Privy Council Appeal No. 12 of 1964

Farrier-Waimak Limited – – – – – – – – *Appellant*

v.

The Bank of New Zealand – – – – – – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH OCTOBER 1964

Present at the Hearing:
VISCOUNT RADCLIFFE.
LORD MORRIS OF BORTH-Y-GEST.
LORD PEARCE.
LORD UPJOHN.
LORD DONOVAN.
[*Delivered by* LORD UPJOHN]

This is an appeal from an order of the Court of Appeal of New Zealand dated the 6th September 1963 reversing an order of Henry J. in the Supreme Court dated the 10th May 1962 which declared that the appellants were entitled to a lien in the sum of nearly £13,000 over a certain area of land of about 11 acres registered under the provisions of the Land Transfer Act 1952 in part in the name of Hornby Development Ltd. the first defendant (which will be referred to as the Development Company) and in part in the name of one Parker the second defendant a nominee of the Development Company. For all relevant purposes however the Development Company has been treated as the registered proprietor of the whole of the 11 acres.

In August 1960 the respondent Bank agreed to advance and did advance substantial sums to the Development Company. These advances were secured by a mortgage dated 15th August 1960 upon the 11 acres. This mortgage was in terms very familiar among bankers and the security was briefly expressed in informal terms at the end of an otherwise lengthy document. Nevertheless, its effect is not in doubt; it created a valid equitable mortgage and on protection by the entry of a caveat or on registration would, speaking generally, rank in priority to any encumbrances registered later.

This mortgage was not expressed to be subject to any earlier encumbrances whatever. Their Lordships were informed and accept that the respondent Bank did not register this mortgage or protect it in the early stages by a caveat for the very simple and perfectly sound reason that the Development Company wanted to sell off parcels of land to purchasers and it was not desired to make the concurrence of the Bank to every deed of conveyance essential as this would have led to much delay and expense.

In the meantime the appellants, a contracting company, between November 1960 and March 1961 did much work for the Development Company carrying out sewerage and water reticulation works on these lands as will be mentioned later.

Under the Wages Protection & Contractors Liens Act 1939 (which will be referred to as the Liens Act) the appellants became entitled to liens on the Development Company's land and the whole question is whether these liens rank in priority to the respondent Bank's mortgage. Before setting out the

relevant facts their Lordships think it will be useful to refer to the relevant statutory provisions of the Liens Act for the appellants' claim to a prior lien depends entirely on those provisions.

" 21. (1) Where any employer contracts with or employs any person for the performance of any work upon or in respect of any land or chattel, the contractor and every subcontractor or worker employed to do any part of the work shall be entitled to a lien upon the estate or interest of the employer in the land or chattel, and every subcontractor or worker employed by the contractor or by any subcontractor to do any part of the work shall be entitled to a charge on the moneys payable to the contractor or subcontractor by whom he is employed, or to any superior contractor, under his contract or subcontract.

(2) The lien or charge of the contractor or of a subcontractor shall be deemed to secure the payment in accordance with his contract or subcontract of all moneys that are payable or are to become payable to him under the contract or subcontract. The lien or charge of a worker shall be deemed to secure the payment in accordance with the terms of his employment of all moneys that are payable or are to become payable to him for his work.

(3) The total amount recoverable under the liens and charges of the contractor and of the subcontractors and workers employed by the contractor or by any subcontractor shall not, except in the case of fraud, exceed the amount payable to the contractor under his contract.

(4) The total amount recoverable under the liens and charges of all claimants who are employed as subcontractors or workers by any contractor or subcontractor shall not, except in the case of fraud, exceed the amount payable under his contract or subcontract to that contractor or subcontractor, as the case may be."

" 25. (1) Subject to the provisions of this section and the last preceding section, where any land to which a lien attaches is subject to a mortgage registered before the registration of the lien against that land, the mortgage shall have priority over the lien.

(2) If the mortgagee is a party to the contract in respect of which the lien arises the lien shall have priority over the mortgage.

(3) In so far as the mortgage secures any money that is advanced after notice of the lien has been given to the mortgagee or to any solicitor for the time being acting for the mortgagee in respect of the mortgage, the lien shall have priority over the mortgage.

(4) All moneys that any mortgagee pays in respect of a lien that has priority over his mortgage shall be added to and form part of the principal money secured by the mortgage, and shall bear interest accordingly."

