Privy Council Appeal No. 7 of 1974

Security Trust Company – – – – – *Appellant*

v.

The Royal Bank of Canada – – – – – *Respondent*

FROM

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

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1st DECEMBER 1975

Present at the Hearing:

LORD CROSS OF CHELSEA
LORD SIMON OF GLAISDALE
LORD EDMUND-DAVIES

[*Delivered by* LORD CROSS OF CHELSEA]

This is an appeal by special leave of the Board from an order dated 17th July 1973 of the Court of Appeal (Civil Side) of the Bahama Islands (Bourke P., Hogan J.A. and Archer J.A.) which set aside an order of the Supreme Court (Equity Side) of the Bahama Islands made by Bryce C.J. on 28th December 1972.

The dispute between the appellant Security Trust Company and the respondent The Royal Bank of Canada relates to the respective priorities of two charges on certain land at Coral Harbour, New Providence. The appellant contends that a mortgage of this land to it by Carl G. Fisher Company Ltd. (hereinafter called "Fisher") which was dated 19th February 1970 but was not effective until 30th April 1971 has priority over the charge on such land arising under a debenture issued by Fisher to the respondent on 4th June 1970. The respondent on the other hand contends that the charge arising under the debenture has priority over the mortgage. In the Court of first instance Bryce C.J. held that the mortgage had priority over the debenture but the Court of Appeal held that his judgment was wrong and that subject to certain points which it remitted for consideration by the lower Court the debenture had priority over the mortgage.

On 20th September 1968 a contract of sale was entered into between the appellant, as trustee of the will of Leonora Hopkins, and Sara H. McKillips and Lindsey Hopkins as executors of the will (therein described as the sellers), and Fisher therein described as the purchaser.

By the contract the sellers agreed to sell and the purchaser to purchase certain real property having an area of 450 acres more or less at Coral Harbour, New Providence Island, for a purchase price of 2,000 dollars per acre (aggregating 900,000 dollars) of which 200,000 dollars should be paid in cash or good certified cheque at the closing of the contract and the balance by the purchaser or his assigns executing and delivering to the sellers a purchase money mortgage on the property in the sum of 700,000 dollars in the form and containing the provisions therein mentioned. Clause 11 of the contract provided that on receipt of the said payments the deed of purchase should be delivered on 20th December 1968 at the offices of the purchaser in Nassau but that the purchaser at its option might defer the closing of the contract for a period not to exceed 12 months from that date. The purchaser exercised the option to extend the closing date until 20th December 1969 and by a supplemental agreement made between the sellers and the purchaser the closing date was extended from 20th December 1969 to 19th February 1970.

By a further agreement between the parties made on 19th February 1970 after a recital to the effect that the purchaser had requested an additional period of time not to exceed 90 days to pay the sellers the initially agreed down payment of 200,000 dollars it was agreed (1) that the appellant as trustee should execute as of that date a conveyance to the purchaser of the aforesaid land consisting according to a recent survey of 461·537 acres (2) that the purchaser would execute as of that date a purchase money mortgage covering the unpaid balance of the purchase price (3) that the executed deed of conveyance and the executed mortgage would be held in the possession and custody of the appellant as escrow agent until such time as the purchaser should pay and deposit with the appellant the sum of 200,000 dollars and the purchaser agreed to make such payment and deposit on or before 90 days from 19th February 1970 (4) that the purchaser agreed to pay the appellant as trustee interest at 8% on the 200,000 dollars as from 19th February 1970 until the deposit and payment of the 200,000 dollars and (5) that time should be of the essence of the contract.

On 19th February 1970 the appellant executed in favour of Fisher the conveyance referred to in clause 1 of the contract of that date. It recited (*inter alia*) that the executors of the will of the said Leonora Hopkins had assented to a residuary devise in favour of the appellant as trustee which included the land conveyed and that the appellant had agreed to sell the land in question to Fisher for an estate in fee simple in possession free from incumbrances for a sum of 923,074 dollars and by clause 1 of the operative part the appellant as trustee in consideration of the said sum of 923,074 dollars expressed to have been paid to it by Fisher conveyed the land referred to in the said contract to Fisher in fee simple.

