said Schedule to the benefit of the rights of way contained in the said Indenture dated the Twenty-third day of March A.D. 1966 over the piece or parcel of land shown coloured Brown on the said diagram or plan hereunto attached marked 'A' and 'B' respectively 10
- (ii) as to the portion of the said hereditaments and premises described in part Three of the said Schedule full and free right and liberty for the Purchaser and its assigns the owner or owners the occupier or occupiers for the time being thereof or of any part thereof its or their agents tenants servants visitors and licensees or anyone authorised by it or them (in common with the Vendor and all other persons who have or may hereafter have the like right) from time to time and at all times hereafter with or without carts carriages motor cars and other vehicles horses and other animals for all purposes connected with the use and enjoyment of the same for whatever purpose the same may be from time to time lawfully used and enjoyed to go pass and repass over along and upon the roadway or the portion thereof known or to be known as "Scenic Drive" shown coloured Yellow on the said diagram or plan hereto attached marked 'C' 20 30 40

EXCEPT AND RESERVING unto the Vendor and its assigns the owner or owners the occupier or occupiers for the time being of the respective portions of the hereditaments and premises or of

any part thereof as hereinafter mentioned its or their agents tenants servants visitors and licensees or anyone authorised by it or them (in common with the Purchaser and all other persons who have or may hereafter have the like right) from time to time and at all times hereafter:-

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Conveyance
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

- 10 (i) as regards the parts of "Coral Harbour" situate to the North and West of the portions of the said hereditaments and premises described in Parts One and Two of the said Schedule hereto remaining in the ownership of the Vendor with or without carts carriages motor cars and other vehicles horses and other animals for all purposes connected with the use and enjoyment of the same for whatever purpose the same may be from time to time lawfully used and enjoyed to go
- 20 pass and re-pass over along and upon the roadway shown coloured Green on the said diagram or plans hereto attached marked 'A' and 'B' respectively
- (ii) as regards the parts of "Coral Harbour" situate to the North and East of the portions of the said hereditaments and premises described in Part Three of the said Schedule hereto remaining in the ownership of the Vendor
- 30 (a) with or without carts carriages motor cars and other vehicles horses and other animals for all purposes connected with the use and enjoyment of the same for whatever purpose the same may be from time to time lawfully used and enjoyed to go pass and re-pass over along and upon
- 40 1. the said roadway coloured green on the said diagram or plan hereto attached marked 'C'
2. the portion of the said roadway known or to be known as "Scenic Drive" coloured Brown and Brown hatched Black on the said

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Conveyance
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

diagram or plan hereto
attached marked 'C' and

- 3. a roadway marked "proposed roadway" also shown coloured Brown on the said diagram or plan hereto attached marked 'C'

- (b) with on in and by vessels and boats of a type from time to time permitted by rules and regulations laid down by the Purchaser or its assigns for general application and not exceeding the length width and draught from time to time specified in such rules and regulations to go pass and repass over along and upon the canal or waterway known or to be known as "Bayswater Passage" shown coloured Blue on the said diagram or plan hereto attached marked 'C'

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TO HOLD the same unto and to the use of the Purchaser in fee simple Subject as to the various parts of the said hereditaments and premises to the rights of way hereinbefore recited.

20

2. Notwithstanding the foregoing rights granted to the Purchaser over the portion of the said roadway known or to be known as "Scenic Drive" coloured Yellow on the said diagram or plan hereto attached marked 'C' and the foregoing rights excepted and reserved in favour of the Vendor over the portion of the said roadway known or to be known as "Scenic Drive" coloured Brown and Brown hatched Black and the said "proposed roadway" coloured Brown and the said canal or waterway coloured Blue on the said diagram or plan hereto attached marked 'C' the course of any of the same may be altered by the mutual consent in writing of the parties hereto or their respective assigns from time to time and in such event the Vendor for itself and

30

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its assigns hereby covenants with the Purchaser and its assigns to release any rights hereby excepted and reserved as aforesaid over any portion of the said roadways and/or canal or waterway as shown on the said diagram or plan hereto attached marked 'C' not forming part of the same when altered as aforesaid in exchange for similar rights over the same laid or to be laid out as the same may be AND the Purchaser for itself and its assigns hereby covenants with the Vendor and its assigns to similarly release any rights hereby granted to it as aforesaid over any portion of the bed of the said roadway known or to be known as "Scenic Drive" as shown coloured Yellow on the said diagram or plan hereto attached marked 'C' not forming part of the same when altered as aforesaid in exchange for similar rights over the same laid or to be laid out as the case may be

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Conveyance
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

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3. In the interpretation of these presents the expression "Coral Harbour" shall mean and include the hereditaments and premises situate in the Western District of the said Island of New Providence owned or formerly owned by the said Leonora Balsley Hopkins or her Estate portions of which have been set out in various Subdivisions or otherwise developed and shall include any further land situate as aforesaid owned or to be owned by the Vendor or its assigns adjacent to or adjoining any land owned or formerly owned by the said Leonora Balsley Hopkins or her Estate

30

4. The Vendor hereby acknowledges the right of the Purchaser at the expense of the Purchaser to production of all documents of title in the Vendor's possession relating to the said hereditaments and premises and to delivery of copies thereof and hereby undertakes for the safe custody thereof damage by fire hurricane

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

and other inevitable accident excepted.

No.11

Conveyance
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

No.11
Mortgage
(Part)
(Exhibit
B.V.K. 7)
19th February
1970

No. 11

MORTGAGE

Recorded Vol. 1763 P 571 - 587

5th May '71

COMMONWEALTH OF THE BAHAMA ISLANDS
New Providence

THIS INDENTURE is made the Nineteenth day of February in the year of Our Lord One thousand Nine hundred and Seventy B E T W E E N CARL G. FISHER COMPANY, LIMITED a Company incorporated under the laws of the Commonwealth of the Bahama Islands aforesaid and having its Registered Office in the City of Nassau in the Island of New Providence aforesaid (hereinafter called "the Borrower") of the one part A N D SECURITY TRUST COMPANY a Corporation incorporated under the laws of the United States of America a copy of whose Act or Charter of Incorporation has been filed in the Registry of Records in the City of Nassau aforesaid in accordance with the provisions of The Foreign Companies Act and whose Registered Office in the said Commonwealth of the Bahama Islands is situate in the said City of Nassau (hereinafter called "the Lender") of the other part

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WHEREAS

A. The Borrower is seised of the hereditaments and premises hereinafter described in the Schedule hereto (hereinafter called "the said hereditaments and premises") for an estate in fee simple in

possession subject as is hereinafter mentioned but otherwise free from incumbrances the same having been conveyed to the Borrower by the Lender by an Indenture of Conveyance of even date herewith made between the Lender of the one part and the Borrower of the other part and now lodged or about to be lodged for record in the Registry of Records aforesaid

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

10 B. Various parts of the said hereditaments and premises are subject to the rights of way exceptions and reservations contained or referred to in the said Indenture of Conveyance of even, date herewith

Mortgage
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

20 C. Upon the treaty for the sale of the said hereditaments and premises by the Lender to the Borrower it was agreed that the Borrower should retain the sum of Seven hundred and Twenty-three thousand dollars in the currency of the United States of America aforesaid (\$723,000.00 U.S.) being part of the purchase price of Nine hundred and Twenty-three thousand and Seventy-four dollars in the currency aforesaid (\$923,074.00 U.S.) upon the payment thereof with interest being secured in manner hereinafter appearing

30 D. The Lender is the trustee of the last Will and Testament dated the Twenty-eighth day of September A.D. 1953 of the late Leonora Balsley Hopkins who died on the Fourth day of March A.D. 1964 Probate of which together with a Codicil thereto dated the Second day of November A.D. 1962 was granted by the Court of Ordinary in and for the County of Fulton in the State of Georgia one of the said United States of America on the Fourteenth day of April A.D. 1964 and sealed with the Seal of the Supreme Court of the said Commonwealth of the Bahama Islands on its Probate Side on the Twenty-second day of December A.D. 1964

40 E. By her said last Will and Testament the said Leonora Balsley Hopkins directed that her trustee should have power (inter alia) to invest and reinvest and keep the trust estate invested in any kind of property real or personal foreign or domestic including foreign real estate.

NOW THIS INDENTURE WITNESSETH as follows:-

1. In pursuance of the said agreement for sale as

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Mortgage
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

hereinbefore recited and in consideration of such sale and the Conveyance of the said hereditaments and premises by the Lender to the Borrower and of the sum of Seven hundred and Twenty-three thousand dollars in the said currency (§723,000.00 U.S.) being the balance of the said purchase price for the sale of the said hereditaments and premises which the Lender has agreed should be retained by the Borrower and secured hereby and of the premises the Borrower hereby covenants with the Lender to pay to the Lender on the Nineteenth day of August A.D. 1970 the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (§723,000.00 U.S.) being the balance of the said purchase price of Nine hundred and Twenty-three thousand and Seventy-four dollars in the said currency (§923,074.00 U.S.) with interest thereon in the meantime at the rate of Five dollars per centum per annum in the said currency (§5.00 U.S.) computed from the date of these presents AND so long after the said Nineteenth day of August A.D. 1970 as any principal moneys remain due under this Mortgage to pay to the Lender interest thereon at the same rate by equal half-yearly payments on the Nineteenth day of February and the Nineteenth day of August in each and every year

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2. In further pursuance of the said agreement and for the consideration aforesaid the Borrower as Beneficial Owner hereby grants and conveys unto the Lender ALL THAT the said hereditaments and premises TOGETHER with the appurtenances thereunto belonging AND TOGETHER with the benefit of the rights of way contained or referred to in the said Indenture of Conveyance of even date herewith TO HOLD the same unto and to the use of the Lender in fee simple as part of the assets of the trust estate of the said Leonora Balsley Hopkins subject as to the various parts thereof to the rights of way and exceptions and reservations contained or referred to in the said Indenture of Conveyance of even date herewith and subject also to the proviso for redemption hereinafter contained

30

40

3. The Borrower hereby covenants with the Lender as follows:-

- (1) That during the continuance of this security the Borrower will keep all buildings for the time being subject thereto insured against

loss or damage by fire however caused and against loss or damage by hurricane storm or tempest to the full insurable value thereof in some insurance office or offices approved of by the Lender and will pay all premiums payable in respect of such insurances at least Seven (7) days before the same shall become due and will assign to the Lender the policy or policies and will produce the receipt for every premium payable in respect thereof AND that if the Borrower shall make default in any of the above matters the Lender may in its discretion insure and keep insured all or any of the said buildings to the full insurable value thereof and that its disbursements and expenses of so doing shall be repaid to it by the Borrower on demand and until so repaid shall be added to the principal moneys hereby secured and bear interest accordingly

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Mortgage
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

- 10
- 20 (2) That during the continuance of this security the Borrower will keep all buildings for the time being subject thereto in good and substantial repair and that if the Borrower shall neglect so to do the Lender or any person or persons authorised by it may enter upon the said hereditaments and premises from time to time in order to repair and keep in repair the buildings for the time being subject to these presents without thereby becoming
- 30 liable as mortgagee in possession and that its expenses of so doing shall be repaid to it by the Borrower on demand and until so repaid shall be added to the principal moneys hereby secured and bear interest accordingly
- 40 (3) That during the continuance of this security the Borrower will regularly and punctually pay all taxes rates assessments outgoings and impositions whatsoever now or during the continuance of this security to become payable in respect of the said hereditaments and premises and will on demand produce and deliver to the Lender all receipts and vouchers in proof of such payments AND that if the Borrower shall make default in any of the above matters the Lender may in its discretion pay all or any such taxes rates assessments outgoings and impositions whatsoever and that its disbursements and expenses of so doing

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Mortgage
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

shall be repaid to it by the Borrower on demand and until so repaid shall be added to the principal moneys hereby secured and bear interest accordingly

4. PROVIDED ALWAYS and it is hereby expressly declared as follows:-

- (1) If the Borrower shall pay to the Lender the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (\$723,000.00 U.S.) on the Nineteenth day of August A.D. 1970 with interest thereon in accordance with the foregoing covenant in that behalf the Lender at any time thereafter at the request and cost of the Borrower will reconvey the said hereditaments and premises to the Borrower or as the Borrower shall direct 10
- (2) Provided nevertheless that if the Borrower shall pay interest at the rate aforesaid on the days hereinbefore fixed for the payment of interest upon the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (\$723,000.00 U.S.) or so much thereof as shall for the time being remain unpaid up to and including the Nineteenth day of February A.D. 1972 and shall from the Twentieth day of February A.D. 1972 up to and including the Nineteenth day of February A.D. 1977 pay the sum of Seventy thousand dollars in the said currency (\$70,000.00 U.S.) for each year or part thereof to include principal and interest to be paid by equal half-yearly instalments of Thirty-five thousand dollars in the said currency (\$35,000.00 U.S.) each on the Nineteenth day of August and the Nineteenth day of February in each and every year the first such instalment to be paid on the Nineteenth day of August A.D. 1972 such instalments to be applied first on account of interest due on the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (\$723,000.00 U.S.) or the balance thereof from time to time outstanding and on all other moneys due and owing to the Lender under the provisions hereof secondly in or towards payment of any moneys payable by the Borrower as a result of any breach or non- 20 30 40

observance of any covenant on the part of the Borrower herein contained or by statute implied or otherwise howsoever and thirdly in reducing the said principal sum of Seven hundred and Twenty-three thousand dollars in the said currency (§723,000.00 U.S.) and shall from the Twentieth day of February A.D. 1977 up to and including the Nineteenth day of February A.D. 1978 pay interest at the rate aforesaid on the days hereinbefore fixed for the payment of interest upon so much of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (§723,000.00 U.S.) as shall for the time being remain unpaid and shall pay the balance of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (§723,000.00 U.S.) as shall for the time being remain unpaid on the Nineteenth day of February A.D. 1978 and if and so long as the Borrower shall perform and observe all its obligations hereunder other than in regard to the payment of principal on the Nineteenth day of August A.D. 1970 pursuant to Clause 1 hereof the Lender will accept payment of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (§723,000.00 U.S.) by such instalments and will not take any steps to enforce the security hereby constituted