" 41. (1) No land shall be affected by a lien unless the lien is registered against the title to the land as provided in this section.

(2) Where the land is subject to the Land Transfer Act, 1915, (the predecessor of the Land Transfer Act, 1952) a copy of the statement of claim in the action to enforce the lien, certified by the proper officer of the Court, may be lodged with the District Land Registrar, who shall thereupon register it in the manner in which caveats are required to be registered. Notice of the registration shall be given by the Registrar, by registered letter, to the registered proprietor of the land and to every person entitled to a mortgage or encumbrance over the land.

(3) Where the land is not subject to the Land Transfer Act, 1915, the statement of claim, certified as aforesaid, may be registered in the manner in which deeds and other instruments affecting the land may be registered.

(4) A statement of claim of lien shall not be liable to stamp duty. The fee for registering a statement of claim shall be one shilling.

(5) The costs of and incidental to the registration of a lien and of a discharge of a lien shall be deemed to be part of the costs of the action."

" 44. Any person alleging that he is prejudicially affected by a claim of lien or charge, or by registration of a lien against any land, may at any

time apply to the Court to have the claim or registration cancelled or the effect thereof modified, and such order may be made as may be just."

Their Lordships must now refer to the facts in some detail.

Under a contract with the Development Company the appellants, between November 1960 and March 1961, provided sewerage works, claiming to be paid over £12,000. A little later between February 1961 and May 1961 under a subsidiary contract they provided a water reticulation plant and some additional sewerage work for which they claim an additional £2,629. These claims were not paid by the Development Company so the appellants began two actions against that Company claiming a lien under the Liens Act; first by a statement of claim in Action A105/61 delivered on the 29th May 1961 and registered in the Land Registry under number 552266 on the 30th May 1961 claiming a lien for £12,100, and secondly by a statement of claim in Action 114/61 delivered on the 12th June 1961 and registered in the Land Registry on the 13th June 1961 under number 553184 claiming a lien for £2,629 for the water reticulation plant and other work. Between these lien registrations however the respondent Bank registered a Caveat 552802 on the 7th June which protected, as from that date, the mortgage of 15th August 1960.

On the 25th July 1961 that mortgage, altered from its original state, as will be mentioned later, was registered under number 593319. At the same time the caveat 552802 was withdrawn.

Apparently in the early days of 1961 it appeared that the Development Company was failing in its business. Ultimately it went into liquidation and it appears that even the secured creditors are unlikely to receive payment in full; its liquidator has been given leave not to appear in these proceedings.

Therefore the respondent Bank sought to register its mortgage at the Land Registry but there was on the register among other prior but irrelevant entries an existing caveat 531003 entered on 4th August 1960 and under the provisions of the Land Transfer Act 1952 the Bank could not register its mortgage without the consent of the caveator, the Staffordshire Finance Corporation Limited, who refused to permit the registration. Proceedings were brought and ultimately, so their Lordships were informed, that Company withdrew its objection to registration. This however did not conclude the respondent Bank's difficulties for the mortgage as drawn was not expressed to be subject to all prior registered interests and the District Registrar insisted that all such interests must be entered on the Deed and the mortgage made subject thereto before he would register it. So an alteration to the mortgage was made by the addition of this phrase:—

" SUBJECT to Liens Numbers 552266 and 553184 AND SUBJECT to

" Building Line Restrictions in Notices 545555 and 548467 and

" to Caveats Numbers 531003, 545660, 549363, 552740 and 552955 ".

The respondent Bank was registered as Proprietor of the mortgage as so altered on the 25th July 1961. On the same day, as already mentioned, the caveat was withdrawn.

The Court of Appeal in New Zealand held that this amendment to the mortgage " was made unilaterally by the Bank with the sole and simple object of obtaining registration without further delay ".

Their Lordships accept this and indeed it seems perfectly clear that if the amendment was made on the only other possible hypothesis (apart from fraud or mistake) namely that it was made with the consent of the mortgagor the Development Company, that would be fatal to the claim of the respondent Bank which would then have to stand by the mortgage as altered because from the date of alteration that would be the Deed of the mortgagor and the Bank could not conceivably claim priority over the appellants' lien.

