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GEI 616

Judgment  
42/1964

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
23 JUN 1965  
25 RUSSELL SQUARE  
LONDON, W.C.1.

IN THE PRIVY COUNCIL No. 12 of 1964

ON APPEAL  
FROM THE COURT OF APPEAL OF NEW ZEALAND

78665

B E T W E E N

A. FARRIER-WAIMAK LIMITED Appellant

- and -

THE BANK OF NEW ZEALAND Respondent

CASE FOR THE APPELLANT

RECORD

B 1. This is an appeal from a judgment of the  
C Court of Appeal of New Zealand dated the 6th  
D September 1963 varying an Order of the  
E Supreme Court of New Zealand made by Henry J.  
on the 10th May 1962 whereby it was ordered  
that the Appellant was entitled to a lien  
under the Wages Protection and Contractors'  
Liens Act 1939 in the sum of £12097 10s. 3d.  
over certain land in blocks IX and XIII of  
the Christchurch Survey District and that the  
Respondent should pay to the Appellant a sum  
of £350 by way of costs and disbursements.  
By the Order of the Court of Appeal the said  
Order was varied to provide that a mortgage  
constituted by a Memorandum of Mortgage in  
favour of the Respondent dated the 15th  
August 1960 should be given priority over the  
Appellant's said lien and that the Appellant  
should pay to the Respondent the costs of the  
appeal and the costs in the Supreme Court.

F 2. The Appellant is a Company incorporated  
in New Zealand carrying on business as Shingle  
Merchants and contractors and the lien the  
subject-matter of the Appeal arose in the  
following circumstances.

G 3. At all material times Hornby Development  
H Limited (hereinafter called "the Development  
Company") was the registered proprietor under  
the Land Transfer Act 1952 of certain  
freehold land situate in Blocks IX and XIII  
of the Christchurch Survey District and  
containing 11 acres 3 roods and 27 perches or  
thereabouts being Lot 2 on Deposited Plan No.

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7326 part of Rural Section 1791 and comprised in Certificate of Title Volume 367 Folio 284 Canterbury Registry. This land is hereinafter referred to as "the 11 acre block". The Development Company was also the purchaser in possession from one Halford Robert Parker (the registered proprietor) of certain land adjoining the 11 acre block and containing 15 acres 1 rood and 24 1/10th perches or thereabouts being part of Lot 2 on Deposited Plan No. 15666 part of Rural Sections 1792 and 3353 and comprised in Certificate of Title Volume 589 Folio 82 Canterbury Registry (which said land is hereinafter referred to as "the 15 acre block"). The interest of the Development Company in the 15 acre block arose under a contract for sale dated the 28th October 1959 and made between the said Halford Robert Parker and one Sydney Raymond Forsyth and it was not in dispute at the hearing before Henry J. that Sydney Raymond Forsyth was the agent of the Development Company or that the Development Company was entitled to the beneficial interest created by the contract.

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4. In the years 1960 and 1961 the Development Company commenced and partially carried out the development as a residential estate of the 11 acre block and the 15 acre block together as a composite area and employed the Appellant as a contractor in connection with the work of development. Between the 17th November 1960 and the 30th March 1961 the Appellant carried out sewerage work for the Development Company on both properties at a contract price of £9500 and between the 2nd August 1960 and the 20th April 1961 the Appellant provided the Development Company with machines and operators for excavating roads and supplied road metal at a total contract price of £2597. 10s. 7d. The machines so supplied carried out work on both blocks but the metal was supplied only to the 11 acre block. The Appellant also between the 6th February 1961 and the 8th May 1961 carried out (inter alia) water reticulation works on the 11 acre block the contract price for which was £1765. 0s. 0d.

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A 5. Section 21 of the Wages Protection and Contractors' Liens Act 1939 (hereinafter called "the 1939 Act") provides (so far as material to this Appeal) as follows :-

B "(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...."

C "(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 sub-contract of all moneys that are payable or are to become payable to him under the contract or sub-contract...."

D 6. Section 20(1) of the 1939 Act defines "Employer" as follows :-

E "'Employer' means any person who contracts with another person for the performance of work by that other person, or at whose request or on whose credit, or on whose behalf, with his privity or consent, work is done; and includes all persons claiming under him whose rights are acquired after the work is commenced; but a mortgagee who advances money to an employer shall not by reason thereof be deemed to be an employer."

G 7. Section 28(1) imposes upon a person who intends to claim a lien on any land or chattel an obligation to give notice to the owner specifying the amount and particulars of claim and under section 34(1) a person who gives a notice of lien under section 28 may commence an action in any Court of competent jurisdiction claiming a declaration that he is entitled to a lien. By section 34(4) (as amended by section 3 of the Wages Protection and Contractors' Liens Amendment Act 1961) such action must H (subject to the Court's power to extend time in certain cases) be brought within sixty days after the completion or abandonment of the work specified in the contract between the employer and the head contractor and by section 34(6) I

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every lien is deemed to be extinguished unless the claimant either commences an action to enforce it within the said period or becomes party to an action for the enforcement of a lien commenced by some other person.

