

IN THE PRIVY COUNCILNo.7 of 1974

O N A P P E A L

FROM THE COURT OF APPEAL (CIVIL SIDE) OF THE B. H. M. ISLANDS

B E T W E E N: SECURITY TRUST COMPANY
Appellants

- and -

THE ROYAL BANK OF CANADA
Respondents

C A S E F O R T H E R E S P O N D E N T

- | | | <u>Record</u> |
|----|---|--|
| 10 | 1. This is an appeal by special leave from an order dated the 17th June 1973 of the Court of Appeal (Civil Side) of the Bahama Islands (Sir Paget Bourke P., Hogan and Archer JJ.A.) which set aside an order dated the 28th December 1972 of the Supreme Court (Equity Side) of the Commonwealth of the Bahama Islands (Sir Gordon Bryce C.J.) | p.97, 1.22 -
p.98, 1.16 |
| 20 | 2. The principal issues in this appeal are whether a Debenture (hereinafter called "the Debenture") dated the 4th June 1970 and granted to the Respondent by Carl G. Fisher Company Limited (the First Defendant in these proceedings and hereinafter called "the Company") charges land comprised in a Conveyance (hereinafter called "the Conveyance") dated and delivered in escrow the 19th February 1970 and made between the Appellant and the Company and if so whether such charge has priority over a Mortgage (hereinafter called "the Mortgage") | p.95, 1. 1 -
p.96, 1.8 |
| 30 | also dated and delivered in escrow the 17th February 1970 and made between the Company and the Appellant. | pp.12-20

pp.51 - 59

pp.60 - 69 |
| | 3. The Respondent contends that upon its true construction and in the events which have | |

Record

happened the Debenture charged the land comprised in the Conveyance regardless of whether the Conveyance operated from or as from the 19th February 1970 or any intermediate date up to and including the 30th April 1971, when the condition of the escrow was fulfilled. The Respondent further contends that the Debenture has priority over the Mortgage regardless of the respective dates upon or as from which they were executed or took effect because the Respondent had an earlier charge on the contract for the Conveyance and because in any case priority is determined by the order of their registration under the Registration of Records Act (cap.193) (hereinafter called "the Act") and the Debenture was registered before the Mortgage.

10

4. Section 10 of the Act is in the following terms :-

p.104,11.10-35

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

20

30

40

pp. 39 - 42

5. By a Contract of Sale dated 20th September 1968 the Appellant and others agreed to sell the land in question to the Company for \$900,000 leaving \$700,000 of this upon a purchase money mortgage in favour of the Appellant.

6. By a supplemental Agreement dated 19th

Record

February 1970 the Appellant agreed to execute as of that date a deed of conveyance to the Company of the land in question and it was further agreed as follows :-

p.44, 1.18 -
p.46, 1.26

10

"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.

p.45 1.30 -
p.46 1.8

20

"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 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%) 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.

30

"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."

7. The payment of \$200,000 there referred to was not made on or before 90 days from the 19th February 1970. Indeed, it was not made until the 30th April 1971, when the sale was completed.

p.25 1.40 -
p.26 1.1
p.81 11.14-25

40

8. By the Debenture (dated 4th June 1970) the Company granted to the Respondent:-

(a) a fixed first charge on all the then present freehold and leasehold property of the Company (with immaterial exceptions)

p.14, 11.6-12

(b) a floating security upon all other property

Record

p.13,11.16-24
p.14,11.16-17

of the Company whatsoever and wheresoever both present and future (with immaterial exceptions).

p.21,11.21-37

9. The Debenture was lodged for registration under the Act on the 30th July 1970 and certified as duly recorded on the 11th August 1970.

p.46, 1. 27 -
p.50, 1.27.

10. By a letter dated the 19th August 1970 from the Company to the Appellant, which was agreed to in writing on behalf of the Appellant, time for the said payment the condition of the escrows was by agreement extended to the 19th September 1970. Time was not of the essence of this agreement.

10

p.22
p.27,11.12 - 17
p.77,11.17 - 19

11. The Respondent appointed a Receiver under the Debenture on 30th November 1970 and the floating charge thereupon crystallised.

p.78, 11. 4 - 8
p.101,11.40-44

12. Time for the said payment the condition of the escrows was further extended by agreement to the 30th April 1971. By a slip in the Judgments this is referred to as having been agreed on 30th April 1971, whereas it was agreed in an Agreement under seal dated the 15th January 1971. Because of the slip, this Agreement does not form part of the Record but the Respondent will produce copies and invite the Lords of the Committee to refer to them.

20

p.71, 1. 30 -
p.72, 1.6

13. The purchase was completed on 30th April 1971. The completion Statement signed on behalf of the Appellant stated that the documents were to relate back and have effect from their respective dates.

30

p.60, 1.4.
p.104,11.5,6.

14. The Mortgage was recorded under the Act on the 5th May 1971.

pp. 1 - 6
p.30,1.8 -
p.33, 1.19
p.29,1.40

15. These proceedings were begun by two Originating Summonses dated respectively the 15th October 1971 and the 28th April 1972 which were subsequently consolidated and the question of priority was expressly raised by a summons under one of them.