Section 28 of the Liens Act imposes on anyone intending to claim a lien an obligation to give notice of the claim as therein set out. That obligation was clearly observed by the appellants and it is not necessary to notice that section further. So much for the facts.

At first instance the actions came before Henry J. who dealt with a number of questions not material to this appeal. He then posed the only relevant question in this succinct form. " To pose the question in short form it is: Can the Bank, having registered the mortgage which *ex facie* creates a charge subject to the liens, now set up in priority to the liens an equitable charge which was created by the mortgage on its execution? The only document which the Bank can produce is a registered document which clearly creates a charge inferior to the liens. The Bank does not seek to contradict its written document. It, of course, cannot do so in these proceedings. What it seeks to do is to show that the alteration was not material and the document has always without the alteration created and still creates a prior charge which exists notwithstanding the alteration and subsequent registration ". He then pointed out as really axiomatic, and their Lordships agree, that the mortgage as registered was subject to the prior liens which had been registered earlier. Later in his judgment he then answered quite shortly the question he had posed thus:

> " The real difficulty facing the Bank is that it cannot now treat the document, nor ask this Court in the present proceedings, to treat the document as if it were unregistered. The Bank is bound by its act in registering the document and cannot go behind that act and ask to be restored to its position as the holder of an unregistered mortgage creating an equitable charge as at the time when no liens had been entered on the title. *Qui sentit commodum sentire debet et onus:* 1 Coke 99.
>
> The Bank has not shown any clear legal principle which will enable the Court to disregard the added words and to treat the prior equitable first charge, created by the unregistered mortgage, as being still in existence. It seems to me that the Bank is seeking on the one hand to retain all the benefits it got from registration, whilst on the other hand it desires to be freed from the results which necessarily ensue if the document is read as a registered instrument which, of course, it now is. It seems to me further that, since the registered charge is clearly inferior to the liens, the Bank is setting up the coexistence of the unregistered prior equitable charge which undoubtedly it held up till the time when the liens were entered on the title. I know of no legal principle, and none has been cited, which would permit a registered document, to which the person taking the benefit still adheres, to be treated as if it were still an unregistered document and in a different state from the document as registered."

He then went on to examine in greater detail the process of reasoning by which it was claimed that the prior charge created by the unregistered instrument still existed notwithstanding its alteration and subsequent registration. He examined and dealt at some length with the question whether the alteration to the mortgage made by the respondent Bank was immaterial and discussed the case of *Barker v. Weld* (1885) 3 N.Z.L.R. S.C. 104 but then rightly, in their Lordships' opinion, held that the alteration in this case *ex facie* converted a mortgage which on execution was a first mortgage in every sense into a second mortgage. He then said, and their Lordships again agree, *Barker v. Weld* did not help.

Finally he dealt with a submission that the respondent Bank's mortgage having created an equitable charge, was initially presented in a registrable form but that registration having been delayed by a caveator who unreasonably refused to permit registration, the Bank should not be deprived of priority over liens which were immune to any delay from the same cause. This point was but faintly pressed before their Lordships and in their opinion the only possible answer was that found by Henry J. that is to say that to concede to this argument would be tantamount to disregarding the registered document and the benefits which the Bank obtained from registration. Henry J. added—and this sentence is important having regard to the course that the action took in the Court of Appeal—" The price of registration was known to the Bank and it elected to register its mortgage as creating a security subject to the liens ".

So that for relevant purposes he held the Bank were bound by the document they registered and could not rely on any pre-existing unregistered rights.

In the Court of Appeal, where the judgment of the Court was delivered by Turner J., the members of the Court proceeded upon the basis that the respondent Bank's unregistered mortgage gave it an equitable security which the subsequent registration of the liens did not over-reach. This proposition was said to be in agreement with the tenor of Henry J.'s judgment and later it was said that this principle was tacitly accepted by him. Their Lordships will refer to this aspect of the matter later. The judgment then went on to consider that because Henry J. had said that the respondent Bank " elected " to register its mortgage (in the passage just quoted) the Court reached the conclusion that the judge was applying (and applying wrongly) the doctrine of election to the facts of this case. The Court of Appeal then discussed this doctrine as explained by Viscount Maugham in *Lissenden v. C. A. V. Bosch Ltd.* [1940] A.C. 412 at 419 and came to the conclusion that the respondent Bank had not made any election for the purposes of that doctrine. For the reason which their Lordships will give later they cannot agree that the doctrine of election can be prayed in aid of the solution of the question before their Lordships. Nor do they think that Henry J. in his judgment was attempting to apply this doctrine of election. They think that when he used the word " elected " he meant no more than that the respondent Bank " chose " to register its mortgage.