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8. The sums due to the Appellant in respect of the work carried out for the Development Company were not paid and on the 28th April 1961 and the 2nd May 1961 respectively the Appellant served on the Development Company notices of lien pursuant to section 28(1) of the Act in respect of the sums of £9500 and £2597. 10s. 7d. respectively. A similar notice in respect of both sums was served on the said Halford Robert Parker on the 26th May 1961. On the 29th May 1961 the Appellant commenced an action in the Supreme Court of New Zealand pursuant to section 34 of the Act claiming a Declaration that it was entitled to a lien for the two said sums and other consequential relief. The reference to the record of such action is A105/61.

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A further notice of lien was served on the Development Company on the 9th June 1961 in respect of (inter alia) the said sum of £1765 due for water reticulation work and on the 12th June 1961 the Appellant commenced a similar action against the Development Company to which the reference to the record is A 114/61. No question arises on this appeal that the work done by the Appellant was work for which a lien can properly be claimed under the Act, or that the said notices of lien were properly given, or that both the said actions were commenced within due time.

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9. Section 41(1) of the 1939 Act provides that no land shall be affected by a lien unless the lien is registered against the title and by subsection (2) of the said section it is provided that where land is subject to the Land Transfer Act 1952 (as is the land the subject-matter of this Appeal) a certified copy of the Statement of Claim in the action to enforce the lien may be lodged with the District Land Registrar who shall thereupon register it in the manner in which caveats are required to be registered and shall give notice to the registered proprietor of the land and to every

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A person entitled to a mortgage or encumbrance over the land. Section 25(1) of the Act provides that (subject to certain provisions not material for the purposes of this appeal) 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. The Appellant's liens in respect of the 11 acre block were duly registered as required by the said section notices of the said actions being entered by the Registrar on the title on the 30th May 1961 and the 13th June 1961 respectively and being numbered respectively 552266 and 553184.

10. The original Defendants to the action A 105/61 were the Development Company and the said Halford Robert Parker and the former was originally the only Defendant to the action A 114/61. On the 25th July 1961, however, the Respondent Bank which claimed to be a mortgagee of the 11 acre-block by virtue of the Memorandum of Mortgage hereinafter mentioned registered the said Memorandum and thereafter was joined as a Defendant in both actions. The Development Company is in liquidation with a deficiency as regards its secured creditors and the liquidator by leave took no part in the proceedings in which the principal question (which is the question raised by this Appeal) was whether the Appellant's liens took priority over the Respondent's mortgage or vice versa.

p. 9 1.11

11. The said actions were heard together and the following statement of facts in relation to the Respondent's mortgage is taken from the Reasons for Judgment of Henry J delivered on the 10th May 1962:-

"The Development Company sought financial assistance from the Bank of New Zealand and on August 15, 1960, executed a Memorandum of Mortgage to secure all moneys to be advanced by the Bank. This Mortgage was held unregistered until January 30th 1961, when it was presented at the Land Transfer Office for registration. The Bank was notified that the mortgage required amendment before registration could be effected, this for

p.8 11. 23-45

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the reason that a caveat No. 531003 entered on August 4 1960 by the Staffordshire Finance Corporation Limited prevented registration. Letters were sent by the District Land Registrar to the Bank on February 24, March 2, April 7, May 8 and July 27, 1961. When the last letter was sent it was a requisition for consents from three separate caveators which consents were required in duplicate. One of the caveators was the Staffordshire Finance Corporation Limited, previously mentioned, but in the meantime, on June 7 and June 8 1961 two further caveats had been entered. The Certificate of Title had also been further encumbered by plaintiff entering a lien on May 30, 1961 in respect of the Statement of Claim in Action No. 105/61 and on June 13 1961, in respect of the Statement of Claim in Action No. 114/61. The three caveators consented to the registration of the Bank's mortgage. The mortgage document was then amended by the Bank inserting thereon the following words :-

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'Subject to Liens Numbers 552266 and 553184 And Subject to Building Line Restrictions Notices 545555 and 548467 and to Caveats Numbers 531003, 545660, 549363, 552740 and 552955.'

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On July 25, 1961, the mortgage was accepted for registration in the altered form...."

pp. 317

12. By its Defences in the said actions the Respondent claimed

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(a) that the Appellant's actions were not commenced within due time after the completion of the works in respect of which lien was claimed

(b) that if (which it denied) the Appellant was entitled to any of the liens claimed in the action A 105/61 over the separate parcels constituting the 11 acre block and the 15 acre block such liens were limited to the value of work actually done to each separate parcel

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(c) that the hire of machinery did not constitute work in respect of which a lien could be claimed

A (d) that no liens could be claimed because no moneys had become payable by the Development Company to the Appellant and

B (e) that as regards the 11 acre block the Respondent's advances on the security of the said Memorandum of Mortgage had priority over any lien claimed by the Appellant.