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Mortgage
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

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- (3) Provided that notwithstanding that any instalments may have been paid pursuant to sub-clause (2) of this Clause and whether or not interest shall have been paid pursuant to Clause 1 hereof and for all purposes hereof the balance of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (§723,000.00 U.S.) as shall for the time being be outstanding shall continue to be due for all the purposes of the exercise of statutory and other powers on the Nineteenth day of August A.D. 1970.
- (4) Provided nevertheless that if the Borrower shall be desirous of making earlier payment of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (§723,000.00 U.S.) or any part thereof and of its desire shall give Ten (10) days prior notice in writing to the Lender and shall at the expiration of the said period of notice pay to the Lender the

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Mortgage
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

amount so mentioned in such notice together with interest thereon at the rate aforesaid the Lender shall accept such sum in discharge or part discharge as the case may be of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (\$723,000.00 U.S.) Provided that on the occasion of such payment in part discharge of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (\$723,000.00 U.S.) the Borrower shall not be in default in the performance of any of its obligations hereunder including the payment of any principal and/or interest pursuant to the provisions of sub-clause (2) of this Clause And the acceptance of such sum or sums shall not be construed as a waiver by and shall be without prejudice to any of the remedies of the Lender in respect of any antecedent claim against or breach by the Borrower of any covenant condition and provision on its part herein contained and shall not prevent the Lender from exercising any of its statutory and other powers

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- (5) The Lender shall at the request and cost of the Borrower upon Five (5) days prior notice in writing of such request release from the security hereby constituted any land forming part of the said hereditaments and premises upon payment to the Lender of the amount of Two thousand Five hundred dollars in the said currency (\$2,500.00 U.S.) per acre or part thereof for each part of the land to be so released such amounts paid pursuant to the provisions of this sub-clause to be applied in part discharge of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (\$723,000.00 U.S.) Provided nevertheless as follows:-

30

- (i) on the occasion of each such request as aforesaid the Borrower shall not be in default in the performance of any of its obligations hereunder including the payment of any principal and/or interest pursuant to the provisions of sub-clause (2) of this Clause And the acceptance of such sum or sums shall not be construed as a waiver by and shall be

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without prejudice to any of the remedies of the Lender in respect of any antecedent claim against or breach by the Borrower of any covenant condition and provision on its part herein contained and shall not prevent the Lender from exercising any of its statutory and other powers

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

10 (ii) the Borrower shall bear all legal and other charges and disbursements incurred or to be incurred by the Lender in providing such releases and shall provide any document therefor the same to be prepared approved perfected stamped and recorded by and at the expense of the Borrower and the Borrower to provide and bear the cost of obtaining any survey including the preparation of plans showing the area of land to be released

Mortgage
(Part)
(Exhibit
B.V.K. 7)
19th February
1970
(continued)

20 (iii) the Lender shall not be obliged to release any part of the said hereditaments and premises as aforesaid if this would cause the land remaining subject to the security hereby constituted to have no readily available means of access to any other hereditaments and premises belonging to the Lender not part of the said hereditaments and premises or any public thoroughfare or
30 any land or roadway over which the Lender may have any legal easement leading to such other hereditaments and premises of the Lender or such public thoroughfare unless the Lender and the Borrower shall mutually agree which agreement shall include the granting by the Borrower to the Lender of any legal easement over the land or any part
40 thereof so released leading to such other hereditaments and premises of the Lender or such public thoroughfare or such land over which the Lender has a legal easement as aforesaid Provided that the Lender shall not be obliged to accept such legal easement by the Borrower

Provided always that any amounts of principal paid pursuant to the provisions of sub-clauses

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.11

Mortgage
(Part)
(Exhibit
B.V.K.78)
19th February
1970
(continued)

(2) or (4) hereof shall enable the Borrower to obtain releases under the foregoing provisions of this sub-clause based upon a similar amount per acre as aforesaid up to the amount of principal for the time being so repaid and the absence of any such request at the time of payment shall not invalidate or prevent the Borrower from obtaining any such releases at any time during the continuance hereof

10

(6) The full amount of the said sum of Seven hundred and Twenty-three thousand dollars in the said currency (\$723,000.000 U.S.) at any time outstanding and all interest thereon and arrears of interest hereunder shall forthwith become due and payable and all a mortgagee's powers of sale foreclosure action possession and to appoint a receiver (and any other powers and remedies of a mortgagee) shall forthwith be or become available to the Lender to recover the same and all costs expenses incurred or to be incurred by the Lender in enforcing its security hereby constituted in the event of any of the following contingencies coming to pass:-

20

(a) if any instalment of the principal and/or interest as aforesaid or any part thereof shall remain unpaid for Thirty (30) days after the same shall have become due (whether lawfully demanded or not)

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(b) if an order is made or an effective resolution is passed for winding up the Borrower other than for the purposes of reconstruction or amalgamation or a receiver is appointed for debenture holders or debenture stock holders of the Borrower or if the Borrower shall be struck off the Register of Companies

(c) if there has been a breach of some provision contained in this Indenture or in The Conveyancing and Law of Property Act and on the part of the Borrower to be observed or performed other than and besides the covenant for payment of the said sum of Seven hundred and Twenty-three thousand dollars in the said

40

currency (\$723,000.00 U.S.) and interest thereon pursuant to the provisions of Clause 1 hereof

In the
Supreme Court
of the
Commonwealth
of the
Bahama
Islands

—
No.11

Mortgage
(Part)
(Exhibit
B.V.K.7)
19th February
1970
(continued)

10 (7) All provisions relating to the exercise of any of the powers and remedies of a Mortgagee whether by Statute or Common Law or Equity (except the provisions of Section 22 of The Conveyancing and Law of Property Act of the said Commonwealth of the Bahama Islands or any statutory modification for the time being in force) shall apply to the powers and remedies arising by virtue of parts (a) (b) or (c) of sub-clause (6) of this Clause

20 (8) The powers contained in sub-clause (6) of this Clause are in addition to and without prejudice to and not in substitution for all other powers and remedies vested in the Lender by Statute or Common Law or Equity for recovering or enforcing payment of the moneys hereby secured and interest thereon

(9) The powers of leasing conferred on mortgagors by Section 20 of The Conveyancing and Law of Property Act shall not be exercisable by the Borrower without the consent in writing of the Lender

30 (10) The Lender shall not be answerable for any involuntary loss happening in or about the exercise or execution of any power conferred on the Lender by these presents or by statute or of any trust connected therewith

5. In this Indenture unless the context otherwise requires the following expressions shall have the meanings assigned to them respectively:-

"The Borrower" shall include the assigns of the Borrower

"The Lender" shall include its assigns and the trustee or trustees for the time being of the estate of the late Leonora Balsley Hopkins

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No. 12

COMPLETION STATEMENT

30th April, 1971

—
No.12
Completion
Statement
(Exhibit
B.V.K. 8)
30th April
1971

Security Trust Company
131 Security Trust Building
119 East Flagler Street
Miami, Florida 33131
U.S.A.

Dear Sirs,

On behalf of Carl G. Fisher Company, Limited,
I hereby tender to you the sum of U.S. \$465,813.80
in full payment and discharge of all sums due to
you to close the various transactions under the
current agreements between the said Company and
yourselves due for closing today.

10

This sum is made up as follows:-

(A) <u>CONTRACT LANDS</u>	Price Per Acre	Cash Required	Mortgage
461.537 Acres	\$2000	\$200,074.00	\$723,000
8% Interest on down payment from Feb. 19 1970 to April 30, 1971		19,068.49	
Mortgage interest payment - August 19, 1970		17,926.24	
Mortgage interest payment - February 19, 1971		17,926.24	
Release from Mortgage - 1.67 Acres			
47.55 "			
<u>49.22 Acres</u>	\$2500	<u>123,050.00</u>	(<u>123,050</u>)
		<u>\$373,044.97</u>	<u>\$599,950</u>

20

30

	<u>Price</u> <u>Per Acre</u>	<u>Cash</u> <u>Required</u>	<u>Mortgage</u>	
(B) <u>OPTION LANDS</u>				In the
92.288 Acres	\$2000	\$ 18,576.00	\$166,000	Supreme Court
(\$184,576)				of the
Release from				Commonwealth
Mortgage -				of the Bahama
20.24 Acres	\$2500	<u>50,580.00</u>	<u>(50,580)</u>	Islands
		\$ 69,156.00	\$115,420	No.12
		11,726.50		Completion
Legal Fees		<u>6,886.33</u>		Statement
Surveys		\$ 87,768.83	\$115,420	(Exhibit
				B.V.K. 8)
				30th April
				1971
				(continued)
		(Due Sept.1/71)		

SUMMARY

(A) Contract Lands	\$378,044.97	\$599,950
(B) Option Lands	<u>87,768.83</u>	<u>115,420</u>
Totals	<u>\$465,813.60</u>	<u>\$715,370</u>

Additional Legal Fees in Bahamian Dollars

Legal Fees - H.B. Sands	B\$9,083.35
Legal Fees - H.B. Sands	<u>152.03</u>
	<u>B\$9,235.38</u>

Please confirm, by signing this letter, that the above is satisfactory to you and that you are prepared to close on this basis, and that the said payment is accepted in full discharge of the amounts required for such closing, and that the documents delivered to my attorneys by Mr. Leon Potier in escrow, are now released from such escrow.

Yours faithfully,

(Signed)

We, Security Trust Company, acknowledge to have received the sum of \$465,813.80 in the amount needed to complete the sale and purchase of various tracts at Coral Harbour, and accept the mortgages for the unpaid balances of the respective purchase prices, on the understanding that the documents

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

relate back, and shall have effect, from their
respective dates, to the intent that the powers
vested in Security Trust Company as legal mortgagee
shall be exercisable on the dates of such respec-
tive mortgages, in accordance with the terms of
the documents.

No.12
Completion
Statement
(Exhibit
B.V.K. 8)
30th April
1971
(continued)

We understand that you will deliver all of
the deeds and mortgages involved in the transaction
to Mr. Leon R. Potier, our attorney, so that he can
record the deeds and mortgages simultaneously.

10

(Sgd)
(Sgd)

No.13
Affidavit of
J.A. Dixon
19th April
1972

No. 13

AFFIDAVIT OF J.A. DIXON

BAHAMA ISLANDS
IN THE SUPREME COURT
EQUITY SIDE

1971

No. 812

BETWEEN

THE ROYAL BANK OF CANADA Plaintiff

AND

20

- (1) CARL G. FISHER COMPANY, LIMITED
- (2) SECURITY TRUST COMPANY
- (3) CHEE-A-TOW & COMPANY LIMITED
- (4) ELEUTHERA LIMITED

Defendants

A F F I D A V I T

I, James Alexander Dixon of Miami Shores in
the State of Florida one of the United States of
America, make oath and say as follows:-

1. I am a member of the Florida Bar Associa-
tion and have been practising since 1924.

30

2. I am and have been General Counsel for
Security Trust Company the Second Defendant herein
since May, 1962 and as such counsel I am cognizant
of all the facts pertaining to this action and I
am authorised and competent to make this Affidavit.

3. I have perused the Affidavit of Burton Vincent Kelly filed herein and sworn the 6th day of March, 1972.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.13

Affidavit of
J.A. Dixon
19th April
1972
(continued)

10

4. As to paragraph 7 of the said Affidavit of Burton Vincent Kelly I say that at the date of the Debenture referred to therein made the 4th day of June, 1970 and recorded at the Registry of Records on the 30th day of July, 1970 that the Conveyance referred to therein dated 19th February, 1970 and the Mortgage dated 19th February, 1970 were not in fact delivered at this latter date and that neither the said Conveyance or the said Mortgage became effective until delivery and fulfillment of the conditions of any Escrow pertaining thereto until 30th April, 1971.

20

5. I further say that the Plaintiff on the 4th June, 1970 by the said Debenture obtained the property mentioned in paragraph 7 of the said Affidavit of Burton Vincent Kelly subject to a contractual obligation of Carl G. Fisher Company Limited the first Defendant herein to grant a mortgage over the said land to the Second Defendant and that the said Mortgage dated 19th February, 1970 has priority over the said Debenture and that the Plaintiff is a party interested in the Equity of Redemption in the said property set out in paragraph 7 of the said Affidavit of Burton Vincent Kelly.

(Sgd) JAMES ALEXANDER DIXON

30

SWORN TO at the City of Nassau
in the Island of New Providence
this 19th day of April A.D.1972,

Before me,

(Sgd)

NOTARY PUBLIC

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.14

Ruling of
Bryce C.J.
21st July
1972

No. 14

RULING OF BRYCE C.J.