16. Bryce C.J. held that, when the condition of the escrows was fulfilled on the 30th April 1971, the commencement of the Company's title was

40

Record

10 thrown back to the date, the 19th February, 1970, borne by the Conveyance and the Appellant's title under the Mortgage was thrown back to the same date. For this reason, he held that the floating charge under the Debenture, when it crystallised in November 1970, became a fixed charge, or must be taken to have been a fixed charge, on the property subject to the Mortgage, which therefore took priority. The Appellant argued in support of the relation back of the titles. Bryce C.J. rejected arguments on behalf of the Respondent that the Mortgage did not relate back and that the Debenture was given priority by its earlier registration under the Act. He accepted that the fixed charge under clause 4 (d) of the Debenture was a "mortgage" within s.10 of the Act, but held that a floating charge under clause 4 was not. He said that, if the if the Conveyance and the Mortgage are taken to relate back to the 19th February 1970, the property should logically be considered to fall within clause 4(d) of the Debenture as being part of "the present freehold" property of the Corporation. He held that the fact that the Corporation had only the equity of redemption did not remove the property from this clause. Yet despite the assumption that the charge created by the Debenture was a "mortgage" within the Act, Bryce C.J. held that the prior registration of the Debenture did not give it priority over the Mortgage, because on the basis that both the Conveyance and the Mortgage related back to the 19th February 1970, the interest which the Corporation had in the land in June 1970 when the Debenture was executed was an equity of redemption, subject to the Mortgage, and the Debenture on its true construction only purported to charge the equity of redemption. He concluded that therefore no question of statutory priority arose.

20

30

40

17. Bryce C.J. left open a contention on behalf of the Respondent that s.10 of the Act rendered the doctrine of notice inapplicable to the Bahamas.

18. In the Court of Appeal neither side sought to question the relation back of the title on release of the escrow.

p.81, 1.23 -
p.82, 1.6

p.82,11.7 - 16

p.83,11.28 - 34

p.83, 1.43 -
p.84, 1.2.

p.90, 1.47 -
p.91, 1.7

p.91,11.8 - 20

p.88, 11.16 - 32

p.88, 11.22 - 38

p.91, 1. 28 -
p.92, 1.5.

p.94,11. 18 - 24

p.94,11.25 - 46

p.105,11.29-30

Record

- p.106,11.23-27
p.106, 1.34 -
p.118, 1.24.
- p.115, 1.28 -
p.116, 1.3
- p.118, 1.25 -
p.120, 1.43.
- pp.122,123
- p.47,11.19 - 23
p.49,11.1 - 7
19. The leading judgment was delivered by Hogan J.A. with which Bourke P. and Archer J.A. agreed. Hogan J.A. accepted that the Conveyance and Mortgage both related back to the 19th February 1970. He held, reversing Bryce C.J. on this point, that clause 4(d) of the Debenture purported to give a first charge over property falling within its description. He accepted that the Debenture was a 'mortgage' within s.10 of the Act. He held that section 10 therefore gave the Debenture priority, because the Conveyance and the Mortgage were two separate transactions. The other view, he said, would give an unregistered document the same effect as if it had been registered, deprive the Act of much of its value and incur the dangers of fraud and concealment of documents. 10
20. The Court of Appeal left open for consideration in the lower Court the question whether the Respondent was adversely affected by notice of the Mortgage and whether, if the Mortgage took priority, either the Appellant or the Respondent was entitled by subrogation to an unpaid vendor's lien. 20
21. On the 20th February 1974 the Appellant was granted special leave to appeal
22. The Respondent contends that the reinstatement of the Contract of Sale on the 19th August 1970 had two consequences. First, it operated as a confirmation or redelivery of the Conveyance upon the previous condition but with time for its fulfilment extended to the 19th September 1970 and beyond. Secondly, it reinstated the Contract of Sale and the Company thus became entitled to the land in equity as purchaser. 30
23. On the appointment of the Receiver on the 20th November 1970, the floating charge under the Debenture crystallised, with the consequence that the Respondent became entitled to a fixed charge on the whole of the Company's interest in the land. 40
24. The completion of the Contract of Sale on the 30th April 1971 had two consequences. First it brought about the fulfilment of the condition of delivery of the Conveyance. Secondly, the legal estate in the land was conveyed to the Company

10 25. Either of these consequences is sufficient to give the Respondent a charge on the land. With the fulfilment of the condition, the Conveyance related back to the 19th February 1970 and the land comprised therein was "present freehold" property for the purposes of clause 4 (d) of the Debenture. Alternatively the estate acquired by the Company on the 30th April 1971 enured to the benefit of the Respondent as chargee under the crystallised charge in the Debenture.

26. The charge granted by the Debenture takes priority to the Mortgage by reason of its having affected the pre-existing agreement for sale or alternatively by virtue of its prior registration under the Act. The crystallised floating charge was a "mortgage" within s.10 of the Act.

20 27. It was open to the Appellant to have searched the Registry or raised requisitions before granting the Mortgage. As it failed to do so it cannot be heard to say that, owing to a contract between the Appellant and the Company, its Mortgage should have priority over the Debenture.

28. The Respondent submits that the appeal should be dismissed with costs for the following among other

R E A S O N S

- 30 (1) When the Debenture crystallised the Respondent obtained a fixed charge on the land comprised in the Contract
- (2) On completion the Respondent obtained a charge on the legal estate anterior in time to the charge created by the Mortgage
- (3) Alternatively the Respondent obtained a charge under clause 4 (d) on the relation back of the Conveyance to the 19th February 1970
- 40 (4) Any mortgage granted to the Appellant and not registered until after

Record

registration of the Debenture is
postponed to the Debenture by
s.10 of the Act

(5) The reasons given by Hogan J.A.

PAUL BAKER

W. J. MOWBRAY

No.7 of 1974

IN THE PRIVY COUNCIL

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

B E T W E E N

SECURITY TRUST COMPANY Appellants

- and -

THE ROYAL BANK OF CANADA
Respondents

C A S E FOR THE RESPONDENT

MESSRS. CLIFFORD-TURNER & CO.,
11, Old Jewry,
London, E.C.2.