13. In his Reasons for Judgment Henry J. (after stating the facts) dealt first with the defences raised by the Respondent under (a) (c) and (d) above (which are not material for the purposes of this Appeal) and held that the Appellant was entitled to a lien in the sum of £12097 10s. 3d. There was no appeal from His Honour's judgment on these points. His Honour then dealt with the question of apportionment of the lien between the 11 acre block and the 15 acre block. His Honour had already found as a fact that the scheme of subdivision into residential sections carried out by the Development Company applied to both blocks and was such that the two blocks lost their individual identity and were developed as a composite area in the name of the Development Company and without regard to the fact that there were separate titles. His Honour held that the lien attached to both titles for the full amount of the contract price recoverable under each claim. He said :-

p.9 ll. 15-24

G "The lien to which the contractor is entitled is by s. 21(2), one which is deemed to secure the payment of all moneys that are payable or are to become payable under the contract. By s. 21(1), where any employer contracts for the performance of any work the contractor is entitled to a lien on the estate or interest of the employer. One must, in my view, look to see what was the contract for the performance of the work and also what was the land of the employer upon which such contract for work was to be performed. The charge is to secure the payment in accordance with the contract or rights

p. 11 ll.  
7-31

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flowing from the contract and not in accordance with a later apportionment of the value of the work which apportionment is not based on the contract but is based on the boundaries of the lands affected by the contract. The contract in each case was for the performance of work on the subdivisinal scheme as a whole without distinction between the two titles. It covered the composite block. The price for the sewerage was one price without reference to what was done on either block. The provision of machines and men for excavating work was likewise done, as I have held, under a continuous contract at hourly rates. The supply of metal was to be done as it was required for the purposes of the work of excavating and filling. Again, all the work was to be done on the scheme generally - there being no distinction whatever between the respective boundaries shewn on the titles. In my view, on the facts proved in this case, plaintiff is entitled to liens on both titles for the full amount of the contract price recoverable for each claim. The lien, which must be separately noted on each title, should show on its face that it secures the same sum as that which is charged on the other."

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14. His Honour then proceeded to deal with the question of the Respondent's claim to priority and said:

p.11 11.35-45

p.12 11.1-19

"The argument for the Bank proceeds on the basis that, upon the execution of the mortgage, it got a good equitable first charge on the land and that when the liens were subsequently entered on the title, the plaintiff as lienor, could get no more than a charge upon the interest of the Development Company, that is to say, a charge subject to the prior equitable charge in favour of the Bank. This proposition is founded on Commercial Property & Finance Coy. v. Official Assignee of Waghorn and A. & T. Burt (1905) 24 N.Z.L.R. 655. Following on from this it is argued on behalf of the Bank that it is entitled to show that the words "Subject to Liens Numbers 552266 and 553184 and subject to Building Line Restrictions in Notices

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54555 and 548467 and to Caveats Numbers 531003 545660 549363 552740 and 552955" were added after the execution of the mortgage and from this it is further argued that such addition was not a material alteration of the document but was done purely for the purpose of effecting registration.....  
.....To pose the question in short form it is: Can the Bank, having registered the mortgage which ex facie creates a charge subject to liens, now set up in priority to the liens an equitable charge which was created by the mortgage on its execution?"

15. The Respondent's contention was that, although it could not contradict the written document, the alteration unilaterally made by it for the purpose of procuring registration was immaterial and that the document when executed created and continued despite the alteration to create a prior charge which existed notwithstanding the subsequent alteration and registration. In considering this contention His Honour first considered the effect of registration saying:-

p. 12 ll.  
22-26

"The first difficulty which the Bank must face is the undoubted fact that its registered charge is inferior to the liens. That the registered charge is inferior is, I think, clear from the provisions of the Land Transfer Act itself. By s. 36 the mortgage, when presented for registration, must be in duplicate. By s. 38 on registration, one copy is filed and the other is returned to the person who presented it for registration, and thereupon the mortgage is, for the purposes of the Act, to be deemed and taken to be embodied in the register as part and parcel thereof. By s. 35 the mortgagee is thereupon deemed to be the registered proprietor of the mortgage. Registration also fixes the priority of all instruments: see s. 37. By s. 100 the registered mortgage, whilst it does not transfer the interest or estate charged, it does have effect as security. All persons, save in

p. 12 ll. 31  
et seq.

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p. 13 11. 1-16

exceptional cases to which reference need not be made, may treat the register as showing the true position of the various interests, estates and other matters noted thereon: see s. 62. By effecting registration the Bank brought about the effects just enumerated. It is conceded that registration could not be effected, at least at the time of registration, unless the alteration had first been made, because it is clear that the District Land Registrar would not register the document until that was done. I think it is also clear that the charge or security which the Bank obtained as a registered charge was one subject to the prior liens. It is also conceded that the Bank got 'unarguable priority over any subsequent mortgages or liens'. How, then, can it be said that the alteration was not material and had no effect upon the document after its execution? It had all the material effects previously referred to, none of which came into existence until registration was effected. Moreover, by altering the document so that it became subject to prior charges the covenants implied in mortgages subject to prior mortgages would, by virtue of s. 78 of the Property Law Act, 1952, be implied in the document as altered. It would seem that the definition of mortgage in s. 2 is wide enough to include a registered lien."