BAHAMA ISLANDS 1971
IN THE SUPREME COURT
Equity Side No.732

B E T W E E N :

SECURITY TRUST COMPANY Plaintiff

AND

(1) CARL G. FISHER COMPANY LIMITED
(2) THE ROYAL BANK OF CANADA 10
(3) CHEE-A-TOW & COMPANY LIMITED
(4) RUSSELL PENNELL CAMPBELL
(5) ELEUTHERA LIMITED
(6) MAURA LUMBER COMPANY LIMITED
(7) BUTLER & SANDS COMPANY LIMITED
Defendants

BAHAMA ISLANDS 1971
IN THE SUPREME COURT
Equity Side No.812

B E T W E E N :

THE ROYAL BANK OF CANADA Plaintiff

AND

(1) CARL G. FISHER COMPANY LIMITED
(2) SECURITY TRUST COMPANY
(3) CHEE-A TOW & COMPANY LIMITED
(4) ELEUTHERA LIMITED
(5) RUSSELL PENNELL CAMPBELL
(6) MAURA LUMBER COMPANY LIMITED
(7) BUTLER & SANDS COMPANY LIMITED
(8) CORAL HARBOUR COMPANY LIMITED 30
Defendants

RULING OF BRYCE, C.J.

On 20th September, 1968, the Security Trust Co. (which I will hereafter refer to as the Trust Co.) entered into an agreement with the Charles G. Fisher Corporation (which I refer to as the C.G.F. Corporation) whereby the Trust Co. agreed to sell

to the C.G.F. Corporation some 460 acres of land situated at Coral Harbour, in New Providence. The purchase price was stated to be \$900,000, and Clause 3 of the Agreement provided for its payment in the following terms:

10 "3. Said purchase price shall be paid as follows: \$200,000 in cash or good certified cheque at the closing hereof; the balance by Purchasers or assigns executing, acknowledging and delivering to Sellers a Purchase Money Mortgage in the sum of \$700,000 on the above premises."

Clause 11 of the Agreement provided that the deed, which I take to be the deed of conveyance, was to be delivered on the receipt of the payments on 20th December, 1968, and Clause 12 provided for the postponement of the closing date for any period not exceeding twelve months at the option of the Purchasers.

20 This date was deferred by agreement between the parties on more than one occasion and beyond the originally stipulated twelve month period, until, on 16th December 1969, the parties entered into an Agreement to extend that date to 19th February, 1970.

30 On 19th February, 1970, the parties entered into a further Agreement whereby the Trust Co. agreed to execute as of that date a deed of conveyance of the property, and the Purchaser, C.G.F. Corporation agreed as of that date to execute a purchase money mortgage in respect of the unpaid balance of the purchase price in the terms of the original agreement of 20th September 1968. It was further agreed by condition 2 of this agreement

40 "3. That the executed deed of conveyance and the executed mortgage will be held in the possession and custody of Security Trust Company as escrow agent until such time as the Purchaser pays and deposits with Security Trust Company the sum of \$200,000 U.S. and the Purchaser agrees to make such payment and deposit on or before ninety (90) days from February 19, 1970."

By condition 4 the Purchaser agreed to pay

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.14

Ruling of
Bryce C.J.
21st July
1972
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.14

Ruling of
Bryce C.J.
21st July
1972
(continued)

interest at the rate of 8% from 19th February, 1970 on the \$200,000 until that sum was deposited and paid by the Purchaser, and by Clause 5, it was provided that time was to be of the essence of the agreement.

In accordance with this agreement the parties executed respectively a deed of conveyance and a mortgage on 19th February, 1970. However the Purchaser, C.G.F. Corporation, did not pay the sum within the stipulated period.

10

On 4th June 1970 the C.G.F. Corporation issued a debenture in favour of the Royal Bank of Canada (which I will refer to as the Bank). Clause 4 of that debenture reads:

"4. The Company as beneficial owner hereby charges with the payment of all monies and liabilities intended to be hereby charged (including any expenses and charges arising out of or in connection with the acts authorised by 8 hereof) all its undertaking, goodwill and other property whatsoever and wheresoever both present and future including its uncalled capital for the time being."

20

This Clause then proceeded to create a fixed charge on the goodwill of the company and its uncalled capital and upon certain properties described, with which we are not concerned, and a floating charge as to "all other premises hereby charged".

Clause 8 empowered the Bank to appoint a receiver in certain circumstances and set out his powers.

30

On 19th August 1970, C.G.F. Corporation (which appears by that time to have changed its name to Hemisphere Hotels Corporation, but which I will continue to refer to as before) wrote to the Trust Co. C.G.F. Corporation proposed with regard to the 461 acres:

"The deed and mortgage with respect to the 461 acres at Coral Harbour has been placed in escrow pending payment of the sum of \$200,000 plus interest to you. We request an extension of time for said payment to September 19, 1970.

40

At the Closing under the Sale Agreement we will pay you the said sum of \$200,000 plus interest thereon to the date of the said Closing. We will also pay you at that time any amounts due to you under the said Mortgage by the reason of the occurrence of interest payment dates under the said mortgage between February 19, 1970 and the date of the Closing under the Sale Agreement."

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.14

Ruling of
Bryce C.J.
21st July
1972
(continued)

10 This proposal was accepted by the Trust Co. as appears from the counter signatures appearing on the letter.

In fact the Purchaser did not pay the \$200,000 on 19th September, 1970, but as Mr. Knowles points out time had not been made of the essence in any case.

On 20th November, 1970 the Bank appointed a receiver in exercise of its powers under Clause 8 of the debenture.

20 On 30th April, 1971, the receiver wrote to the Manager of the Bank saying that at the time of his appointment the Company, C.G.F. Corporation, was under contract to purchase 461 acres of land at Coral Harbour and also had an option to purchase a further 747 acres. He continued:

30 "In January of this year it was agreed that the option should be exercised as to 92 acres and both transactions should be closed on or before 30th April. The amount of cash required to close the transactions is \$465,813.80. I am satisfied that it will be to the advantage of the Company and its creditors to buy this land as the contract price is, so I am advised, much less than the market value."

The receiver then said that as the Company did not have the money he was applying to the Bank for a loan and said

"... but I am advised that I may authorise the Company to give a Mortgage on the property to be acquired to secure repayment of the sum advanced to purchase it."

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.14

Ruling of
Bryce C.J.
21st July
1972
(continued)

The mortgage, the receiver said, would be in addition to and not in lieu of any charge which the Bank might have under the debenture.

Also on 30th April, 1971, the Trust Co. and C.G.F. Corporation entered into an agreement whereby the original closing date in the agreement of 20th September, 1968, was extended to 30th April, 1971.

The Bank it seems advanced the money and upon payment the deed of conveyance and the mortgage executed on 19th February, 1970 were, as the deponents say, released from escrow. 10

Mr. Knowles for the Bank contends that on the appointment of the receiver on 20th November, 1970, the floating charge which the Bank had under the debenture over the property of C.G.F. Corporation, crystalized and became a fixed charge. A deed does not take effect until it is delivered and the deed of conveyance was not delivered until 30th April 1971 when it was released from escrow nor was the mortgage until, on that date or perhaps a day or so later, it was similarly released and delivered. Therefore, since the mortgage did not have effect until after the date when the charge under the debenture became fixed, a charge which attaches to property both present and future, the fixed charge attached immediately to the land upon delivery from escrow of the deed and takes priority to the mortgage. 20

I agree that the effect of the appointment of the receiver on 20th November, 1970, was to crystalize the floating charge, that is to say, to the extent that previously the charge had been floating it became fixed on that date, I think this is clear from the judgments in *Re Griffen Hotel* (1940) 4 All E.R. 324 and *N.V. Robbie & Co. Ltd v Witney Warehouse Co.* (1963) 2 All E.R. 199. I also agree that in the case of a conveyance of land in consideration of a cash payment and a purchase price mortgage there must necessarily be an interval between the conveyance and the mortgage to enable the Purchaser to convey to the vendor subject to an equity of redemption, the title he acquires under the former. 30 40

However, it seems to me that this case turns upon the question of when the deed of conveyance

and the mortgage were delivered.

In *Vincent v. Premo Enterprises Ltd.* (1969)
2 All E.R. Lord Denning said at p. 944:

10 "A deed is binding on the maker of it even though the parts have been exchanged so long as it has been signed sealed and delivered. 'Delivery' in this connection does not mean 'handed over' to the other side. It means delivered in the old legal sense, namely an act done so as to evidence an intention to be bound. Even though the deed remains in the possession of the maker or of his solicitor, he is bound by it if he has done some act evincing an intention to be bound as by saying 'I deliver this as my act and deed'. He may however make the delivery conditional in which case the deed is called an 'escrow' and becomes binding when the condition is fulfilled."

20 Lord Cranworth, quoted by Lord Denning, said in *Xenos v Wickham* (1866) L.R. 2 H.L. at p. 323:-

30 "In the first place the efficacy of a deed depends upon its being sealed and delivered by the maker of it. That as a general proposition of law cannot be controverted. It is not affected by the circumstances that the maker may so deliver it as to suspend or qualify its binding effects. He may declare it shall have no effect until a certain time has arrived or till some condition has been performed but when the time has arrived or the condition has been performed the delivery becomes absolute and the maker of the deed is absolutely bound by it whether he has parted with possession or not. Until the specified time has arrived or the condition has been performed the instrument is not a deed. It is a mere escrow."

40 Farwell L.J. in *Foundling Hospital (Governors and Guardians) v Crane* (1911) 2 K.B. at p.377 sheds further light upon the effect of a deed delivered in escrow: He said:

"Now an escrow or script is not a deed at all, it is a document delivered upon a condition on

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.14

Ruling of
Bryce C.J.
21st July
1972
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.14

Ruling of
Bryce C.J.
21st July
1972
(continued)

the performance of which it will become a deed and will take effect from the delivery but until such performance it conveys no estate at all. Thus in *Hooper v Ramsbottam* (reported in 6 Taunt. p.12) a vendor sold real property to A., received part of the purchase price and delivered a conveyance of the property as an escrow on condition of payment of the balance; the vendor then pawned the deeds; and it was held that the purchase on payment of the balance of the purchase money was entitled to the estate and the deeds free from the pawn-brokers claim; the pledge was perfectly good when made but was defeated by the subsequent performance of the condition which threw the commencement of the purchaser's title back to the date of the original delivery of the escrow."

10

Farwell L.J. then went on to refer with approval to the rules relating to escrow set out in *Preston on Abstracts*, 2nd Ed. Vol. 3, p.65, the third of which is that upon second delivery of the writing it will have relation for the purpose of title, and not for the purpose of giving a right to intermediate rents etc., from the delivery. As to this rule Morton L.J. said in *Thompson v McCullough* (1947) 1 All E.R. at p.268, after referring to Farwell L.J.'s judgment in *Foundling Hospital v Crane* (above):

20

"The relation back does not have the effect of giving a 'right to intermediate rent, etc.' from the time of the original delivery, and if that be so I can see no good reason why it should have the effect of validating a notice to quit given at a time when the fee simple was not vested in the Plaintiff."

30

As I understand the facts of the present case, when the Trust Co. executed the deed of conveyance on 19th February, 1970, that deed was intended to be the deed of the Company subject to the performance by the Purchaser of a stipulated condition. No other deed seems to have been drawn up or executed and it appears that all that happened on 30th April 1971 was the physical transfer of the deed from the custody of the Trust Company to the Purchaser. The binding effect of the deed, then, was suspended, as Lord Cranworth puts it, and while it was originally delivered in the sense that it

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was delivered as the deed of the Company, it was to have no effect until the condition was performed, namely the payment of the cash. In the same way it seems to me that the mortgage, which I take to be a legal mortgage, was executed as the deed of the Purchaser, but its effect was suspended, and it was to have no effect until the performance of an event, namely the acquiring by the purchaser of the estate in the land, dependent upon his fulfilling the condition of the deed of conveyance, which would enable him to grant to the mortgagee the necessary title, subject to the equity, in the land.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.14

Ruling of
Bryce C.J.
21st July
1972
(continued)

The money was not paid within the stipulated time and so the suspension of the effect of the deed was not lifted. But on 19th August, 1970, the parties entered into a further agreement, which Mr. Knowles has called a reinstatement agreement but which I think can also be regarded in the light of an agreement by the vendors not to insist on strict compliance with the time stipulated for performance by the Purchaser of the condition.

Then when the money was paid on 30th April, 1971, the condition was fulfilled, so the vendors appear to have considered. They released the deed from escrow, as the deponents put it; in other words they terminated the suspension of the deed. Thereupon, on fulfillment of the condition, it would seem to follow, the commencement of the Purchaser's title was thrown back to the date of the original delivery, that is to say, 19th February, 1970. In the same way, I have come to the conclusion that the mortgage was delivered in escrow. It was intended to be the deed of the Purchaser subject to the happening of a certain event. The mortgage deed executed on 19th February, 1970, was released from escrow, involving so it appears simply a physical transfer of possession. When the event on which its effect was dependent happened, that is to say, immediately upon the Purchaser acquiring the necessary estate in the land from which he could grant the necessary title to the mortgagee, then the suspension of the effect of the deed of mortgage terminated, and it seems to me only logical to say that for the purposes of the title conveyed by the deed of mortgage, the commencement of that title was thrown back to the date of the original delivery of

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

the mortgage, 19th February 1970. This relation
back is for the purposes of title and does not give
a right to intermediate rents, etc. But with this
mortgage it is with title that we are concerned and
not with any intervening rent or other profit from
the land.