On the same day—19th February 1970—Fisher executed the mortgage of the land so conveyed provided for by clause 2 of the contract. It contained a recital to the effect that the agreement for the sale contained a provision that Fisher should retain 723,000 dollars part of the purchase price of 923,074 dollars upon the payment thereof with interest being secured in the manner therein appearing and by the operative part Fisher covenanted to pay the appellant on 19th August 1970 the said sum of 723,000 dollars with interest as therein provided and conveyed the lands conveyed to it by the said conveyance to the appellant by way of mortgage subject to redemption.

The said conveyance and mortgage when executed were retained by the appellant as escrows as provided by clause 3 of the contract of

19th February 1970. The 90 days therein mentioned expired on 20th May 1970 without Fisher having paid the 200,000 dollars the payment of which was the condition of the escrows.

On 4th June 1970 Fisher created in favour of the respondent a debenture whereby it undertook to pay to them all monies then due or thereafter to become due by Fisher to it on any account with interest as therein mentioned. Clause 4 of the said debenture was in the following terms:

"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 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

(*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)."

Clause 8 conferred on the respondent power to appoint a Receiver at any time after it should have demanded payment of any money thereby secured with the powers thereby specified. Clause 9 was in the following terms:

"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."

The First and Second Schedules contained particulars of certain lands not included in the said conveyance of 19th February 1970 and Exhibit "A" particulars of certain other lands not included therein. The debenture was lodged for registration under the provisions of the Registration of Records Act (Ch. 193) on 30th July 1970 and certified as recorded therein on 11th August 1970.

By letter dated 19th August 1970 Fisher requested the appellant to extend the time for payment of the 200,000 dollars until 19th September 1970 and the appellant acceded to that request. Time was not expressed to be of the essence of this agreement. Fisher failed to pay the said sum of 200,000 dollars to the appellant before 19th September 1970. On 30th November 1970 the respondent appointed a Receiver under the said debenture. By a further agreement between the appellant and Fisher made on 15th January 1971 after reciting the various extensions of time hereinbefore mentioned and that Fisher had not paid the said 200,000 dollars to the appellant within the times thereby required and had requested that the contract be further amended to extend the closing date to 30th April 1971 it was provided that the closing date should be extended to 30th April 1971 unless an earlier date was fixed by mutual agreement between the parties, that time should be of the essence and that if the closing was not accomplished on or before 30th April all rights of the purchaser under the contract of 20th September 1968 and the various amendments thereto should terminate.

On 30th April 1971 the Receiver wrote a letter to C. W. Minard, the Manager of the respondent in Nassau, in which he stated that the amount of cash required to complete the purchase from the appellant of the 461 acres which were the subject of the contract of 20th September 1968 and of a further 747 acres over which Fisher had an option was 465,813·80 dollars. The letter continued as follows:

"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 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.)"

Mr. Minard signed this letter as requested. The Receiver thereupon on the same day tendered to the appellant the sum of 465,813·80 dollars. Of that sum 378,044·97 dollars was attributable to the 461·537 acres comprised in the contract of 20th September 1968. That was made up (1) as to 200,000 odd dollars by the cash payment provided for by the contract (2) as to about 54,000 dollars of interest and (3) as to 123,000 odd dollars of the price of some 50 acres (part of the 461 acres) which were to be purchased outright and not to be comprised in the mortgage back. In consequence of this arrangement the sum for which the remainder of the 461 acres—some 412 acres—was to be mortgaged back to the appellant was reduced from 723,000 dollars to 599,950 dollars. After setting out the relevant figures the Receiver's letter making the tender continued as follows:

" 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."

The explanation of the concluding sentence is that the attorney of the appellant who had retained possession of the conveyance and mortgage dated 19th February 1970 since their execution had handed them to Messrs. Higgs & Johnson, the attorneys for Fisher, on 27th April 1971 in anticipation of the completion of the contract. The appellant accepted the tender made by the Receiver by signing an endorsement on his letter in the following terms:

" 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 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.

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."

On receiving back the documents from Messrs. Higgs & Johnson on 3rd May the appellant's attorney registered the mortgage to his clients on 5th May 1971. No second mortgage was granted by Fisher to the respondent to secure the monies advanced to complete the contract of 20th September 1968.