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16. Accordingly His Honour held that the Appellant's liens had priority over the mortgage. He said :-

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p. 13 11. 29  
et seq.

"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:  
† Coke 99.

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"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

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A 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  
B the liens, the Bank is setting up the co-  
existence 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  
C 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  
D document as registered."

17. From this decision the Respondents appealed  
to the Court of Appeal.

E On the hearing of the appeal the question  
arose as whether the Appellants had commenced  
the work in respect of the liens claimed in  
action No. A 105/61 before or after the date  
of the execution of the Respondents mortgage  
(under which it was proved in evidence that  
F £9088 6s. 8d. had been advanced by the 16th  
September 1960). It was agreed that the case  
should proceed on the assumption that in fact  
all the work was commenced after the date of  
the mortgage and of the advancement of moneys  
thereunder. It had not been argued at the  
G trial that the Respondent's mortgage was  
effectively lodged with the Registrar for  
registration prior to the registration of the  
Appellant's lien (and accordingly that it took  
priority from the date of its presentation on  
H 30th January 1961) and the Court of Appeal  
ruled that this argument was not open to the  
Respondent in that Court.

p.19 ll.  
40-44

p. 20 ll.  
40 et seq.

I 18. On the 6th September 1963 the Court of  
Appeal allowed the appeal on the question of  
priority and varied the order of Henry J. to  
the extent necessary to give the Respondents  
priority of over the Appellant's liens. The  
Court's reasons for judgment were delivered

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by Turner J. who said:

p.21 ll. 14-19

"The liens derive their efficacy solely from the provisions of the Wages Protection and Contractors' Liens Act 1939. Section 21 of that Act provides in terms that a contractor shall be entitled to a lien upon 'the estate or interest of his employer in the land'. It is the beneficial estate or interest of the employer which is charged by the claim of lien..."

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Having referred to the decision of Williams J. in Commercial Property & Finance Co. v O.A. of Waghorn and A. & T. Burt Ltd. (1905) 24 N.Z.L.R. 655 and to the definition of "Employer" in section 20 of the Act His Honour continued:-

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p. 21 ll.38  
et seq.  
p. 22 ll.  
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"In this case the Development Company was clearly an 'employer' of the Contractor, and its estate or interest is the subject of the Contractor's liens: but that estate or interest is exclusive of the interest of the Bank as equitable mortgagee - Commercial Property & Finance Co. v. O.A. of Waghorn and Anor. (supra). It cannot in this case be argued that the Bank is an employer, for the case proceeds expressly on the assumption that the execution of the Bank's mortgage and the advances thereunder of sums totalling £9088 6s. 8d. ante-dated, in the case of each lien, the commencement of the work .... It follows that any interest of the Bank's can never be affected by any of the Contractor's claims for lien, for the only effect which they or any of them can have is that which is given by the Statute, and the Statute limits their whole effect to that of a charge on the estate or interest of an employer."

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19. His Honour then postulated the question whether the Respondent lost the security which it had before it amended its mortgage and registered the amended document. He said:

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p. 23 ll. 25  
et seq.

"Henry J. thought that the essence of the matter was to be found in the doctrine of election. At the end of his judgment he said:-

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'The price of registration was known to the Bank and it elected to register its mortgage as created on security subject to the liens'.

A On consideration we have reached the conclusion  
that the learned Judge was wrong in applying  
the doctrine of election to the particular  
facts of this case. It is clear that if  
"election" is to be invoked it must be the  
B Common Law doctrine, and not equitable  
election. The latter always finds its  
source in a presumed intention of the  
author of a will or instrument namely the  
intention that a man shall not claim under  
C the work or instrument and also claim  
adversely to it - Lissenden v. C.A.V. Bosch  
Ltd. [1940] A.C. 412. 419, per Viscount  
Maugham ... and it is clear that if there  
is election it is the Common Law doctrine  
D which must be invoked. This is a species  
of estoppel whereby a person having a  
choice between two courses of conduct is  
to be treated as having made an election  
from which he cannot resile, once he has  
E taken a benefit under or arising out of  
the course of conduct which he has pursued  
and with which his subsequent conduct is  
inconsistent: 15 Halsbury 3rd Ed. 171 (cf.  
F Spencer Bower on Estoppel by Representation  
page 225 et seq.). But this kind of  
election, like all forms of estoppel, must  
be founded on a representation to the party  
setting up the estoppel upon the faith of  
which the relative position of the parties  
G has been altered to his detriment - Spencer  
Bower op. cit. 248.... In the present case  
we are unable to perceive any respect in  
which the Bank and the Contractor altered  
their relative positions on the faith of  
H the amendment and registration of the  
mortgage ...."

p. 24 ll.  
4-20

His Honour therefore held that there were never the essential elements to support the application of the doctrine of election.

I 19. It was argued on behalf of the Appellant that if and so far as the Respondent had equitable rights before registration those rights merged on registration in the legal

p. 24 ll.  
30-33.