No.14

Ruling of
Bryce C.J.
21st July
1972
(continued)

If, then, the commencement of the title of the
C.G.F. Corporation to the land and the title of the
Trust Company as mortgagee is, in each case thrown
back to 19th February 1970, it seems to me to follow 10
that, when the floating charge crystalized in
November, 1970, it became a fixed charge, or must
be taken to have become a fixed charge, on the
property subject to the mortgage, because if the
titles so relate back, that, in fact, would be the
situation.

No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972

No. 15

RULING OF BRYCE C.J.

BAHAMA ISLANDS 1971
IN THE SUPREME COURT 20
Equity Side No.732

B E T W E E N

SECURITY TRUST COMPANY Plaintiff

AND

- (1) CARL G. FISHER COMPANY LIMITED
 - (2) THE ROYAL BANK OF CANADA
 - (3) CHEE-A-TOW & COMPANY LIMITED
 - (4) RUSSELL PENNELL CAMPBELL
 - (5) ELEUTHERA LIMITED
 - (6) MAURA LUMBER COMPANY LIMITED 30
 - (7) BUTLER & SANDS COMPANY LIMITED
- Defendants

BAHAMA ISLANDS 1971
IN THE SUPREME COURT
Equity Side No.812

B E T W E E N

THE ROYAL BANK OF CANADA Plaintiff

AND

- (1) CARL G. FISHER COMPANY LIMITED
- (2) SECURITY TRUST COMPANY
- (3) CHEE-A-TOW & COMPANY LIMITED
- (4) ELEUTHERA LIMITED
- (5) RUSSELL PENNELL CAMPBELL
- (6) MAURA LUMBER COMPANY LIMITED
- (7) BUTLER & SANDS COMPANY LIMITED
- (8) CORAL HARBOUR COMPANY LIMITED

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

10 RULING OF BRYCE C.J. (Continued)

I adjourned this matter so that Counsel might have the opportunity of submitting further arguments, if they so wished, in view of my finding as to the effect of the fulfillment of the conditions of escrow of the documents concerned.

Mr. Knowles, who appears for the Bank, has pointed to Halsbury's Laws, 3rd Ed'n., Vol. 11, page 350, where it is stated

20 "When a sealed writing has been delivered as an escrow to await the performance of some condition, it takes effect as a deed (without any further delivery) immediately the condition is fulfilled and the rule is that its delivery as a deed will, if necessary, relate back to the time of its delivery as an escrow."

30 Mr. Knowles submits that in this case there is no such necessity. Mr. Callendar, on the other hand, submits that it is necessary in order to carry out the intentions of the parties, particularly in view of the agreement that the purchaser would pay interest at the rate of 8% per annum from the date of execution until the fulfillment of the conditions.

40 The learned editor of Halsbury's Laws does not elaborate upon the expression "if necessary" but it seems to me that what is intended thereby to be conveyed is that the relation back does not have effect for all purposes such as, e.g., for the purpose of giving a right to intermediate rents mentioned in Preston (supra), or of validating the notice to quit in Thompson v McCullough (supra). I can see no reason why, in this instant case,

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

there should not be relation back for the purposes of title.

However, Mr. Knowles further submits that if in fact there is relation back, this goes to strengthen his claim because the debenture was recorded in the Registry on 30th June 1970, while the mortgage was not recorded there until 5th May 1971. Therefore, he submits, by virtue of section 10 of the Registration of Records Act (Ch.193), the debenture must take priority over the mortgage. He submits that a debenture comes within the term "mortgage" in that section and in support of this contention he refers to the definition of "mortgage" in the Conveyancing and Law of Property Act (Ch.115) section 2, which reads:- 10

"mortgage" includes any charge on any property for securing money or money's worth".

He also refers to the definition in Words and Phrases contained in Vol. 2 page 19.

He further claims that, accepting that the title related back to 19th February, 1970, at the time of the creation of the debenture, 4th June, 1970, and at the time of the crystallization of the floating charge created by that debenture, by the appointment of the Receiver on 20th November, 1970, the Company, C.G.F. Corporation, had a legal interest in the land and the charge so created attached to that legal interest. He adds that even if the relation back does not have this effect, the land comes under the umbrella of "after acquired property" and the charge under the debenture consequently attached to it. 20 30

Mr. Callendar while not suggesting that the word "mortgage" in section 10 of the Registration of Records Act is not apt to include a debenture such as the one in the present case, contended that the essence of the transaction between the C.G.F. Corporation and the Trust Company was the purchase of the equity of redemption in the land. He quotes Re Connally Bros (1912) 2 Ch. 25 in support of his argument and contends that registration under the Act cannot have the effect of creating a better title in the C.G.F. Corporation than it had. The most therefore to which the charge in the debenture could attach was the equity of redemption. 40

Mr. Callendar also suggests that while the mortgage was in escrow it could not be registered. Mr. Knowles disagrees and points to sections 2 and 3 of the Act.

Now it seems to me that "debenture" is the name given to a document evidencing indebtedness, usually, of a company. Such a document may, but need not necessarily, secure that debt by a charge upon the property of the debtor. Whether or not such a charge is created is to be discovered from an examination of the document. Furthermore, the nature of the charge created, whether or not it be in effect a mortgage, must again be determined from such an examination, and it seems to me that since a debenture is contractual by nature, it is open to the parties to provide that in relation to some of the property of the debtor the charge shall be in effect a mortgage while in relation to other property it is not to have this effect. Therefore I think one must take this particular debenture and decide, firstly, whether upon a proper construction it effected a mortgage over the property for the purpose of section 10 of the Registration of Records Act, and, secondly, if so does the prior registration of the debenture under the Act result in that mortgage so created having priority over the legal mortgage granted over the property by the Company to the vendor?

The Registration of Records Act does not contain any definition of the expression "mortgage". Mr. Knowles has pointed out that the Conveyancing and Law of Property Act (Ch.115) defines the expression, but the definition in that Act is for the purposes of that Act, purposes appearing to me to be different from those of the Registration of Records Act, which its long title declares to be an Act for the registration of records. I do not think that it necessarily follows that when the Legislature of the day used the expression in the latter Act, it was intended that it should bear the same meaning as had been attributed in the former. In my opinion, the expression is to be construed in accordance with the meaning, so far as can be ascertained, which it is commonly recognized as bearing. Dictionary definitions give valuable guidance in many cases but, being of necessity concise, do not debate the problem of what is and what is not a mortgage.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

In Megarry and Wade's Law of Real Property
(3rd Ed'n) at page 879, the learned authors say

"The essential nature of a mortgage is that it is a conveyance of a legal or equitable interest in property, with a provision for redemption, i.e. that upon payment of a loan or the performance of some other obligation the conveyance shall become void or the interest shall be re-conveyed."

This is in accordance with the statement of Lindley M.R. in *Santley v Wilde* (1899) 2 Ch. 474, who said:

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"A mortgage is a conveyance of land or an assignment of chattels as a security for the payment of a debt or the discharge of some other obligation for which it is given. This is the idea of a mortgage and the security is redeemable on the payment or discharge of such debt or obligation any provision to the contrary notwithstanding."

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This statement was approved in *London County and Westminster Bank v Tompkins* (1918) 2 K.B. 515 by Pickford L.J. at p.522. One may perhaps further say that an equitable mortgage, while it does not convey the land, will either convey the equitable interest of the mortgagor which he has by his equity of redemption with a proviso for re-conveyance or will be in the form of an informal mortgage or by deposit of title deeds or by deposit accompanied by a memorandum, in each case containing an undertaking, or by the deposit implying an undertaking, by the mortgagor to execute a mortgage when called upon.

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In *London County and Westminster Bank v Tompkins* (supra) the question arose as to whether a document was to be considered as a mortgage within the meaning of the Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, in England, which did not contain a definition of the expression. Pickford L.J. held that it was not, while Bankes and Scrutton L.JJ held that it was. Scrutton L.J., after commenting on the classifications made in Fisher on Mortgages, went on to say at p.529:

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10 "Further the text-book classification does not seem to take account of the subtle devices which the ingenuity of conveyancers has introduced in favour of lenders who do not desire to get the legal estate at once but desire to be able to get it without the intervention of the Court. Though the Conveyancing Act 1881, s.19, gives a power of sale of the mortgaged property to the person entitled to the charge it does not entitle an equitable mortgagee to transfer the legal estate which he has not got: In re Hodson and Howes' Contract (35 Ch.D 668); but though such a mortgagee does not get the legal estate under his document of mortgage, two clauses have been inserted by which he may get it of his own motion without coming to the Court, and both these clauses are in the document in question in this case. The first is a clause by which the borrower declares to hold the charged property as trustee for the lender (in which case the legal estate is still in the borrower but an equitable estate is created in the lender), authorizes the lender to remove him as trustee and to appoint new trustees with a declaration vesting the borrower's estate in the new trustees. This as held in London and County Banking Co. v Goddard [(1877) 4 Ch.D. 6057 enables the lender to get the legal estate in himself without the intervention of the Court. Further under section 8 of the Conveyancing Act, 1882, the borrower appoints the lender his irrevocable attorney to execute a conveyance of his legal estate on a sale by the lender as mortgagee".

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40 Scrutton L.J. then, having summarized the provisions of the document in question, came to the conclusion that it was "an equitable mortgage and is not made the less so by the fact that the lender can in the future get the legal estate without coming to the Court."

Turning now to the debenture itself, we find, firstly, an acknowledgment of indebtedness and provisions for the payment of interest and for the due payment of the debt. Then by Clause 4, the Company charges "all its undertakings, goodwill and other property whatsoever and wheresoever both present and future" with the payment of the

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

monies secured. This charge is stipulated as being a fixed charge in respect of certain real property specified in the First and Second Schedules and:

"(d) a fixed charge on all other the present freehold and leasehold property of the Company ... save and except the freehold property brief particulars of which appear on Exhibit A hereunto annexed and purchase moneys payable in respect thereof"

I think that it is right to say that earlier we have proceeded on the assumption that the charge affecting the particular property was the floating charge created also by Clause 4 over "all other premises hereby charged". But that was before I had made my determination as to the effect of the fulfillment of the conditions of escrow. On the basis of that finding, if we take the conveyance of the land and the mortgage by the Company to relate back to 19th February, 1970, logically we should consider the property to fall within clause 4(d) as being part of "the present freehold" property of the Company. The fact that on such an assumption at the time of the creation of the charge in June 1970, the estate in fee simple of the property was vested in the mortgagee and the Company had simply the equity of redemption does not in my view remove the property from this clause, in view of what I take to be the intention of the parties as demonstrated in the preceding sub-clauses in which what is termed "the real property of the Company" is in both sub-clause (b) and (c) stated to be subject to an existing mortgage. I think, as I shall have occasion to refer to again, that the expression in clause 4(d) "all other the present freehold and leasehold property of the Company" is intended to mean all other freehold and leasehold property to the extent that the Company has any estate or interest therein. My difficulty is that I have not been advised as to whether or not the property in question falls within the exception set out in clause 4(d). If it does, and if, accordingly it was the floating charge which attached to the property, then I think one comes to a different conclusion.

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However, to continue with the debenture, Clause 8 provides that in the circumstances referred to, the Bank may appoint:

"... a person to be a Receiver of all or any part of the property hereby charged in like manner in every respect as if the Bank were mortgagee within the meaning of the Conveyancing and Law of Property Act and had become entitled under that Act to exercise the power of sale thereby conferred and every Receiver so appointed shall be the Agent of the Company (which shall be alone personally liable for his act, defaults and remunerations) and shall have and be entitled to exercise all powers conferred by the said Act in the same way as if such Receiver had been appointed thereunder

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

I think that the effect of this clause is to give the Receiver the powers of a mortgagee exercising the powers of sale under the Act. But Cotton L.J. said in *In re Hodson and Howes Contract* (supra) at p.672:

"Now what is a power of sale in a mortgage? It is an equitable authority which enables the mortgagee to sell so as to give the purchaser the estate discharged from the equity of redemption. What is there in the Act to enable a mere equitable mortgagee to convey the legal estate? Section 19 provides that the mortgagee shall have the powers therein mentioned, one of which is a power of sale, "to the like extent as if they had been in terms conferred by the mortgage deed, but no further". Now if this mortgage deed, which does not deal with the legal estate had in terms conferred a power of sale, that power would have enabled the mortgagee to dispose of the equitable estate. Section 21 enacts that a mortgagee exercising the power of sale shall have power by deed to convey the property sold for such estate and interest therein as is subject of the mortgage freed from all estates, interests, and rights to which the mortgage has priority. The power to convey "the property sold" does not enable him to convey the legal estate when a power in the deed would only have enabled him to sell the equitable estate ..."

Section 19 of the Conveyancing Act, 1881, appears, it seems to me, as section 21 of Chapter 115 and section 21 as section 23.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

I do not think therefore that clause 8 of the debenture can be taken to convey the property to the lender nor does it to my mind contain provision whereby the lender may at a future date get that property.