By an originating Summons issued on 15th October 1971 and amended on 23rd May 1972 between the appellant as plaintiff and Fisher, the respondent and various persons and companies who were judgment creditors of Fisher as defendants, the appellant claimed payment of the monies due to it under the mortgage dated 19th February 1970 and asked that it be enforced by foreclosure or sale. By another originating summons also issued in 1971 and amended on 28th April 1972 between the respondent as plaintiff and Fisher, the appellant and the said judgment creditors of Fisher as defendants, the respondent claimed payment of the monies due to it from Fisher under the debenture and asked that it be enforced by foreclosure or sale. It appeared from the Affidavits filed in support of the two summonses that the appellant was claiming that the mortgage had priority over the debenture and the respondent was claiming that the debenture had priority over the mortgage. Accordingly both summonses were heard by Bryce C.J. together so that that point might be determined.

On 21st July 1972 Bryce C.J. gave a preliminary ruling holding that the conveyance and mortgage which were delivered on 19th February 1970 subject to a condition and which until 30th April 1971 were not deeds but simply "escrows" became absolutely delivered deeds on 30th April 1971 by fulfilment of the condition and related back for purposes of title to 19th February 1970—*i.e.* to a date before the creation of the debenture.

At a later date the Chief Justice heard further argument on the basis of this preliminary ruling. Counsel for the respondent then contended that even though by the doctrine of relation back the mortgage took effect before the debenture the debenture was entitled to priority by virtue of section 10 of the Registration of Records Act (Ch. 193) which is in the following terms:

> "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."

The Chief Justice rejected that contention on the ground that at the date of the issue of the debenture the interest of the respondent in the land was only an equity of redemption subject to the mortgage, that the charge created by the debenture could only be a charge on the equity of redemption which did not compete with the mortgage and

that the Act did not operate to give it priority. This conclusion was, he thought, in line with the decision of Warrington J. in *Jones v. Barker* [1909] 1 Ch. 321. Accordingly by order dated 28th December 1972 he declared that the mortgage had priority over the debenture.

The respondent appealed to the Court of Appeal. The arguments there proceeded on the footing—which was accepted as correct by the Court—that the Chief Justice had been right in holding that the doctrine of the relation back of escrows on the fulfilment of the condition on which they were delivered applied here and that the legal estate in the lands must be taken to have passed from the appellant to Fisher and from Fisher back to the appellant by way of mortgage on 19th February 1970. In a judgment delivered by Hogan J.A. in which Bourke P. and Archer J.A. concurred the Court held that the lands the subject of the conveyance and mortgage were present freeholds of Fisher within the meaning of clause 4 (*d*) of the debenture upon which the debenture purported to create a fixed first charge which competed with the charge given by the mortgage and was given priority by section 10 of the Registration Act. In this connection the Court considered that the Privy Council case of *Chung Khiaw Bank Ltd. v. United Overseas Bank Ltd.* [1970] A.C. 767 afforded a closer analogy to this case than did the case of *Jones v. Barker* on which the Chief Justice had relied. Counsel for the appellant submitted that the cases of *Wilson v. Kelland* [1910] 2 Ch. 306 and *Re Connolly Bros. Ltd. (No. 2)* [1912] 2 Ch. 25 showed that Fisher must be taken never to have acquired an unencumbered freehold in the property upon which it could create conflicting charges but should be regarded as having acquired only an equity of redemption on which alone the debenture could bite. The Court of Appeal, however, thought that the later cases of *Church of England Building Society v. Piskor* [1954] Ch. 553 and *Capital Finance Co. Ltd. v. Stokes* [1969] 1 Ch. 261 showed that this was not so, and that if and so far as there was any conflict between the earlier and the later cases—as the Court was inclined to think there was—the later cases should be preferred. Accordingly on 17th July 1973 the Court of Appeal made an order setting aside the order of the Chief Justice. But as they thought that the final outcome of the dispute between the appellant and the respondent might be affected one way or the other by the questions of notice and of a vendor's lien they remitted the case to the Court of first instance for further consideration in the light of their decision.