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mortgage which was perfected by registration. The Court of Appeal rejected this submission, Turner J. saying :-

p.24 ll. 39  
et seq.

"Here there was one document only, the mortgage, at first unregistered and later registered, its registration merely perfecting in the mortgagee a legal, where before it had no more than an equitable, estate. The doctrine of merger as it applies to contracts cannot be applicable to such a case. It is the doctrine of merger of estates which is invoked here. It has been stated as 'a universal proposition, that whenever these legal and equitable estates, uniting in the same person, are co-extensive and commensurate, the latter is absorbed in the former' - per Pearson J. in In Re Douglas, Wood v. Douglas (1884) 28 Ch. D.327, 331, citing Lord Alvanley M.R. in Selby v Alston 3 Ves. 341. But it must be remembered that in New Zealand it is provided by section 30 of the Property Law Act 1952 (and in England by s. 185 of the Law of Property Act 1925) that there shall be no merger where the beneficial estate would not be extinguished in equity. In equity merger is dependent upon the intention of the parties."

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p. 25 ll. 1-6

p. 25 l. 13  
p. 25 l. 21

His Honour then referred to the decisions in Fung Ping Shan v. Tong Shun [1918] A.C. 403, 411 and Whiteley v Delaney [1914] A.C. 132 and to section 44 of the 1939 Act (which enables any person claiming to be prejudicially affected by a claim of lien or by registration of a lien against any land to apply to the Court to have the claim a registration cancelled or the effect thereof modified) and continued :-

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p.25 ll. 43 et  
seq  
p.26 ll. 1-4

"It is difficult to understand why the Bank did not in this case make use of the convenient procedure afforded by this section to regularise its equitable rights. We will presently point out that had it done so it seems likely on authority that it would have been able to obtain an order analogous to a rectification order, enabling registration while preserving the priority of its equitable security."

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This follows in our opinion from the charging order cases now to be discussed."

A 20. His Honour then compared the Appellant's position to that of a judgment creditor having a charging order and referred to decisions in which, on applications under Rule 320 of the Code of Civil Procedure, charging orders were removed from the register so as to enable earlier-executed transfers on mortgages to be registered in their equitable priority. He said :-

C "Section 44 of [the Act] is in words identical with those of Rule 320 and, as we have already said, it seems plain that if the Bank had made application under the section it could have been granted relief analogous to the rectification referred to in Whiteley v. Delaney.

D "It may be inquired: if the Bank by amending and registering did not give up its equitable rights what was the effect of the amendment and registration? The answer to this question must be found in the true intention of the person whose acts are under examination ...." "In considering this question we think that the Court must examine the reasons why the alteration was made .... In the particular case we are now considering we think that the proper

E view is that the Bank did no more than bow to the insistence of the Registrar and felt obliged - apparently failing to appreciate the use which could have been made of s. 44 - to endorse on the documents the words which the Registrar demanded ...." "In these circumstances we are of opinion that the lien-holder has failed to establish an intention to merge and to admit the liens to priority. Moreover, we think it clearly inequitable to permit the lien-holders to secure an advantage purely as a result of the requisition of a District Land Registrar. For these reasons applying to this case equitable principles similar to those which guided the House of Lords in refusing to merge in Whiteley v. Delaney we have reached the conclusion that this Court should in the circumstances of this case decline to apply the doctrine of merger so

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as to defeat the equitable rights of the Bank as against the Contractor ..."

p. 27 ll. 33-38

21. His Honour then proceeded to answer a submission on behalf of the Appellant that upon registration of the Respondent's mortgage the priorities were determined by section 37 of the Land Transfer Act 1952 the material provisions of which are as follows :-

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"(1) Every instrument shall be registered in the order of time in which the same is presented for that purpose.

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(2) Instruments registered with respect to or affecting the same estate or interest shall, notwithstanding any express, implied, or constructive notice, be entitled in priority the one over the other according to the date of registration and not according to the date of each instrument itself."

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By section 2 of the said Act "Instrument" means

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"any printed or written document map or plan relating to the transfer of or other dealing with land or evidencing title thereto."

As to this His Honour said:-

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p. 28 ll. 6-15

"Assuming that the Statement of Claim of lien is an 'instrument' - as to which we express no opinion - the fact remains that the provisions of s. 37 go no further than this: as between instruments registered with respect to or affecting the same estate or interest the earlier-registered is given priority over the later-registered. But where - as here - the lien never operated to charge anything more than the Development Company's estate or interest - i.e. its equity in the land - this result cannot follow, for the lien never affected the Bank's interest in the land as mortgagee. In its very essence it could not affect more than the residuary interest of the registered proprietor after the Bank's mortgage was secured."