Clause 9 however contains a covenant by the Company to "execute a first legal mortgage in favour of the Bank over all or any of the property hereby subject to a first fixed charge", in other words, an undertaking to execute a mortgage when called upon so to do, which is itself a form of equitable mortgage. This would extend to property falling within clause 4(d), but not of course property which by the debenture is subject to the floating charge. Then by Clause 10 the Company declares that it "will henceforth hold the said property" i.e. the property referred to in Clause 9, "as Trustee for executing such mortgage as aforesaid"; that the power of appointing a new trustee shall be exercisable by the Bank in its unfettered discretion with power to the Bank to appoint itself as trustee; and that the Bank and the Receiver appointed by the Bank are irrevocably appointed the attorneys of the Company "to vest the legal estate in any purchaser or other person in exercise of the powers conferred upon mortgagees free and discharged from all rights of redemption hereunder".

So by these clauses the Company covenants to grant to the Bank a mortgage over the properties when called upon. It declares that it holds the properties as trustee for the purpose of executing the mortgage. The Bank has power to substitute itself as trustee, the effect of which is referred to by Scrutton L.J. in the judgment I have just quoted, and the Company irrevocably appoints the Bank and Receiver its attorney for the purpose of conveying the legal estate to any purchaser. These provisions are not in precisely the same terms as those to which Scrutton L.J. referred in London County and Westminster Bank v Tompkins (supra), but nonetheless I think they satisfy the same basic principle: they enable the lender to get the legal estate in himself without the intervention of the court and to convey it to a third party.

Thus in so far as property within Clause 4(d)

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is concerned, including if it falls within that clause, this particular property, I think that the security created by the debenture is of such a nature as to bring it within the meaning normally attributed to the expression "mortgage" and so within section 10 of the Registration of Records Act.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

10 However the same does not follow if the
property does not fall within Clause 4(d) but
instead became subject to the floating charge. I
can find no provision in the debenture whereby the
lender can get the legal estate of such properties
and, in so far as they are concerned, it seems to
me that no security having the necessary character-
istics of a mortgage has been effected. I do not
think that the provisions relating to such proper-
ties fall within the expression "mortgage" in the
Act, and so far as those properties are concerned
I do not think the debenture can be said to be a
20 mortgage for the purposes of the Act.

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

 However, on the assumption that the charge
created by the debenture was a mortgage within the
Act, I now turn to the second part of my question:
whether the prior registration of the debenture
containing this charge gives it priority over the
previous legal mortgage which was not registered
until later.

30 Proceeding on the theory that the effect of
the deed of conveyance and of the mortgage to the
vendor relates back to the time of first delivery
upon fulfillment of the conditions of escrow, as I
have said, it appears to me to follow that when
considering the incidence of the charge created by
the debenture we should do so on the basis that in
fact both the deed and the mortgage had been
executed and come into effect in February 1970.
In that case, in February, 1970, by the legal
mortgage the Company conveyed the legal estate in
40 the land to the vendor subject to its equity of
redemption and accordingly the interest which the
Company had in the land in June 1970 when the
debenture was executed was its equity of redemption.
Thus the asset of the Company represented by the
land, or so far as the land was concerned, was the
equity of redemption and it was to that equity, in
my view, that the charge attached. Can it then be
that by the device of registration, a mortgage of

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

the equity of redemption can be placed in a prior position not simply in regard to the equity but in regard to the legal estate, something which was not at any time the subject of the mortgage between mortgagor and mortgagee?

Jones v Barker (1909) 1 Ch. 321, seems to me to throw some light upon the problem, In that case which was concerned with the application of s.14 of the Yorkshire Registries Act, 1884 the facts were that the owner executed a legal mortgage of land situated in Yorkshire to a bank and the mortgage was duly registered under the Yorkshire Registries Act 1884. He had previously created an equitable charge over the land in favour of two other persons H. and W. but that charge was not registered until 5th October, 1907. On 30th August, 1907, he executed a deed of assignment of all his real and personal estate to a trustee for the benefit of his creditors and that deed was registered on 11th September, 1907. There were other equitable mortgages which the owner had created prior to 1907 but which had not been registered. In 1908 the Bank sold the property comprised in their security and, after satisfying their claim, a balance was left in their hands. The trustee claimed this balance as against H. and W. on the ground that his deed, though later in date of execution than their charge, was prior to it in date of registration. Warrington J., according to the headnote, held upon the construction of the deed of assignment that only such property as the owner then possessed passed to the trustee, namely the property subject to the equitable mortgages upon it and therefore that the question as to priority did not arise. He further held that the claim of the trustee must be postponed to the claims of all prior equitable mortgagees who established then whether their mortgages were registered or not.

Having considered the provisions of the deed Warrington J. said, at p. 327:

"So here it seems to me that this deed only purported to convey such interest as the debtor had, which was the interest subject to the mortgages. The Yorkshire Registries Act, 1884, may give the deed priority, but to give it priority has no effect because

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the deed itself does not in fact purport to postpone the mortgages to the deed."

He then went on to hold that the trustee was not entitled to the money held by the bank unless and until the claims of such of the prior equitable mortgagees as established them had been discharged.

Section 14 of the Yorkshire Registries Act, 1884, is not in the same terms as section 10 of the Registration of Records Act. In fact, it is more precise for, while it proceeds to give priority to documents registered under the Act in accordance with their date of registration and not with their date of execution, it also proceeds to deal with the matter of notice, something omitted from section 10. However, on the point of priority by registration, Jones v Barker seems to me to be a relevant decision. Warrington J. came to the conclusion that the intention of the deed of assignment was to provide for the distribution of the debtor's estate without the necessity of resorting to bankruptcy. The intention of the debenture seems to me to be to secure the repayment of the money loaned by sale, if necessary, of the debtor's property without the necessity of resorting to the court. I do not think that the debenture can be taken to include something, the legal estate vested in the first mortgagee, to which the mortgagor had, for the time being, no title and which he could not encumber. Just as Warrington J. took the view that the real meaning of the words in the deed of assignment: "all the real estate of or belonging to the debtor" was not all the hereditaments of or to which the debtor was seised or entitled but all such interest as the debtor had in the hereditaments, so, too, I think the real meaning of the words "all other the present freehold or leasehold property of the Company" in clause 4(d) of the debenture is: all such interest as the Company has in any such freehold or leasehold property. That interest was and is, as I have said, limited to the equity of redemption.

I do not think that clauses 9 and 10 of the debenture assist the Bank in this respect. By clause 9, as I have said the Company covenants to execute a first legal mortgage over property subject to the first fixed charge. But this I think must be read in the light of prevailing circumstances.

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

—
No.15

Ruling
(continued)
of Bryce C.J.
3rd December
1972
(continued)

Where the property is already the subject of a legal mortgage in the form of conveyance of title, the Company is unable to execute another such mortgage in favour of the Bank. So a limitation, namely to do so as and when it may be possible in respect of properties so subject, must I think of necessity be read into the covenant. All the Company could do would be to execute an equitable mortgage. By clause 10 the company declares that it holds the property as trustee for executing such mortgage as aforesaid. But as trustee the Company has no better title or interest in the property than it has as beneficial owner, so again if it holds as trustee executing any mortgage it can only hold as trustee for executing a legal mortgage when it is in a position to do so.

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I have therefore come to the conclusion that upon the construction of the debenture, only such interest as the Company had in the property, the equity of redemption, became subject to the charge, in other words, the property subject to the legal mortgage, and therefore the question as to priority of registration does not arise.

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There is a further point which I would mention. Mr. Knowles gave me to understand that in his view section 10 of the Registration of Records Act made the doctrine of notice inapplicable in the Bahamas. However, it is perhaps, at least arguable that the principle enunciated by Lord Hardwicke in *La Neve v La Neve*, 3 Atk. 646, and to be found in other cases, to the effect that in equity a person having actual knowledge of a previous unregistered instrument cannot rely on the statutory priority, applies in the Bahamas in respect of section 10 of the Registration of Records Act. However no such argument has been made in the instant matter and since I have reached a conclusion independently of such consideration I feel there should be no further delay through exploring this avenue. It well may be that Mr. Knowles was speaking in general terms and I mention the point, with all respect, simply to indicate that I myself am not yet satisfied that such a proposition can be accepted without qualifications or reservation.

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Delivered the 3rd day of December 1972

W.G. Bryce, C.J.

No. 16

ORDER

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

BAHAMA ISLANDS
IN THE SUPREME COURT
Equity Side

1971

No.372

No.16

BETWEEN

SECURITY TRUST COMPANY

Plaintiff

Order
28th December
1972

AND

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- (1) CARL G. FISHER COMPANY LIMITED
- (2) THE ROYAL BANK OF CANADA
- (3) CHEE-A-TOW COMPANY LIMITED
- (4) RUSSELL PENNELL CAMPBELL
- (5) ELEUTHERA LIMITED
- (6) MAURA LUMBER COMPANY LIMITED
- (7) BUTLER & SANDS COMPANY LIMITED

Defendants

BAHAMA ISLANDS
IN THE SUPREME COURT
Equity Side

1971

No.812

20

BETWEEN

THE ROYAL BANK OF CANADA

Plaintiff

AND

30

- (1) CARL G. FISHER COMPANY LIMITED
- (2) SECURITY TRUST COMPANY
- (3) CHEE-A-TOW & COMPANY LIMITED
- (4) ELEUTHERA LIMITED
- (5) RUSSELL PENNELL CAMPBELL
- (6) MAURA LUMBER COMPANY LIMITED
- (7) BUTLER & SANDS COMPANY LIMITED
- (8) CORAL HARBOUR COMPANY LIMITED

Defendants

ORDER

Upon hearing Counsel for the Plaintiff,
Security Trust Company and Counsel for the 2nd
Defendant, The Royal Bank of Canada IT IS ORDERED
that the Mortgage dated the 19th day of February,
1970 executed by Carl G. Fisher Corporation in

In the
Supreme Court
of the
Commonwealth
of the Bahama
Islands

favour of the Plaintiff herein shall take priority
over the Debenture dated the 4th June, 1970 issued
by the said Carl G. Fisher Corporation in favour
of the 2nd Defendant, The Royal Bank of Canada.

Dated the 28th day of December 1972

No.16

BY ORDER OF THE COURT

Order
28th December
1972
(continued)

Sd. ILLEGIBLE

REGISTRAR.

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

No. 17

NOTICE OF APPEAL

10

BAHAMA ISLANDS
IN THE COURT OF APPEAL

Appeal 1973 No.

1971 No. 732
1971 No. 812

No.17

Notice of
Appeal
10th January
1973

B E T W E E N :

THE ROYAL BANK OF CANADA
(Plaintiff/Defendant) Appellant

and

SECURITY TRUST COMPANY
(Plaintiff/Defendant) Respondent 20

TAKE NOTICE that the Court of Appeal will be
moved so soon as Counsel can be heard on behalf of
the above-named Appellant on Appeal from the whole
of the Order herein of the Honourable Chief Justice
made on the Twenty-eighth day of December 1972
whereby it was ordered that the Mortgage dated the
Nineteenth day of February 1970 executed by Carl G.
Fisher Corporation in favour of the Plaintiff
herein shall take priority over the Debenture dated
the Fourth day of June 1970 issued by the said Carl
G. Fisher Corporation in favour of the 2nd Defendant,
The Royal Bank of Canada.

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For an Order that the said Order be set aside
and that there shall be substituted therefor an
order that the said Debenture dated the Fourth day
of June 1970 shall take priority over the said
Mortgage dated the Ninth day of February 1970.

AND FURTHER TAKE NOTICE that the grounds of this Appeal are:

- (a) Clause 4(d) of the said Debenture dated the Fourth day of June 1970 and on its true construction included all the interest conveyed to Carl G. Fisher Company Limited by the Conveyance dated the Nineteenth day of February 1970.
- (b) The said Debenture being registered in the Registry of Records on the Thirtieth day of June 1970 has priority over the said Mortgage dated the Nineteenth day of February 1970 but not registered until the Fifth day of May 1971.

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DATED this Tenth day of January 1973.

Sgd. HIGGS & JOHNSON

Attorneys for the above-named Appellant.

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To the above-named Respondent and to Messrs. Callenders, Orr, Pyfrom & Roberts.

No. 18

ORDER AND JUDGMENT OF THE COURT OF APPEAL

BAHAMA ISLANDS
IN THE COURT OF APPEAL
CIVIL SIDE

1973
No.1

THE ROYAL BANK OF CANADA - Appellant

SECURITY TRUST COMPANY - Respondent

CERTIFICATE OR ORDER OF THE COURT

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Appeal from the Ruling of Bryce, C.J. of the Supreme Court dated the 28th day of December 1972

This appeal coming on for hearing on the 7th day of June 1973 before the Bahamas Court of Appeal, in the presence of Leonard J. Knowles counsel for the Appellant(s) and W.E.A. Callender, Q.C. and C.Callender counsel for the Respondent(s):

In the Court of Appeal (Civil Side) of the Bahama Islands

—
No.17

Notice of Appeal
10th January 1973
(continued)

No.18

Order and Judgment of the Court of Appeal
2nd July 1973

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

I hereby certify that an Order was made as follows:

The Order of 28th December, 1972, set aside and case returned for completion in the lower court, leaving entirely open for determination in that court the incidence, if any, of an unpaid vendor's lien on the issues raised by the case. The Bank to have the costs of the appeal.