Leave to appeal to the Board from the decision of the Court of Appeal was granted on 20th February 1974.

Their Lordships will deal first with the question of "relation back" and the construction of the debenture. The appellant delivered the conveyance dated 19th February 1970 on that day as an escrow which was to become a deed on payment by Fisher of 200,000 dollars part of the purchase price and execution by Fisher of a mortgage for the balance on or before 20th May. That condition was not fulfilled but on 19th August the appellant agreed to the date for the completion of the contract being extended to 19th September and, completion still not having taken place by that date, the appellant agreed on 15th January 1971 to a final extension of the time for completion to 30th April 1971. The contract was completed on that date though the part of the purchase price which was paid down was greater and the part which was secured by mortgage and the land on which it was secured was less than was originally intended since Fisher wished to have some of the land free from any mortgage back. The Courts below have assumed that the effect of these transactions was that on the conveyance

dated 19th February 1970 becoming a deed on 30th April 1971 the legal estate must be deemed under the doctrine of relation back of escrows to have passed from the appellant to Fisher on 19th February 1970. Their Lordships are not satisfied that this assumption is justified for, if it is, it must follow that from 20th May to 19th August and again from 19th September to 15th January the " status " of the conveyance was undetermined. It would seem more in accord with principle to hold that between 20th May and 19th August the conveyance was not even an "escrow " and that on the latter day it must be taken to have been delivered afresh as an " escrow " subject to the condition that the contract be completed on or before 19th September. If that be the right way to view the matter then on the completion of the contract on 30th April 1971 the conveyance—though dated 19th February 1970—only related back to the 15th January 1971. It is not, however, necessary for their Lordships to express any concluded opinion on this point since even if it be assumed that the relation back was to 19th February 1970 the result so far as concerns the construction and effect of the debenture must, as they see it, be the same. On fulfilment of the condition subject to which it was delivered as an escrow a deed is not taken to relate back to the date of its delivery for all purposes but only for such purposes as are necessary to give efficacy to the transaction—*ut res magis valeat quam pereat* (see *Butler & Baker's case* Co. Rep. (1826 Ed.) vol. 2 p. 94). Thus the fact that the grantor has died before the condition of an escrow is fulfilled does not entail the consequence that the disposition fails. If and when the condition is fulfilled the doctrine of relation back will save it—but notwithstanding the relation back for that limited purpose the grantee is not entitled to the rents of the property during the period of suspense or to lease it or to serve notices to quit (see Sheppard's Touchstone 7th ed. (1820) p. 60: *Thompson v. McCullough* [1947] 1 KB 447). So in considering whether and in what way the debenture affected the property which was the subject of the contract of 20th September 1968 one must have regard to the surrounding circumstances at the time when the debenture was issued without regard to any operation of the doctrine of " relation back ". Now on 4th June 1970 Fisher had no interest of any sort in the property which was the subject of the contract. The time for fulfilling the condition had passed and time had been declared to be of the essence of the transaction. It was only if the appellant was prepared to renew the contract by extending the time for payment that Fisher would get back an interest in the land. In these circumstances it is, their Lordships think, impossible to regard the lands in question as " present freeholds " of Fisher on which the respondent was given a " fixed first charge " by clause 4 (*d*) of the debenture. The contract lands were property in which Fisher might acquire an interest in the future and which if it did acquire an interest would become subject to a floating charge. This construction is in line with the concluding words of clause 4 and with clause 9. Fisher was plainly not in a position at the date of the creation of the debenture to deposit the title deeds of the lands with the respondent or to give it a legal mortgage over them. On 19th August 1970 when the contract was renewed Fisher's interest in it became subject to the floating charge created by the debenture. On 30th November when the respondent appointed a Receiver the floating charge " crystallised ". By that date however the period for which the contract had been extended had expired and though time had not been made of the " essence " of the agreement for extension made on 19th August it may well be that Fisher did not on 30th November possess any interest in the contract lands on which the " crystallised " charge could bite. That point is, however, of no importance because there is no doubt that at all events

the final renewal of the contract on 15th January 1971 gave Fisher an interest in the lands under the contract and that by the joint effect of the renewal agreement, the debenture and the appointment of the Receiver Fisher's interest under the contract was on 15th January 1971 assigned to the respondent by way of equitable charge (see *N. W. Robbie & Co. Ltd. v. Witney Warehouse Co. Ltd.* [1963] 1 W.L.R. 1324).