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A 22. His Honour then proceeded to deal with the question of whether the Appellant's lien was to be apportioned between the 11 acre block and the 15 acre block (which in the light of the Court's decision on the question of priority could arise only in relation to such part of the work done by the Appellant as could be shewn to have begun before execution of the Respondent's mortgage) and upheld the decision of Henry J. on this point. His Honour concluded:-

B "For the reasons which we have indicated this appeal is allowed and the Order made by the learned Judge in the Court below varied in accordance with the Opinion which we have expressed. When the outstanding question of fact has been resolved between Counsel a draft Order may be submitted for our approval. An Order should be made (but subject to the determination first of the outstanding question of fact) in which the Bank's mortgage is given priority over the Contractor's liens."

p. 30 ll.  
15-21

E The costs of the Appeal and below were awarded to the Respondent.

F 23. The Appellant submits in the first place that the Court of Appeal was in error in disregarding for the purposes of the decision the express terms of section 25(1) of the 1939 Act and in applying to a claim under the Act the same reasoning as that upon which Williams J. based his decision in Commercial Property & Finance Company v. Official Assignee of Waghorn and A. & T. Burt (1905) 24 N.Z.L.R. 655 (hereinafter referred to as "the Waghorn case").

G The claim of the lien-holder in the Waghorn case was made under the Wages Protection and Contractors' Liens Act 1892, in which the "Employer" was defined in the same terms as in the 1939 Act save that the words "but a mortgagee who advances money to an employer shall not by reason thereof be deemed to be an employer" did not appear. Any mortgagee therefore who acquired his mortgage after commencement of the work in respect of which lien was claimed was for the purposes of that Act an "employer". In the Waghorn case the

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contest arose between a mortgagee who had advanced money prior to the commencement of work and who, instead of registering his mortgage, had registered only a caveat and a contractor who had, after the caveat had been lodged, applied for registration of his lien. The District Land Registrar refused to register the lien but called upon the mortgagee to substantiate his caveat. Williams J. upheld the claim of the mortgagee on the ground that the lien attached only to the beneficial interest of the employer which was already subject to the equitable charge of the mortgagee. In his Honour's view, section 6 of the 1892 Act (which was in all material respects in the same terms as section 25 of the 1939 Act) was designed to protect a mortgagee who had registered his mortgage before registration of lien, where the mortgage was executed before the lien had attached.

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24. The Appellant submits first that it is wrong to apply the same reasoning to a claim under the 1939 Act and secondly that it is wrong in any event to apply the reasoning in a case concerned with the rights of two claimants neither of whose charges was registered to a case in which the contest was between claimants both of whose charges were registered.

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Williams J. considered that section 6 was designed to protect the claim of the proprietor of a registered mortgage who had advanced money after the commencement of the work and who was therefore an "employer" to whose interest the lien would (apart from the section) have attached upon registration. The inclusion in the definition of "Employer" in the 1939 Act of the words "but a mortgagee who advances money to an employer shall not by reason thereof be deemed to be an employer" rendered this reasoning no longer applicable. On Williams J.'s reasoning a mortgagee advancing before commencement of the work could never have been affected by a lien whether or not his mortgage was registered and the priority conferred by section 6 would therefore have been otiose except in the case of a mortgagee who advanced after the work had commenced and

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A who would therefore ex hypothesi be an  
"employer". If this reasoning was correct  
therefore, the removal (by the 1939 Act) of  
the mortgagee from the category of "employer"  
would have removed the only case in which  
section 6 would have had any application. In  
fact however section 6 was substantially re-  
enacted as section 25 and it is submitted that  
at least from 1939 onwards the provisions of  
B that section govern the case of every mortgagee  
whether or not he would under the previous  
legislation have been an "employer" whose  
interest was bound and that by re-enacting the  
provisions of section 6 of the 1892 Act the  
C Legislature evinced a clear intention that  
priority was to depend upon the order of  
registration and nothing else. In this  
connection the Appellant relies upon section  
5(j) of the Acts Interpretation Act 1924  
D which is in the following terms :-

E "Every Act, and every provision or  
enactment thereof, shall be deemed  
remedial, whether its immediate purport  
is to direct the doing of anything  
Parliament deems to be for the public  
good, or to prevent or punish the doing of  
anything it deems contrary to the public  
good, and shall receive such fair, large  
and liberal construction and interpretation  
F as will best ensure the attainment of the  
object of the Act and of such provision  
or enactment according to its true intent,  
meaning and spirit."

G 25. The Appellant submits that section 25 of  
the 1939 Act contains an exhaustive code for  
deciding questions of priority between  
mortgagees and claimants for lien under the  
Act and that it is a necessary implication  
from the section that where a lien is  
H registered before the registration of a  
mortgage the lien has priority. In the  
Appellant's submission the Court of Appeal  
wrongly failed to consider the import of this  
section and treated as all-important the  
I question of whether the advance was made before  
or after the date of commencement of the work.  
This clearly emerges from the following passage  
from the reasons for judgment :-

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p. 29 ll. 14-21

"In the view of the law which we have come in this judgment, the argument as to apportionability has no relevance unless the obscure question of fact to which we have earlier referred should be resolved on investigation in favour of the Contractor - i.e. if it should turn out as regards the claim for £2597 that the work was begun before the Bank's mortgage was executed. If this turns out to be so, however, this particular lien will take priority over the Bank's mortgage, and in this event the argument as to apportionability will become relevant."