Given under my hand and the Seal of the Court 10
this 17th day of July 1973.

.....
Acting Registrar
Court of Appeal

TO:
Messrs. Higgs & Johnson,
Messrs. Callenders, Orr, Pyfrom & Roberts.

Copies of Judgments attached.

BAHAMAS ISLANDS

IN THE COURT OF APPEAL 9th June, 1973 CIVIL SIDE

Civil Appeal No. 1 of 1973 20

THE ROYAL BANK OF CANADA Appellant

v

SECURITY TRUST COMPANY Respondent

JUDGMENT OF HOGAN J.A.

The respondents (hereinafter referred to as the Trust Company) held considerable areas of land at Coral Harbour in New Providence. On 20th September, 1968, they agreed with the Charles G. Fisher Corporation (hereinafter referred to as the Corporation) to sell to the Corporation some 460 acres of this land for \$900,000, of which \$200,000 was to be paid in cash or by certified cheque and the balance by a purchase money mortgage for \$700,000 secured on the land. There was provision for the postponement of the closing date for any 30

period not exceeding twelve months at the option of the purchasers. The date was deferred by agreement on more than one occasion and beyond the originally stipulated period of twelve months until, on 16th December, 1969, the parties agreed to extend the date to 19th February, 1970.

In the Court of Appeal (Civil Side) of the Bahama Islands

No.18

Order and Judgment of the Court of Appeal
2nd July 1973
(continued)

10 On 19th February, 1970, it was agreed that the parties would execute, as of that date, a conveyance of the property and a purchase money mortgage in respect of the unpaid balance of the purchase price, as provided in the original agreement; that the executed deeds of conveyance and mortgage would be held in possession and custody of the Trust Company, as escrow agent, until such time as the Corporation paid \$200,000 to the Trust Company and that such payment would be made on or before 90 days from February 19, 1970.

20 There was a further condition that the Corporation would pay interest at 8% from the 19th February 1970 on the \$200,000 until it was paid and that time was to be of the essence of the contract. The deeds were executed and held as agreed but the Corporation did not pay the \$200,000 within the stipulated period.

On the 4th June, 1970, the Corporation issued a debenture in favour of the appellants (hereinafter referred to as the "Bank").

So far as material, clause 4 of that debenture reads as follows:-

30 "4. The company as Beneficial Owner hereby charges with the payment and discharge of all moneys and liabilities intended to be hereby secured . . . all its undertaking goodwill and other property whatsoever and wheresoever both present and future including uncalled capital for the time being.

The charge hereby created shall be:-

(a)

40 (b) a fixed second charge on the real property of the company described in the first schedule hereto

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

(c) a fixed second charge on the real property of the company described in the second schedule hereto . . . and

(d) a fixed first charge on all other the present freehold and leasehold property of the company and the fixed plant and machinery thereon Save And Except the freehold property brief particulars of which appear on exhibit "A" hereunto annexed and purchase moneys payable in respect thereof or any part thereof and

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(e) a fixed first charge on all future leasehold property of the company and the fixed plant and machinery thereon

And as to all other premises hereby charged shall be a floating security but so that the Company is not to be at liberty to create any mortgage or charge upon and so that no lien shall in any case or in any manner arise on or affect any part of the said other premises either in priority to or paripassu with the charge hereby created it being the intention that the company shall have no power without the consent of the bank (which will not be unreasonably withheld) to part with or dispose of any part of such other premises except by way of sale in the ordinary course of its business. Any debenture mortgages or charges hereafter created by the company (otherwise than in favour of the bank) shall be expressed to be subject to this debenture. The company shall deposit with the bank and the bank during the continuance of this security shall be entitled to hold all deeds and documents of title relating to the company's freehold and leasehold property which is the subject of this security (save that described in the first and second schedule hereto so long as the said mortgages shall subsist)".

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By clause 8 the Corporation gave the Bank power to appoint a receiver over the property included in the debenture, who would be the agent of the Corporation.

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The debenture was recorded in the Registry of Records on the 30th June, 1970 in accordance with

the provisions of the Registration of Records Act (Cap.193).

10 On the 19th August, 1970, the Corporation, which, it is said, had in the meantime changed its name to Hemisphere Hotels Corporation, wrote to the Trust Company asking for an extension up to September 19, 1970 of the prescribed period for payment of the \$200,000 together with interest from February 19, 1970. This proposal was accepted by the Trust Company. No reference was made to time being of the essence of the contract. The \$200,000 was not paid on the 19th September, 1970. On 20th November, 1970, the Bank appointed a receiver. On the 30th April, 1971, the Receiver wrote to the Bank telling them of the agreement to purchase 461 acres at Coral Harbour and of an option to purchase a further 747 acres. He continued:-

20 "In January of this year it was agreed that the option should be exercised as to 92 acres and both transactions should be closed on or before the 30th April. The amount of cash required to close the transactions is \$465,813.80. I am satisfied that it will be to the advantage of the company and its creditors to buy this land as the contract price is, so I am advised, much less than the market value".

30 The Receiver went on to say that the company did not have the money and applied to the bank for a loan saying that he was advised that he could authorize the company to give a mortgage on the property to be acquired to secure repayment of the sum advanced to purchase it; that he undertook to procure the execution of a mortgage by the company to rank immediately after the purchase mortgage; and that the mortgage would be in addition to and not in lieu of any charge which the Bank had under the debenture.

40 On the same date, 30th April, 1971, the Trust Company and the Corporation agreed to extend to 30th April, 1971 the original closing date in the agreement of the 20th September, 1968.

Apparently, the Bank advanced the amount requested and, upon payment, the deed of conveyance

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

and the mortgage executed on the 19th February 1970 were released from escrow.

The concluding paragraph of the letter addressed to the Trust Company by the Receiver, forwarding the payment, and the ensuing acknowledgment by the Trust Company are in the following terms:-

"Please confirm, by signing this letter, that the above is satisfactory to you and that you are prepared to close on this basis, and that the said payment is accepted in full discharge of the amounts required for such closing, and that the documents delivered to my attorneys by Mr. Leon Potier in escrow, are now released for such escrow.

10

We, Security Trust Company, acknowledge to have received the sum of \$465,813.80 in the amount needed to complete the sale and purchase of various tracts at Coral Harbour, and accept the mortgages for the unpaid balance of the respective purchase prices, on the understanding that the documents relate back, and shall have effect, from their respective dates, to the intent that the powers vested in Security Trust Company as legal mortgagee shall be exercisable on the dates of such respective mortgages, in accordance with the terms of the documents.

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We understand that you will deliver all of the deeds and mortgages involved in the transaction to Mr. Leon R. Potier, our attorney so that he can record the deeds and mortgages simultaneously."

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Differences arose between those concerned as to the relative priorities of the securities held respectively by the Bank and the Trust Company with the result that, on the 23rd May, 1972, the Trust Company took out an originating summons in which the Corporation, the Bank and others were named as defendants and which sought, as against the Corporation:-

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1. payment of the money due under the covenants in the mortgage of the 19th February, 1970;

2. An account of what was due to the Trust Company by virtue of the said mortgage for principal, interest and costs;
3. An inquiry whether anything was due and if so what to the Trust Company for costs, charges and expenses in respect of the said mortgage beyond costs of the action;
4. An order that the mortgage may be enforced by foreclosure or sale;
- 10 5. Further or other relief.

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

On the 21st June, 1972, Mr. Knowles, as counsel for the Bank and Mr. Ernest Callender Q.C. and Mr. Colin Callender as counsel for the Trust Company appeared before the learned Chief Justice to argue the matter and, as a result on the 21st July, 1972, he delivered a ruling that, when the money was paid on the 30th April, 1971, the condition of the escrow was fulfilled; that, for the purposes of title, the commencement of the Corporation's title, as purchaser, and of the Trust Company as mortgagee, was thrown back to the date of the original delivery, i.e. to 19th February, 1970; and that the effect of the appointment of the Receiver, on the 20th November, 1970, was to crystalize the floating charge contained in the debenture. The ruling concluded with the following two paragraphs:-

30 "If, then, the commencement of the title of C.G.F. Corporation to the land and the title of the Trust Company as mortgagee is, in each case thrown back to 19th February 1970, it seems to me to follow that, when the floating charge crystalized in November, 1970, it became a fixed charge, or must be taken to have become a fixed charge, on the property subject to the mortgage, because if the titles so relate back, that, in fact, would be the situation.

40 I realize that my finding is on premises not argued before me by counsel except for the general submission of Mr. Knowles regarding delivery. I would, therefore, be prepared to hear any further submissions counsel may wish to make."

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

Submissions were made on 31st October, 1972, when Mr. Knowles argued that, following on the relation back, the debenture should have priority over the mortgage because it was recorded on 30th July 1970 and the mortgage was not recorded until 5th May, 1971, which brought into play the provisions of section 10 of the Registration of Records Ordinance, Cap. 193 (hereinafter called "Cap.193"), which reads 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.

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Provided that this section shall not apply to any disposition of property made with intent to defraud."

To this Mr. Callender replied, relying on the case of *In Re Connolly Brothers* 1912 2 Ch.25, that the Corporation never acquired anything more than an equity of redemption and that the section could not create or confer a better title than the Corporation already had, which was a title subject to the mortgage in favour of the Trust Company.

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On the 4th December, 1972, the learned Chief Justice delivered his ruling substantially upholding Mr. Callender's argument, although advancing, as his main reason for doing so, an analogy with

the case of Jones v Barker (1909) 1 Ch.321 rather than the Connolly case and being content to assume that the fixed charge conferred by clause 4(d) of the debenture was a mortgage for the purposes of s.10 of Cap.193. After quoting from Jones v Barker a passage in which Warrington J. dealt with the intent of the deed before him, the learned Chief Justice went on to say that:-

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

10 "The real meaning of the words 'all other
the present freehold or leasehold property of
the company' in clause 4(d) of the debenture
is: all such interest as the company has in
any such freehold or leasehold property.
That interest was and is, as I have said,
limited to the equity of redemption".

He concluded with the following words:-

20 "I have therefore come to the conclusion that
upon the construction of the debenture, only
such interest as the company had in the
property, the equity of redemption, became
subject to the charge, in other words, the
property subject to the legal mortgage, and
therefore the question as to priority of
registration does not arise."

The ruling was followed by a formal Order on
28th December 1972 giving priority to the purchase
mortgage.

30 Against that decision the Bank has appealed.
Neither side seeks to question the relation back of
the title on release of the escrow but Mr. Knowles
has submitted that the decision involves five
findings: three of which he accepts and two he
disputes. He accepts that :-

- (1) the debenture crystallized on 20th November,
1970 when the Receiver was appointed;
- (2) the title of the Trust Company related
back to the 19th February 1970; and
- (3) the debenture was a mortgage for the
purposes of section 10 of Cap.193.

40 He disputes that:-

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

- (1) the debenture imposed a fixed charge only on the equity of redemption and subject to the prior mortgage to the Trust Company, and
- (2) the mortgage of the Trust Company had priority over the debenture.

He submitted that the decision of the learned Chief Justice involved two erroneous propositions. The first was that the debenture only purported to charge an equity of redemption and the second was that the company, in any event, only had an equity of redemption to charge. 10

On the first of these he submitted that the debenture was most explicit, in clause 4, when it set out to give nothing but a second charge, as exemplified by sub-clauses (b) and (c), and that it was no less explicit in sub-clause (d) when it clearly purported and intended to give a fixed first charge over the property falling within that clause. 20

Mr. Callender, in reply, did not really seek to refute this part of Mr. Knowles argument which, in any event, seems to me well founded. To my mind, the terms of the debenture clearly purport to give, in language of the plainest character, a first charge over property falling within the descriptions used in sub-clauses (d) and (e), and, in this respect, any analogy with the Jones v Barker case is mistaken. The issue really turns on whether the property in question did fall within such description or, failing that, could be caught by the crystallization of the floating charge conferred by the later part of the clause. 30

On this, Mr. Knowles submitted that the lifting of the escrow let in his debenture and gained for it the benefits of priority conferred by section 10; a priority which could not be defeated by an instrument the operation of which was postponed by the provisions of the statute. He said that it was not true that a successor in title could never take more than his predecessor had enjoyed, and cited the example of a bona fide purchaser for value who would not, without notice, be affected by equities that were binding on the vendor; for one reason or another prior interests may become void or ineffective as against subsequent grantees. 40

In support of his contention that registration gave priority to the debenture, he cited three cases: Moore v Culverhouse 27 Beavan 639, in Re Wights Mortgage Trust L.R. 16 Equity cases 41, and Chung Khiaw Bank Ltd. v United Overseas Bank Ltd. 1970 A.C. 767.

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

10 These cases were concerned with different statutes, two of which, 7 Anne Cap.20, and 5 Anne Cap.18, are not immediately available, but Mr. Knowles claimed that the reports indicated a sufficient similarity between the legislation involved and section 10 of Cap.193 to make them good authority for the proposition as to priority which he put before the court.

20 In response to this argument, Mr. Callender for the Trust Company relied on Jones v Barker, which featured so prominently in the ruling of the learned Chief Justice, but also on In re Connolly Brothers and Wilson v Kelland 1910 2 Ch.306, both of which had been mentioned in argument in the court below, but do not feature in the ruling.