Their Lordships turn now to consider what were the relative priorities of this charge and the appellant's mortgage apart from any question of registration under the Registration of Records Act. As they see it the mortgage was entitled to priority. The respondent's charge was a charge on Fisher's interest under the contract and could give the respondent no greater interest than Fisher had. Fisher could not obtain a conveyance of the lands free from the obligation to grant back the mortgage to the appellant. He had no right to obtain an unincumbered fee simple and the charge on his interest which he created in favour of the respondent only gave the respondent rights which were subject to the prior rights of the appellant. The case is exactly parallel to the case of *Re Connolly Bros. Ltd. (No. 2) (ubi supra)*. There the Company borrowed £1,000 from Mrs. O'Reilly for the purpose of buying some property on the terms that she was to have a charge on it. The same solicitor acted for the three parties. The purchase price including the £1,000 was paid to the vendor who conveyed the property to the Company and the solicitor retained the deeds on behalf of Mrs. O'Reilly in whose favour the Company subsequently executed a memorandum of deposit. The Company had previously issued debentures creating a floating charge on all its property present and future which had been duly registered. The charge had not in fact crystallized but nothing turned on that fact. The solicitor did not know of the debenture and had not searched the register. Warrington J. held that the debenture and the accompanying trust deed amounted to nothing more so far as concerned after acquired property such as the property in question than a contract by the Company to give the debenture holder a security on such interest in it as it might acquire and that it never acquired any interest at all in the property as against Mrs. O'Reilly except subject to the obligation to give her a charge for the amount of the purchase price which she advanced. His decision was upheld by the Court of Appeal, Cozens-Hardy M.R. saying in his judgment:

> "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."

No doubt whatever was thrown on the correctness of that decision in the two later cases in the Court of Appeal above referred to and they are clearly distinguishable. In the *Church of England Building Society v. Piskor* [1954] Ch. 553 purchasers of property who had taken possession before completion of their contract granted a tenancy of part of it. The property was subsequently conveyed to them and on the same day they executed a legal charge on it in favour of the plaintiff Building Society to secure money which it had advanced to the purchasers to enable them to complete the purchase. When the plaintiff sought to evict the tenant on the ground that his tenancy was not binding on it the tenant argued that though his tenancy was originally merely equitable his landlords, the purchasers, were bound by estoppel to clothe

it with the legal estate as soon as they acquired it themselves. Consequently when the legal estate was conveyed to the purchaser by the vendor the estoppel was "fed" and the tenancy became a legal one. This it was argued must be taken to have happened in the notional interval of time between the conveyance to the purchasers and the granting of the charge. The Court of Appeal held that this argument was sound and that the tenant had acquired a legal tenancy before the grant of the mortgage which was binding on the mortgagee. But Romer L.J. in distinguishing *Re Connolly Bros. Ltd. (No. 2)* was careful to point out (see page 566) that there was no evidence to show that the purchasers had prior to granting the tenancy entered into any binding contract with the plaintiff Society to grant them a mortgage on completion in consideration of their advancing some of the purchase price. If there had been such an agreement then the rights of the parties might well have been different—though as the tenancy was undoubtedly subsequently clothed with the legal estate an agreement to grant a mortgage even though made before the grant of the equitable tenancy to him would presumably not have bound the tenant unless he had notice of it. Furthermore the fact that the Building Society had not inspected the property or enquired as to the rights of any person in occupation might also have been relevant. But the basic difference between the two lines of cases is that in cases such as *Re Connolly* and this case the charge under the debenture only bites on property which is already fettered by the agreement to give the other charge whereas on the facts of the *Piskor* case the tenancy was created out of an interest which was then unfettered by any such agreement. In the case of *Capital Finance Co. Ltd. v. Stokes* [1969] 1 Ch. 261 land was sold on the terms that 75% of the purchase money should be secured by a first mortgage. On the same day that the land was conveyed to it the purchasing company mortgaged the property back to the vendor for the appropriate amount. The vendor retained possession of the title deeds but the mortgage was not registered under section 95 of the Companies Act 1948 which provided so far as material as follows:

> "(1) Subject to the provisions of this Part of this Act, every charge created after the fixed date by a company registered in England and being a charge to which this section applies shall, so far as any security on the company's property or undertaking is conferred thereby, be void against the liquidator and any creditor of the company, unless the prescribed particulars of the charge together with the instrument, if any, by which the charge is created or evidenced, are delivered to or received by the registrar of companies for registration in manner required by this Act within twenty-one days after the date of its creation, but without prejudice to any contract or obligation for repayment of the money thereby secured, and when a charge becomes void under this section the money secured thereby shall immediately become payable.
>
> (2) This section applies to the following charges:— . . . (*d*) a charge on land, wherever situate, or any interest therein . . .".

The purchasing company having been wound up the liquidator contended that the vendor was an unsecured creditor. In answer to that contention the vendor referred to section 97 (1) of the Act which was in the following terms:

> "Where a company registered in England acquires any property which is subject to a charge of any such kind as would, if it had been created by the company after the acquisition of the property, have been required to be registered under this Part of this Act, the company shall cause the prescribed particulars of the charge, together with a copy (certified in the prescribed manner to be a

> correct copy) of the instrument, if any, by which the charge was created or is evidenced, to be delivered to the registrar of companies for registration in manner required by this Act within twenty-one days after the date on which the acquisition is completed."

He argued that it was that section and not section 95 that applied to the case. The Court rejected that argument—holding that section 97 only applied to what could truly be said to be a purchase of an equity of redemption—*i.e.* a purchase of land already subject to a mortgage created by someone else—and that the fact that the purchaser was contractually bound to mortgage the property back to the vendor as soon as it was conveyed to him did not mean that the mortgage had not been created by him within the meaning of section 95. That seems to their Lordships to be, if they may say so, clearly right—but the conclusion is not in any way inconsistent with *Re Connolly*.

Finally their Lordships turn to consider whether the Registration of Records Act affects the position. In this connection they would first observe that it is not altogether clear to them that the charge on which the respondent relies has ever been registered. No doubt the debenture was a "mortgage" for the purpose of the Act and its registration in July 1970 was a registration of all the charges—whether fixed or floating —created by it on the lands in which Fisher had an interest when it was issued on 4th June 1970. But as their Lordships have already pointed out Fisher had not at that date any interest in the lands which were the subject of the contract of 20th September 1968. It only acquired an interest in such lands at a later date. The charge on which the respondent relies came into existence on 15th January 1971 under the combined operation of the agreement of that date coupled with the debenture and the appointment of the Receiver. It would appear to be arguable that the charge was not "made and executed" for the purpose of section 10 of the Act until 15th January 1971. It is not however necessary for their Lordships to express a concluded opinion on this point—which would involve the consideration of such cases as *Independent Automatic Sales Ltd. v. Knowles & Foster* [1962] 1 W.L.R. 974 and *Paul & Frank Ltd. v. Discount Bank (Overseas) Ltd.* [1967] Ch. 348—because even if one assumes that the registration of the debenture in July 1970 counts as a registration of the equitable charge created six months later section 10 would not operate to give it "priority or preference" over the mortgage for the two do not compete with one another. The situation which section 10 envisages is the creation of two successive dispositions of land which conflict with one another so that full effect cannot be given to both; but here there is no inconsistency between the equitable charge and the mortgage. If one reads the debenture and the agreement of 15th January 1971 together one sees that the charge which they jointly operate to create is subject to the prior charge in favour of the vendor. The Chief Justice was, their Lordships think, quite right in seeing an analogy here to the case of *Jones v. Barker* [1909] 1 Ch. 321. Warrington J. there held that the deed of assignment on its true construction only assigned such property as the debtor then possessed. Accordingly the only interest in the land in question which passed to the trustee was the equity of redemption subject to the unregistered equitable mortgage. Section 14 of the Yorkshire Registries Act 1884 did not operate to confer any priority on the registered assignment over the unregistered mortgage since they were not in conflict. Their Lordships' Board in the Singapore case of *Chung Khiaw Bank Ltd. v. United Overseas Bank Ltd.* [1970] A.C. 767 referred to by the Court of Appeal did not dissent in any way from the decision in *Jones v. Barker* but held that it did