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In saying this the Court appears to have assumed that the lien arose upon commencing the work and that the commencement of work gave rise to an equity which would take priority over the Respondent's equity if it arose before it in point of time. In fact however it is clear that a lien under the 1939 Act is not in the nature of a floating charge and does not arise until notice of lien is given (J.J. Craig v. Gillman Packaging Ltd [1962] N.Z.L.R. 201 per Gresson P. at 211). It would therefore follow from the decision of the Court, that advances made under an unregistered mortgage at any time up to the giving of notice of lien would have priority there being no equity in the lien-holder until that date.

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26. The Appellant further respectfully submits that the decision of the Court of Appeal that the security of the Respondent created by the said mortgage never became subject to the Appellant's lien notwithstanding registration ignores the express provisions of the Land Transfer Act 1952 (hereinafter referred to as "the 1952 Act"). Under section 21 of the 1939 Act the lien under the Act is a lien upon the estate or interest of the employer in the land or chattel upon or in respect of which the work is done and the Appellant submits that the words "estate or interest" in this section must be given the same meaning as the same words in the 1952 Act. In the case of land registered under the 1952 Act the estate or interest of the employer is defined and prescribed by the entries appearing on the

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Register and section 182 of the 1952 Act provides that except in case of fraud no person contracting or dealing with the registered proprietor of any registered estate or interest shall be affected by notice of any trust or unregistered interest. Section 62 of the 1952 Act is in the following terms :-

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"Notwithstanding the existence in any other person of any estate or interest which but for this Act might be held to be paramount or to have priority the registered proprietor of land or of any estate or interest in land under the provisions of this Act shall, except in the case of fraud, hold the same subject to such incumbrances, liens, estates, or interests as may be notified on the folium of the register constituted by the grant or certificates of title to the land but absolutely free from all other encumbrances liens estates or interests whatsoever."

(with certain exceptions immaterial for the purposes of this appeal).

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Accordingly the Appellant submits that the estate or interest to which upon registration the Appellant's lien attached was the registered estate of the Development Company and the said Halford Robert Parker which at the date of the lien was held free from the Respondent's mortgage.

27. It is further submitted that if the unregistered mortgage conferred any interest upon the Respondent good as against the Appellant such interest upon registration of the instrument merged in and became co-extensive with the security created upon registration which security was expressed to be subject to the Appellants' lien.

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The reasoning of the Court of Appeal as it appears from the passages cited in paragraphs 19 and 20 of this case seems to have been that because the alteration to the Respondents' mortgage was made to meet the requirements of the Registrar and because the Respondent could have made an application under section 44 of the 1939 Act therefore

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there must be inferred an intention not to merge and that it would in any event be inequitable to permit the lien-holders to secure an advantage "purely as a result of the requisition of a District Land Registrar."

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In fact however section 44 of the 1939 Act was never pleaded or invoked by the Respondent nor were the merits of a claim by the Respondent under that section ever argued and the Appellant respectfully submits that the Court of Appeal was wrong to assume that a claim by the Respondent would have succeeded when it had not before it all the materials for considering the merit of such a claim. That the Court did in fact make that assumption is, it is submitted, plain from the following passages in the reason for judgment.

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p.28 ll. 27-30

"It might have been possible for us, had we been so invited, to reach the same result by a much shorter route than the issues of election and merger provide - viz. by treating the present proceedings as an application by the Bank under s. 44 of the Wages Protection and Contractors' Liens Act 1939".

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p.28 ll. 34 et seq.

"The section does not appear to have been referred to in argument before Henry J.; it certainly formed the basis of no definite submission before us. In these circumstances we did not think it right to decide the dispute between the parties as if an application had been made under the section: yet had the Bank made such an application at any material time it is difficult to see what answer the Contractor could have made to a prayer that the registration of the liens should be deemed postponed to that of the mortgage. This is exactly what was done in the charging order cases, in circumstances whose essentials seem completely comparable with those of the present case. Nevertheless as the Bank's advisers did not see fit to invoke the section, we have not thought it proper to shorten consideration of the questions at issue by deciding them by this route. This does not mean, however, that in considering submissions as to election and merger we

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p.29 ll. 1-5

shorten consideration of the questions at issue by deciding them by this route. This does not mean, however, that in considering submissions as to election and merger we

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have ignored s.44 whose very existence must have an implication bearing on the application of these doctrines to a situation such as has arisen in the present case."