30 In the Jones case, the owner had created an equitable charge which was unregistered. Subsequently he executed a deed of assignment of all his real and personal estate to a trustee for the benefit of his creditors and this deed was duly registered under the provisions of the Yorkshire Registries Act 1884. The Trustee claimed proceeds of the property on the ground that his deed, though later in date of execution than the charge was prior to it in date of registration. Warrington J. held, upon the construction of the deed of assignment, that only such property as the owner then possessed passed to the trustee, namely the property subject to the equitable mortgage, and therefore that the question as to priority did not arise. He said (p.327):-

40 "So here it seems to me that this deed only purported to convey such interest as the debtor had, which was the interest subject to the mortgages. The Yorkshire Registries Act 1884, may give the deed priority, but to give it priority has no effect because the deed itself does not in fact purport to postpone the mortgages to the deed".

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

Although Warrington J. seems to have relied more on the intent of the deed than the overriding limitations of the debtor's estate, the learned Chief Justice in the court below professed reliance on this passage when coming to his conclusion that the debenture could not "be taken to include something, the legal estate vested in the first mortgagee, to which the mortgagor had, for the time being, no title, and which he could not encumber".

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This conclusion was, Mr. Callender argued, fully supported by a passage in Fisher and Lightwood on Mortgages (8th ed., p.112), which reads:-

"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 debentures".

A footnote adds the caution "Assuming the chargee has the title deeds or registers" and for the general proposition quotes the Connolly case.

20

This passage, incidentally, is in conflict with the view expressed in Palmer's Company Law (21st Ed. p.400).

In Connolly's case, a company had issued debentures creating a floating charge over all its property present and future, one of the conditions being that the company should not be at liberty to create any other mortgage or charge in priority to the debentures, which were duly registered. They were supported by a trust deed. Subsequently the company borrowed £1,000 from a Mrs. O'Reilly for the purpose of purchasing certain property and on the terms that she should have a charge on the property so purchased. At the purchase, she was present and gave her cheque, which was paid into the company's account. The company thereupon paid out the bulk of it as the balance of the purchase price to the vendor. The same solicitor acted for all parties. He took and retained the title deeds of the property on behalf of Mrs. O'Reilly. A memorandum of the deposit was subsequently made. Mrs. O'Reilly's solicitor did not know of the debentures and made no search.

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Warrington J. held that Mrs. O'Reilly had priority on two grounds: first, that, by subrogation, she stood in the place of the vendor and had the benefit of the vendor's lien because "she agreed to make this advance for the purpose and sole purpose of paying off this purchase money; and under a contemporaneous agreement, she was to have a charge upon the property so purchased"; and, secondly, on the ground that the debentures and the accompanying trust deed, so far as this after-acquired property was concerned, amounted to nothing more than a contract by the company to give to the debenture holders a security upon this particular item of property, but only on such interest as the company might, in fact, acquire in that and other after-acquired property and that the company, on the facts of the case, never acquired "as against Mrs O'Reilly any interest in this property at all, except subject to the obligation of giving to her a charge for the amount of the purchase money which she so advanced".

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

This view was upheld on appeal, Cozens-Hardy, M.R. saying:-

"Did the company as between themselves and Mrs. O'Reilly ever become the absolute owners of the property? Or was not the bargain that Mrs. O'Reilly was to have a first charge, and the company was only to get the property subject thereto? In my opinion, we should be shutting our eyes to the real transaction if we were to hold that the unincumbered fee simple in the property was ever in the company so that it became subject to the charge of the debenture holders.

But there is another way of arriving at the same conclusion. Mercer was instructed to act as solicitor for all parties. He was present at the completion, took the deeds, and says he held them on behalf of Mrs. O'Reilly. What reason is there to disbelieve that evidence, which is in accordance with the course of the whole transaction? The learned judge certainly drew that inference from the evidence and I think it was the proper inference, and that being so, I am of opinion that all the company in equity obtained was the equity of redemption

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

in the property subject to Mrs. O'Reilly's charge of £1,000."

Buckley, L.J., sitting in the Divisional Court, came to a similar conclusion, saying that the company obtained the property subject to a contractual obligation to give a first charge on it to Mrs. O'Reilly and that the debenture holders could get no more.

There appears to have been no question of granting priority by virtue of registration under a statute, but the reasons as stated would suggest that the company was never in a position to give the debenture holders an interest in the property over-reaching Mrs. O'Reilly's equitable charge. 10

The case of Wilson v Kelland is to the same effect, but question did arise in it as to the effect of notice by registration of the debenture. The vendors of freehold property had agreed to let part of the purchase money remain on mortgage. Conveyances to the company were executed but remained in the custody of the vendors' solicitor, and subsequently, on January 27th, 1905, the mortgage deed was executed without investigation or inquiry on the part of the vendors as to the company's title and without notice of any debentures or trust deed. In 1901 the company had issued a debenture secured by a trust deed, particulars whereof had been duly registered pursuant to section 14 of the Companies Act 1900. Both trust deed and debenture charged the present and future property of the company by way of a floating charge in the usual manner and both prohibited the creation of any charge ranking in priority to the security created by the debenture; but the conditions endorsed on the debenture, a form of which was scheduled to the trust deed, provided that nothing "herein" contained shall prevent the creation of specific mortgages upon after-acquired freehold or leasehold property. In a foreclosure action, counsel for a subsequent holder of the purchase mortgage argued that, having regard to the agreement that part of the purchase money should remain on mortgage, the sale by, and mortgage to, the vendors was all one transaction, that, although the conveyances were executed some time before the mortgage, the deeds remained the whole time in the custody of the vendors' solicitors with the vendors' lien attaching to them; 20 30 40

and that the company could only give to the debenture holders and the trustee what the company had to give, namely, an equity of redemption in the property. That argument was upheld by Eve J. who, in a brief passage in his judgment, said (p.312):-

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

10 "Any equity which attached to the property contracted to be purchased in June and conveyed to the company in September, 1904, in favour of the debenture holders or their trustees, was, throughout, subject to the paramount equity of the unpaid vendors; and the legal mortgage which secures the unpaid purchase moneys must, in my opinion, take priority over any charge to persons claiming through the purchaser."

20 Eve J. went on to say that notice did not affect the position but that if it had, then the particulars registered in pursuance of section 14 of the Companies Act 1900 would have amounted to constructive notice of the charge affecting the property but not of any special provisions contained in that charge restricting the company from dealing with their property in the usual manner when the subsisting charge is a floating security. He also held that a subsequent mortgage made with actual notice of the trust deed could not take priority over the latter because of the provision prohibiting the company from charging subsequently acquired
30 property in priority to it.

Mr. Knowles sought to meet the implications of these two cases by a later decision in the Court of Appeal: Capital Finance Co. Ltd. v Stokes and another, 1968 1 Ch.261.

40 In that case land was sold on terms that 75% of the purchase money should be secured by a first mortgage. On the same day that it got the conveyance, the purchasing company mortgaged the property to the vendor for the appropriate amount and other moneys covenanted to be paid. The vendor retained possession of the property and the title deeds. Particulars of the charge were not delivered to the Registrar of Companies under section 95 of the Companies Act 1958. In the following year, the purchasing company charged all its property by a debenture holder. The company was wound up within

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

a year, and the debenture became void under section 322 of the Companies Act 1948, thus reducing the debenture holders to unsecured creditors. Question arose as to whether the vendor was also an unsecured creditor. When the matter came before Pennycuik J. at first instance (1968) 1 A.E.R. 573, both Wilson's case and Connolly's case were brought to his attention. In regard to the former, he said that it dealt with a different matter and did not throw any light upon the question he was deciding, but that it was worthwhile "to point out that Eve J. uses the neutral expression 'the paramount equity of the unpaid vendor'." In regard to Connolly, he said (1968 1 W.L.R. 1165):-

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"That decision would be of the greatest weight here if it stood alone. But in the more recent case, Church of England Building Society v Piskor (1954) 2 A.E.R. 85, it was held by the Court of Appeal that for the purposes of feeding an estoppel in favour of a tenant the purchaser must be treated as having acquired the property as a whole. Evershed M.R. and Romer L.J. held that the rights of the parties must be determined according to the normal conveyancing procedure, which was adopted in that case and distinguished In Re Connolly as involving only a conflict of equities. It seems to me that I am entitled to treat the analysis made by Evershed M.R. and Romer L.J. as applicable here with regard to the two sections of the Companies Act. There can, I think, be no difference in principle where, as here the charge is made, not in favour of a third party, but in favour of the vendor himself."

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In the Church of England Building Society case, the purchasers of property agreed to grant a tenancy and allowed the tenant into possession before they received their assignment. On the day they received their assignment, they executed a charge in favour of the Building Society. The Building Society sought to evict the tenant, claiming their charge had priority. The tenant claimed there was a tenancy by estoppel, fed by the assignment, which, for at least a moment, conferred a title on the purchaser unfettered by the charge. The

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Building Society argued that the assignment and the charge were one transaction in substance. They relied on the Connolly case and, inter alia, on the decision of Harman J. in Coventry Permanent Economic Building Society v Jones (1951) 1 A.E.R. 901, where he rejected the assumption of *scintilla temporis* in such matters. In the Court of Appeal, Sir Raymond Evershed M.R., with whom Birkett L.J. agreed, said of the Connolly case, after quoting the observation of Cozens-Hardy M.R. about shutting ones eyes to the real transaction:-

"I do not think that that language, appropriate to a case of competing equities, can be used to justify the view that there is one transaction - one that is, not only in substance, but in law, one and indivisible - in a case such as the present".

Romer L.J. said:-

"I agree. The theory that a purchase which is completed by payment of money that has been provided in part by a third party, and a mortgage by the purchaser of the property sold to secure the repayment of that money to the lender, constitutes only one transaction if the instruments are executed at more or less the same time is a conception which has a prima facie appeal, but does not, on analysis, in my opinion, truly reflect the legal effect of what takes place. The mortgage of the purchased property cannot have any operation in law (whatever rights it may give rise to in equity or by estoppel) unless and until the purchaser is in a position to vest a legal term in the property, as security, in the mortgagee, and he is not and cannot be in a position to do this until he himself has acquired from the vendor the legal estate out of which the mortgage term is capable of being created. From this it follows that the execution and delivery of the conveyance (if the property is freehold) or of the assignment (in the case of a leasehold) by the vendor to the purchaser must of necessity constitute an essential preliminary to the vesting in the mortgagee of a subsidiary interest in the property. Counsel for the plaintiffs pressed on us the necessity of looking at the substance rather than the

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

form of the transaction which took place in the present case and referred us to such cases as *Meux v Smith* in support of that proposition. I am very willing to do so, but the substance of the transaction was that the purchasers were to purchase property with money lent in part by the building society and give the society a mortgage on the property for the loan. All this has in fact been done and the society has got its security, but, look at it 10
how one will, the fact remains that the purchasers could not have given the society the legal charge which the society required unless, at the time when the charge was executed, the purchasers were the owners of the legal interest in the property charged ... I agree with the submission of counsel for the defendant that a composite transaction cannot be regarded as being one transaction, unless 20
it is not only one, but one and indivisible, and that two transactions, each possessing a legal individuality of its own, do not coalesce into one merely because they are dependant on each other. The whole object of the plaintiffs in trying to displace the view which is both logical and in conformity with conveyancing practice, viz., that the completion of the purchase preceded by however short a time the execution and 30
delivery of the mortgage, is to defeat the claim of the sitting tenants. But for the Rent Restrictions Acts the point would have had no importance and would, I suppose, never have been taken at all, for the society could have determined the tenancies by the service of notices to quit. I find myself unable to treat as one what were, in law, two palpably distinct transactions merely for the purpose of enabling the society to evict 40
persons who were already in occupation but whose existence or rights the society had never troubled to inquire about.

To the extent, then, that the view which Harman J., acted on in the *Coventry Building Society* case was founded on the principle that in cases such as the present the conveyance and the mortgage are to be regarded as one transaction, I do not, for myself, now that the matter has been so fully argued before us, feel able to accept it." 50

Coming back to the Capital Finance Company case, counsel there relied on Wilson's case and Connolly's case, seeking to distinguish the Church of England Building Society case on the ground that it involved three parties, but the judges in the Court of Appeal, who now included Harman L.J., did not accept that submission. He said (1968) Ch.D. 277:-

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

10 "The ordinary conveyancing practice was followed whereby the entirety of the property was conveyed to the company which then charged it by way of legal mortgage. The company had to have the legal estate in the property before it could create the legal charge, and it is not true to say that all that the vendor was selling was the equity of redemption. In Re Connolly Bros. Ltd. (2) was a case where the Court of Appeal was considering equitable priorities and not the legal estate, and thus is distinguishable. The subsequent case of Church of England Building Society v Piskor contains a passage directly in point, the Judgment of Romer L.J. where he said:"

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The learned Lord Justice then went on to quote part of the judgment of Romer L.J. already recited herein.

30 Although these later cases chose to distinguish the Wilson and the Connolly cases, it seems clear that, in them, the judges were adopting a view which must throw doubt on at least part of the argument adopted in the earlier and less authoritative decisions and that the weight of judicial opinion favours the conclusion that there is not in substance one transaction but two consecutive transactions.