Then the Court of Appeal went on to consider the argument addressed to them that the equitable rights of the respondent Bank under the unaltered unregistered mortgage merged in the altered registered mortgage and they held that the lien holder had failed to establish an intention to merge these two interests. The Court of Appeal quite correctly stated the principles relating to the doctrine of merger and a number of authorities were cited to their Lordships upon this point. These principles are not in doubt but again, with respect to the judgment of the Court of Appeal, and to the arguments presented to their Lordships, they do not consider that the well understood doctrine of merger is relevant to the facts of the present case. Equally their Lordships regard as irrelevant the argument addressed to them that a person cannot give evidence to contradict the contents of a deed to which he was a party or that the alteration was immaterial. The facts of this case lie in a small compass and can be solved only by reference to the most general principles. Their Lordships have already stated the relevant facts and it seems to them that as between mortgagor and mortgagee the alteration made by the mortgagee unilaterally, was, as against the mortgagee, a nullity. It did not avoid the deed and it could not affect it as between its parties. The relevance of this alteration lies solely in the fact that the mortgagee altered the document so as to obtain the benefit of registration. Thereafter the mortgage deed appeared on the register, as altered, for all the world to see and represented that it was subject to the prior registered entries. How, without driving a coach and four through the whole system of compulsory registration which has been a feature of the law of New Zealand for so long, the mortgagee can rely on the deed as unaltered and unregistered as well as upon the deed as altered and registered their Lordships fail to understand. This deed was one deed. In their Lordships' view no question of election or merger arises; the respondent Bank chose to alter the mortgage deed for their own purposes and cannot thereafter rely on it in its unaltered form. In case these observations should be misunderstood their Lordships desire to say that they do not rely on any principle of estoppel. This deed, altered solely for the purpose of registration in the Land Register, cannot thereafter speak with two voices; a former unregistered equitable voice and a newly registered legal voice. The respondent Bank never had two securities but one only, which they chose to alter for their own good purposes; it is now one deed creating one interest in the respondent Bank, that is a mortgage security to secure the sums advanced, speaking with one voice on the register for all to see. Their Lordships agree entirely with the way in which this matter was treated by Henry J. in the passage in his judgment which they have already quoted. Their Lordships will add one additional consideration, fatal in itself to the Respondents' case in their Lordships opinion, not mentioned in either of the courts below. As their Lordships have already stated, on the 7th June 1961 the respondent Bank protected its unaltered equitable mortgage by entry of a caveat No. 552802.

This would undoubtedly have given the mortgage priority over the second lien but when the altered mortgage was registered this caveat was withdrawn. Thereafter anyone inspecting the register was entitled to assume that the interest protected by that caveat no longer affected the land. The respondent Bank cannot thereafter in their Lordships' view maintain that it has any priority in respect of an unregistered and no longer protected mortgage against any subsequent entry on the register.

For these reasons therefore their Lordships agree with the judgment of Henry J.