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28. Furthermore, the suggestion that

"the Bank did no more than bow to the insistence of the Registrar and felt obliged . . . to endorse on the documents the words which the Registrar demanded"

p.27 ll. 6-9

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ignores, it is submitted, the requirements of the Land Transfer Act 1952. In fact so long as there were caveats on the title the Registrar was obliged to refuse registration unless the Respondent either established its rights against the caveators or made its security subject to the rights of the caveators. In electing to alter its security so as to render it subject to (inter alia) the Appellant's lien it is submitted that the Respondent evinced a clear intention to merge such rights as it had under the unregistered mortgage in the altered document presented for registration. It is submitted that quite apart from the provisions above referred to there is nothing inequitable in giving priority to the Appellant's lien. It was open to the Respondent at any time after the execution of the mortgage in its original form and when it knew of the Registrar's requisition to protect its position by itself registering a caveat. In fact however it did not seek to do so and the Appellant accordingly acquired its interest in the land without notice of any equitable rights which the Respondent may have acquired. (Abigail v. Lapin [1934] A.C. 491 at p. 502).

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29. The Appellant further submits that the Court of Appeal was wrong in treating the estate or interest of the Development Company as being "exclusive of the interest of the Bank as equitable mortgagee" and that if and so far as such decision was based upon the decision in the Waghorn case that case was wrongly decided. Section 100 of the 1952 Act provides that a mortgage under that Act

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p.21 ll. 40-41.

"shall have effect as security but shall

RECORD

not operate as a transfer of the estate or interest charged."

The estate or interest of the Development Company was therefore the whole estate or interest in the land subject only to such security as was created by the unregistered instrument of mortgage and Section 41 (1) of the 1952 Act provides

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"No instrument shall be effectual to pass any estate or interest in any land under the provisions of this Act or to render any such land liable as security for the payment of money, but upon the registration of any instrument in manner hereinbefore prescribed, the estate or interest specified in the instrument shall pass, or, as the case may be, the land shall become liable as security in manner and subject to the covenants conditions and contingencies set forth and specified in the instrument, or by this Act declared to be implied in instruments of a like nature."

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30. Having regard to the foregoing provisions it is respectfully submitted that the Court of Appeal was wrong in rejecting the submission that the Respondent's mortgage and the Appellant's lien were instruments affecting the same estate or interest and took effect in order of registration pursuant to section 37 (2) of the 1952 Act. It is further submitted that if the unregistered mortgage conferred any interest upon the Respondent good as against the Appellant such interest upon registration of the instrument merged in and was co-extensive with the security created upon registration which security was expressed to be subject to the Appellant's lien.

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31. Accordingly it is respectfully submitted that the appeal should be allowed and the order of Henry J. should be restored for the following (among other)

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R E A S O N S

(1) BECAUSE it is a necessary implication

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- A from section 25 (1) of the Wages Protection and Contractors' Liens Act 1939 that a lien duly registered pursuant to the Act takes priority over a mortgage registered subsequently to the registration of the lien.
- B (2) BECAUSE the estate or interest to which the Appellant's lien attached was the registered estate of the Development Company and of the said Halford Robert Parker under the Land Transfer Act 1952 which at the date of the registration of the Appellant's lien was held free from the Respondent's mortgage.
- C (3) BECAUSE the only document upon which the Respondent relied for its security was the registered mortgage which was expressed in terms to be subject to the Appellant's lien and extrinsic evidence was not in the absence of any claim for rectification admissible to vary the express terms of such document.
- D (4) BECAUSE if and so far as the Respondent had any interest in or security on the said land prior to registration such interest or security merged and was extinguished in the registered mortgage and there was no equity in the Respondent to keep such pre-existing interest or security alive and no evidence from which an intention not to merge could be inferred.
- E (5) BECAUSE if and so far as the said mortgage prior to registration created any interest in or security on the said land such interest or security could be binding only upon third parties taking an interest the said land with notice of the Respondent's rights and the only effective notice for this purpose would have been registration of the mortgage or the entry of a caveat.
- F (6) BECAUSE the prior interest of the Respondent (if any) under the mortgage before registration could prevail against the interest of the Appellant only if the equities were equal and by reason of the failure of the Respondent to enter a caveat the equities were not equal.
- G (7) BECAUSE the decision of the Court of Appeal of New Zealand conflicts with the underlying
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RECORD

principle upon which the system of conveyancing established by the Land Transfer Act 1952 is based namely that the Register established under the said Act shall give a full and true picture of the title of the Registered proprietor.

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(8) BECAUSE the lien conferred on a Contractor by the Wages and Contractor's Liens Act 1939 is a statutory charge on the land and the copy Statement of Claim registered pursuant to section 41 of the said Act is an "instrument" within the meaning of section 2 of the Land Transfer Act 1952 which entitles the lien-holder to priority according to the date of registration pursuant to section 37 of the last-mentioned Act.

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(9) BECAUSE the decision of Henry J. in the Supreme Court was right and ought to be upheld and the decision of the Court of Appeal of New Zealand was wrong and ought to be reversed.

PETER OLIVER.

HAMISH R. GRAY

IN THE PRIVY COUNCIL No. 12 of 1964

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ON APPEAL  
FROM THE COURT OF APPEAL OF NEW  
ZEALAND

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B E T W E E N

FARRIER-WAIMAK LIMITED Appellant

- and -

THE BANK OF NEW ZEALAND Respondent

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CASE FOR THE APPELLANT

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WRAY SMITH & CO.,  
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Appellant's Solicitors.