40 The weakness in the view adopted in the court below and supported by Mr. Callender's argument is that it gives to the unregistered document the same effect as if the document had been registered, thereby ignoring the defect which flows from non-registration and significantly limiting the operation of section 10 of the Registration of Records Ordinance. It would deprive Cap. 193 of much of its value and increase the dangers of fraud; making it easier for people to conceal and withhold, whether by way of escrow or otherwise, documents which, after further transactions had been entered

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

into, they could bring forward as showing that the power of the owner to deal with the property was limited by an earlier unregistered transaction.

If it is correct then the case, for example, of in *Re Wights Mortgage Trust* (16 Eq case 41) would appear to have been wrongly decided. In that case the mortgagor's interest was cumbered or fettered by a second charge which, as Sir R.Malins V.C. said (p.47), would have ranked according to its priority of date if the land had not been in "Register country", as a result of which he postponed it to the third charge which had been duly registered. 10

The justification for this lay, as it would lie in the present case, in the fact that the earlier encumbrancer held not a faultless title to his encumbrance but a defective title; consequently the owner's or mortgagor's interest was not lessened or diminished by an unassailable right in the earlier encumbrancer but by a defeasible interest; an interest which could, in certain circumstances, be forced to give preference to a later encumbrancer. 20

The point emerges with, perhaps, greater clarity from the *Chung Khiaw Bank* case, 1970 A.C. 767, where equitable mortgagees holding a deposit of deeds and a memorandum which had not been registered were faced with a claim by creditors, who had obtained a judgment and an order of attachment against their debtor's interest in the properties in question. The order had been registered in the Registry of Deeds of Singapore as an "assurance" under the Registration of Deeds Ordinance (Cap.255). Stress was laid on the fact that the attachment only affected the "debtor's interest" in the properties and reliance was placed, *inter alia*, on the case of *Jones v Barker*. In its judgment the Privy Council said (p.774): 30

"These cases lend substantial support to the contention that under the general law, apart from the special provisions of legislation as to registration, and in certain circumstances even where such special provisions exist, the judgment creditor can only take whatever interest the debtor has and that in such a case, questions of priority and 40

correspondently postponement through failure to register do not arise."

The Board went on to consider the effect of the Singapore Registration of Deeds Ordinance which, in regard to priorities appears to make provision very similar to that in section 10 of our Cap.193 and referred to the case of Fung Sin Wa v Moi Chan Hen (1897) 4 S.S.L.R. 175, where, according to the Board:-

10 "The question referred to the court was as to the respective priorities of a registered writ of execution and unregistered equitable charges. The equitable charges were not (as is the present case) accompanied by a memorandum of deposit, but it was held that this made no difference as regards the application of the Registration of Deeds Ordinance. Thus the issue was precisely the same as in the present case, and indeed the Federal Court, 20 in the judgment under appeal, followed the earlier decision. It was held in both courts that the judgment creditor had priority."

They went on to consider a later case, Ng Boo Bee v. Khaw Joo Choe (1916) 14 S.S.L.R. 90 and referred to it in the following terms:-

30 "There the contest was between a judgment creditor who had registered an order of attachment, and persons to whom the debtor had conveyed the land, who had paid the purchase money and entered into possession but had not prior to the registration of the order registered their conveyance. It was held that at the date of the seizure there was not interest of the debtor to be seized and that the Registration of Deeds Ordinance did not postpone the conveyance to the seizure. The courts considered Fung's case, 4 S.S.L.R. 175; 5 S.S.L.R. 29, Eyre v McDowell, 9 H.L. 619 and also the English case of Jones v 40 Barker (1909) 1 Ch.321. Though, on the facts there before the court, the decision was given against the judgment creditor, no reservation was expressed as to the correctness of Fung's case. Indeed Sproule J. said that the decision was "unquestionably right" and asked who could doubt the registered writ of execution had

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

priority over an earlier unregistered charge. No subsequent authority was cited to their Lordships in which any doubt was cast upon the decision in Fung's case and it was described as "still good law" in the judgment of the Federal Court."

The Board went on to indorse the authority of Fung's case and dismissed the appeal before them.

Unfortunately the Straits Settlements Reports are not immediately available and it is not possible to see how the Singapore Courts came to what, on the bare recital available, appears to have been a contradictory decision in the later case whilst indorsing the authority of the earlier. Moreover, the decision of the Board must be approached with some caution since it placed such stress on not disturbing the authority of a case which had long been followed in Singapore and which is basically merely declaratory of the Singapore law. Nevertheless, it seems unlikely that the Board, if the matter was open, would have come to any different conclusion on similar legislation elsewhere and, to that extent, the decision lends weight to the contentions of the appellant in the present case. 10

In the course of the argument before us Mr. Callender sought leave to refer to the lien of an unpaid vendor as also supporting the judgment of the court below but without requesting any amendment of his Originating Summons which seeks simply to realise his client's mortgage and makes no mention of such a lien. 20 30

Mr. Knowles made no objection to the introduction of this argument, though he claimed it to be fully answered by the Capital Finance case, and Mr. Callender was allowed to elaborate on it. If I understood him correctly, he was disposed to advance as his main contention that, since his clients had bargained for and expected to get a good mortgage on the property, then, if the mortgage failed for any reason, they should at least be entitled, as against the Bank, to fall back on a vendor's lien for the balance of the unpaid purchase price. He did not expressly rely on the language of Eve J. in Wilson's case for the contention that the paramount equity of the unpaid vendor's lien would itself support and sustain the 40

mortgage as against a claim based on prior registration though his argument at times seemed to embrace this approach. The introduction of a question about a vendor's lien at this stage of the proceedings must, however, lead to complications.

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

In addition to his reliance on the Capital Finance case, Mr. Knowles very rightly drew our attention to two later cases for the purpose of distinguishing them: Congressbury Motors Ltd. -v- Anglo-Belge Finance Co. Ltd. 1970 1 Ch. 81 and Coptic Ltd. -v- Bailey and Another 1972, A.E.R. 1242.

In the first of these cases the Court of Appeal, when allowing money lenders, who had advanced money for the purchase of property and had taken an ineffective security in return, to fall back, by way of subrogation, on an unpaid vendor's lien, distinguished the Capital Finance case on the ground that the security there given was effective until failure to comply with a condition subsequent and was always an effective security against the debtor company as a going concern whilst, in the Congressbury case, the security was void ab initio.

The Coptic case was also concerned with an advance to purchase property. Whitford J., taking a view of the facts different from that adopted in the Capital Finance case, found no reason to hold that there never was a lien by subrogation or that it was abandoned when the investment company, which advanced the money, took a charge on the property.

These cases appear to throw up a question whether, if the Bank's charge does not receive priority over the Trust Company's mortgage for other reasons, the Bank would nevertheless be entitled, by subrogation, to a lien for that portion of the purchase price provided by it, which would take priority over the mortgage for the balance of the purchase price.

This aspect has not been mentioned in the argument and the full implications of the lien issue do not appear to have been thoroughly explored and examined before us, no doubt because of the manner in which it was raised, and they do not feature in the court below. Had we been in a position to deal comprehensively with all the issues raised by the

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

—
No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

summons one might have been disposed to try and unravel the complexities of the situation even at this late stage but there is another matter, which logically would appear to require attention before coming to the lien issue, and that is the question of Notice.

The learned Chief Justice mentions it at the end of his ruling merely for the purpose of indicating that he does not necessarily agree with the submission that Section 10 of Cap.193 has made the doctrine of Notice inapplicable in the Bahamas but that there was no need to deal with the point as he had come to his conclusion on other grounds.

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The point found no specific mention in Mr. Callender's address although he did refer us to the Receiver's letter of 30th April, 1971, which might well raise a question whether the Bank was affected by notice in respect of moneys advanced after receipt of that letter. Mr. Knowles came back briefly to the problem at the end of his address and mentioned the case of *in re Monolithic Building Company, 1915*, 1 ch. 645, but did not press us to try and deal with the matter in this court: accepting, instead, the view that it should first receive consideration in the lower court.

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It seems to me that it would be inappropriate to segregate and try to deal with the question of a lien until the priority of the purchase mortgage has been fully examined, bearing in mind that this is the question expressly raised by the summons in its present form. Because of this and the other considerations previously mentioned I think the judgment of the court should be confined to the matter expressly covered by the ruling now before us. For the reasons already indicated I think the ruling was incorrect. Consequently I would set aside the Order of 28th December, 1972 on the ground that the reasons expressed by the learned Chief Justice for his conclusion were erroneous and I would return this case for completion in the lower court, leaving entirely open for determination in that court the incidence, if any, of an unpaid vendor's lien on the issues raised by the case. The Bank should have the costs of the appeal.

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MICHAEL HOGAN

2nd July 1973

IN THE COURT OF APPEAL
BAHAMA ISLANDS

C.A. No. 1 of 1973

THE ROYAL BANK OF CANADA

Appellant

v

SECURITY TRUST COMPANY

Respondent

JUDGEMENT OF BOURKE P.

I agree with the judgement of Hogan J.A., and
feel that there is nothing that I can usefully add.

Signed: Paget J. Bourke

President.

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Date: 2 July, 1973

Delivered:

BAHAMA ISLANDS
IN THE COURT OF APPEAL
CIVIL SIDE

No. 1 of 1973

BETWEEN

THE ROYAL BANK OF CANADA

Appellant

and

SECURITY TRUST COMPANY

Respondent

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JUDGEMENT OF ARCHER, J.A.

I also agree.

Signed: C.V.R. Archer

Archer, J.A.

2/7/1973

In the Court
of Appeal
(Civil Side)
of the Bahama
Islands

No.18

Order and
Judgment of
the Court of
Appeal
2nd July 1973
(continued)

In the Privy
Council

No.19

No.19

ORDER GRANTING SPECIAL LEAVE TO
APPEAL TO HER MAJESTY IN COUNCIL

Order
granting
special leave
to appeal to
Her Majesty
in Council
20th February
1974

AT THE COURT OF ST. JAMES

The 20th day of February, 1974

PRESENT

THE COUNSELLORS OF STATE IN COUNCIL

WHEREAS Her Majesty in pursuance of the Regency Acts 1937 to 1953 was pleased by Letters Patent dated the 24th day of January 1974 to delegate 10 to the six Counsellors of State therein named or any two or more of them full power and authority during the period of Her Majesty's absence from the United Kingdom to summon and hold on Her Majesty's behalf Her Privy Council and to signify thereat Her Majesty's approval for anything for which Her Majesty's approval in Council is required:

AND WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 7th day of February 1974 20 in the words following viz:-

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Security Trust Company in the matter of an Appeal from the Court of Appeal (Civil Side) of the Bahama Islands between the Petitioner and The Royal Bank of Canada (Respondent) setting forth that the Petitioner prays for special leave to appeal 30 from a Judgment of the Court of Appeal (Civil Side) of the Bahama Islands delivered on the 2nd July 1973 reversing the Judgment of the Supreme Court (Equity Side) of the Bahama Islands delivered on the 3rd December 1972 on the hearing of an Originating Summons issued by the Petitioner claiming (inter alia) payment of moneys secured by a mortgage: And humbly praying Your Majesty in Council to grant it special leave to appeal against the Judgment 40

of the Court of Appeal (Civil Side) of the
Bahama Islands dated the 2nd July 1973:

In the Privy
Council

No.19

Order
granting
special leave
to appeal to
Her Majesty
in Council
20th February
1974
(continued)

10 "THE LORDS OF THE COMMITTEE in obedience
to His late Majesty's said Order in Council
have taken the humble Petition into considera-
tion and having heard Counsel in support
thereof and in opposition thereto Their
Lordships do this day agree humbly to report
to Your Majesty as their opinion that leave
ought to be granted to the Petitioner to
enter and prosecute its Appeal against the
Judgment of the Court of Appeal (Civil Side)
of the Bahama Islands dated the 2nd July 1973
upon depositing in the Registry of the Privy
Council the sum of £2,000 as security for costs:

20 "AND Their Lordships do further report
to Your Majesty that the proper officer of
the said Court of Appeal ought to be directed
to transmit to the Registrar of the Privy
Council without delay an authenticated copy
of the Record proper to be laid before Your
Majesty on the hearing of the Appeal upon
payment by the Petitioner of the usual fees
for the same."

30 HER MAJESTY Queen Elizabeth The Queen Mother
and Her Royal Highness The Princess Margaret Countess
of Snowdon being authorised thereto by the said
Letters Patent have taken the said Report into
consideration and do hereby by and with the advice
of Her Majesty's Privy Council on Her Majesty's
behalf approve thereof and order as it is hereby
ordered that the same be punctually observed
obeyed and carried into execution.

Whereof the Governor-General or Officer
administering the Government of the Commonwealth
of the Bahamas for the time being and all other
persons whom it may concern are to take notice and
govern themselves accordingly.

N. E. LEIGH.

IN THE PRIVY COUNCIL

No. 7 of 1974

ON APPEAL
FROM THE COURT OF APPEAL (CIVIL SIDE) OF THE BAHAMA ISLANDS

BETWEEN :-

SECURITY TRUST COMPANY

Appellant
(Respondent)

- and -

THE ROYAL BANK OF CANADA

Respondent
(Appellant)

RECORD OF PROCEEDINGS

SIMMONS & SIMMONS,
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London, EC2M 2RJ.

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