not cover the particular facts of the case before them. Moreover in reaching its decision the Board was plainly much influenced by the fact that the precise point before it had been the subject of a decision in the local courts as long ago as 1897 the correctness of which had never been doubted and which indeed had been accepted by the local legislature as correct in 1907. It is *Jones v. Barker* rather than the Singapore case which is in point here.

The respondent argued finally—on this aspect of the case—that even if the mortgage was not postponed to the equitable charge arising on 15th January 1971 because the two were not in conflict yet when the legal estate was conveyed to it on 30th April 1971 Fisher acquired a fresh item of property to which there attached a separate equitable charge in favour of the respondent under clause 4 of the debenture and that though an equitable charge in favour of the appellant arose at the same moment of time by reason of the agreement to grant a legal mortgage—which equitable charge was a moment later clothed with the legal estate when the mortgage took effect—the two equitable charges were in conflict with one another and since that in favour of the respondent was registered first it had priority. Their Lordships while admiring the ingenuity of this argument cannot accept it. It depends on treating the charge in favour of the respondent on the legal estate when it was conveyed to Fisher as in some way different in character from the charge on the benefit of the contract. As their Lordships have pointed out the effect of the agreement between the parties was that Fisher was never to acquire the fee simple free from a charge in favour of the appellant. Therefore the charge in favour of the appellant could never compete with a charge in favour of the respondent—whether one regards that as a charge on the benefit of the contract or a charge on the legal estate arising on completion of the contract. In the result, therefore, their Lordships do not think that the provisions of the Registration of Records Act assist the respondent here.

The Court of Appeal while setting aside the order of the Chief Justice made no positive order of its own but remitted the case to the Court of first instance to consider whether the priorities were affected in any way by the doctrine of notice or by the existence of a vendor's lien. So far as notice is concerned it must have been obvious to the respondent's manager at Nassau when he read the Receiver's letter of 30th April 1971 that the Receiver was envisaging and that the vendors would have been envisaging that any security to be given to the respondent for any money which it might advance to enable the contract to be completed would rank after the mortgage to the appellant for the balance of the purchase price and that if—as appears to have happened—the property became worth less than the total of the two charges the intention was that the loss should fall on the respondent in the first place before any could fall on the appellant. In the light of this fact it is somewhat surprising to find the respondent, the Royal Bank of Canada, arguing that its charge has priority. But as their Lordships think that the points of law taken by the respondent as to the construction of the debenture and the effect of the registration are misconceived it is not necessary for them to consider whether if they had taken a different view the terms of the Receiver's letter would have affected the result. Again it is not necessary for them to consider the point as to a vendor's lien in so far as that point might assist the appellant since they are in its favour anyway. The Court of Appeal seems however to have thought that the respondent might have founded some argument on the point; for after referring to the cases *Congresbury Motors Ltd. v. Anglo-Belge Finance Co. Ltd.* [1970] Ch. 294 (affirmed on appeal [1971] Ch. 81) and *Coptic Ltd. v. Bailey* [1972] 1 All E.R. 1242 they continue as follows:

> " 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."

Their Lordships cannot follow this suggestion or find anything in the cases cited which lends support to it. If Fisher had created no charge in favour of the respondent then no doubt the respondent having provided part of the purchase price would have been entitled as against Fisher to the benefit "*pro tanto*" of the vendor's lien; but as their Lordships have pointed out it was clearly the intention of the parties that any monies advanced by the respondent should rank behind the purchase mortgage and so any interest in the vendor's lien acquired by the respondent by subrogation would also rank behind it.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and the order of the Chief Justice restored and that the respondent be ordered to pay the appellant its costs before the Court of Appeal and the Board save the costs of the petition for special leave to appeal which should be borne by the appellant.

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In the Privy Council

SECURITY TRUST COMPANY

v.

THE ROYAL BANK OF CANADA

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