Their Lordships however desire to advert to the question mentioned at an earlier stage, though it is not necessary to express a final opinion upon the matter, that is, the assumption by the Court of Appeal that an unregistered equitable mortgage of the Bank takes priority over liens registered under the Liens Act. This assumption rests upon the alleged authority of the *Commercial Property and Finance Company v. Official Assignee of Waghorn and Another* (1905) 24 N.Z.L.R. 655. The Court of Appeal assumed, as already mentioned, that Henry J. was of the same opinion, but their Lordships are by no means certain that Henry J. was of any such opinion for they notice in a passage which they have already quoted that he was very careful to say that the Bank " is setting up the coexistence of the unregistered prior equitable charge which undoubtedly it held *up till the time* when the liens were entered on the title ". Their Lordships cannot think that *Waghorn's* case is any authority for the proposition upon which the Court of Appeal relied. In that case the mortgage was protected by a caveat; the lien holder was not registered and Williams J. quite rightly held that in those circumstances the mortgagee took priority over the unregistered lien holder. Their Lordships cannot attach any great importance to the phraseology of section ~~41~~ 21 of the Liens Act which only expresses what the law otherwise implies namely that if a registered proprietor makes unregistered encumbrances of whatever nature they necessarily take subject to one another in the order of time in which they were made on the simple principle that the owner of an estate or interest can only charge or encumber that which he has, subject to all charges or encumbrances into which he has previously entered. But the whole idea of equitable priorities changes in a system of land registration and it seems to their Lordships that the Liens Act which granted a right of lien to those who do work on the land of the owner or on some chattel of his was plainly intended to introduce into the general system of registered land the registration of such a lien and to give it the appropriate priority on registration. Their Lordships think that section 25, the successor of section 6 of the original Act of 1892, in effect deals with this question of priorities. Subsection (1) applies equally as a matter of construction to a mortgage executed before the lien attaches as well as to one executed afterwards but registered before the lien, and their Lordships do not think that Williams J. in *Waghorn* was trying to draw any such distinction between those two cases as was suggested in argument before them. Further Gresson P. in *Craig v. Gilman* [1962] N.Z.L.R. p. 201 has recently pointed out the general nature of the lien to which the contractor or employee is entitled and their Lordships are unable to accept the argument of the respondents that the rights of the lien holder attach to the land as on the first day of work. That seems quite inconsistent with the whole scheme as it appears in the sections of the Liens Act which their Lordships have already quoted. Their Lordships cannot doubt that one of the objects of section 25 is to lay down priorities between the holders of registered liens and other registered or otherwise protected persons whose interests are noted on the register. Thus e.g. subsections (2) and (3) appear to postpone the rights of prior mortgagees to those of lien holders, which they would otherwise have enjoyed apart from that section. Their Lordships think that the inevitable inference to be drawn from that section is that if a lien is registered before a mortgage whenever executed it necessarily takes priority over that mortgage. It is to be noted that although section 41 provides that the lien is to be registered in the same manner as a caveat it is not reduced to the status of a caveat. The holder of the lien is entitled, as their Lordships think, as, undoubtedly did Henry J., to describe himself as the " registered proprietor of a lien ". He is not properly described as a person whose interest is protected by a caveat.

Their Lordships, as at present advised, do not see how any unregistered encumbrance can take priority over such a registered interest without doing complete violence to the Torrens system of registration.

Their Lordships heard much argument upon the submission that the statements of claim delivered by the appellants were " instruments " for the purposes of sections 2 and 37 of the Land Transfer Act 1952 and on registration took priority accordingly but as this point was not considered in the Courts below, their Lordships prefer to express no opinion on this question.

In the Court of Appeal a close analogy was drawn between a lien holder and a judgment creditor having a charging order and their Lordships have been referred to a number of authorities on charging orders. Their Lordships however think the analogy is unsound, first of all, because all those cases were decided under Rule 320 of the Code of Civil Procedure which corresponds closely to section 44 of the Liens Act already set out, but Counsel for the respondent Bank disclaimed any reliance upon section 44 before their Lordships. But secondly it seems to their Lordships that consideration of the interest of a judgment creditor under a charging order bears no analogy to the interests of those entitled to liens under the Liens Act. In the former case the judgment creditor is entitled to obtain a charging order over the estate of the judgment debtor as one method of levying execution on the property of the debtor and it would be most unjust to hold that a judgment credior was entitled to over-reach a prior mortgage executed by the judgment debtor, in order to enforce his judgment. But the situation is quite different under the Liens Act where the Assembly has quite deliberately given a statutory lien to those who do work on the land or chattels of the employer and there is then no reason why the statute should not dictate the priorities which should obtain in liens over that land or those chattels. Their Lordships agree entirely with the judgment of the Court of Appeal in *Re Williams* 17 N.Z. 712 at 726.

Their Lordships however decide this case as in the Courts below, on the footing that the question of decision is as to the effect of the alteration and subsequent registration of the respondent Bank's mortgage. For the reasons they have already given, they will humbly advise Her Majesty that the appeal should be allowed, that the order of the Court of Appeal should be discharged and that the order of Henry J. should be restored. The respondent Bank must pay the appellant's costs of this appeal and in the Court of Appeal.

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In the Privy Council

FARRIER-WAIMAK LIMITED

v.

THE BANK OF NEW ZEALAND

DELIVERED BY

LORD UPJOHN

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