

GEI 6-6

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

Judgment  
42/1964  
78666

IN THE PRIVY COUNCIL

No. 12 of 1964

ON APPEAL  
FROM THE COURT OF APPEAL IN NEW ZEALAND

BETWEEN:

FARRIER-WAIMAK LIMITED ... Appellant

- and -

THE BANK OF NEW ZEALAND Respondent

CASE FOR RESPONDENT

RECORD

10 1. This Appeal is from a judgment of the Court of Appeal of New Zealand given at Wellington on the 6th September 1963 in which the Court of Appeal allowed an appeal by the Bank of New Zealand (hereinafter referred to as "the Bank") against a judgment given in favour of Farrier-Waimak Limited by the Supreme Court of New Zealand at Christchurch on the 10th May 1962. pp.18 to 30

20 2. In the Supreme Court, Farrier-Waimak Limited had claimed liens under Part II of the Wages Protection and Contractors Liens Act 1939 over two blocks of land owned by Hornby Development Limited a land development company. One Halford Robert Parker the unpaid vendor under an Agreement for Sale and Purchase of one block and the Bank, as Mortgagee of the other block of which Hornby Development Limited was registered proprietor, were joined as Defendants. The judgment of the Supreme Court, given by Henry J., dealt with a considerable body of fact and law in deciding whether the claimant was entitled to liens over the land, but the Appeal by the Bank to the Court of Appeal was limited to two points of law, namely: pp. 1 - 3 and pp. 5 and 6

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- (a) The conflicting priority between the liens of Farrier-Waimak Limited on the one hand and the registered first mortgage of the Bank on the other in respect of one 11 acre block of land.
- (b) The question of whether the liens claimed by Farrier-Waimak Limited were apportionable between the two blocks of land.

Hornby Development Limited and Halford Robert Parker were not affected by the outcome of the appeal to the Court of Appeal and took no part in the proceedings.

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3. In the Court of Appeal the following statutory provisions were particularly referred to and considered:

(a) WAGES PROTECTION AND CONTRACTORS LIENS ACT 1939 Part II

Section 20        Definitions

Section 21        Contractor's entitlement to a lien upon the estate or interest of an employer in the land upon or in respect of which work has been done.

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Section 25        Mortgaged land and liens.

Section 34        Actions to enforce liens.

Section 41        Procedure for registration of liens.

Section 44        Persons prejudicially affected by registration of a lien may apply to the Court for relief.

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(b) LAND TRANSFER ACT 1952

Section 1        Interpretation

Section 34        When instruments deemed registered

Section 37 Priority according to time of registration

Section 62 Estate of registered proprietor paramount

Section 101 Form of Mortgage

Section 141 Caveat against dealings

Section 244 Effect of Property Law Act

(c) PROPERTY LAW ACT 1952

Section 2 Definitions

10 Section 3 Effect of Land Transfer Act

Section 30 Merger

Section 78 Implied covenants in mortgages

(d) SUPREME COURT CODE OF PROCEDURE

Rule 314 Charging Orders

Rule 320 Applications for relief against effect of order

4. The facts relevant to this appeal and which are undisputed are:

20 In August 1960 the Bank made advances to Hornby Development Limited a company whose primary object was the purchase of land for development, subdivision and eventual resale as housing sections. Hornby Development Limited had purchased a block of land comprising 11 acres 3 roods 27 perches (hereinafter referred to as "the 11 acre block") from one John Halford Robert Parker and executed a Memorandum of Mortgage of that  
30 land in favour of the Bank to secure the advances which commenced on the 12th August 1960 and exceeded £9000 by the 22nd August 1960. The transfer from Parker to Hornby Development Limited was not registered until the 2nd September 1960, the consent of the Caveator under Caveat Number 531003 which had been entered on the 4th August 1960 having been obtained. The Bank held its mortgage unregistered until the 30th January

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Lines 29-31  
  
pp. 34-36  
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Exhibit 7  
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p.34 1961 when it presented the document for registration. A Proclamation taking a small area for street purposes necessitated an alteration in the description of the area in the mortgage and this was done thus putting the Mortgage in registerable form. The Mortgage was accepted for registration on the 30th January 1961 and given the Number 543319. A memorial was entered upon the Original Certificate of Title and signed by an Assistant Land Registrar. Then the District Land Registrar realised that the existing caveat prevented registration of the Mortgage. The memorial on the Certificate of Title was cancelled and a marginal note "Entered in error" was signed by the Assistant Land Registrar. The Bank requested the District Land Registrar to have notice served on the Caveator who after proceedings brought in the Supreme Court pursuant to Section 145 of the Land Transfer Act 1952, consented to registration of the Bank's Mortgage in July 1960. In the meantime, Farrier-Waimak Limited, a contractor which had carried out extensive work in the way of street formation, sewer and water reticulation on both blocks of land, had lodged against the Certificate of Title to the 11 acre block, claims for liens under the Wages Protection and Contractors Liens Act 1939, to secure the monies owing to it by Hornby Development Limited under its various contracts. The District Land Registrar accepted the claims of Lien for registration without requiring the Caveator's consent. In doing so, the District Land Registrar followed an established practice of the Land Transfer Office. Thus the claims of lien were registered on the Certificate of Title to the 11 acre block on the 30th May 1961 and on the 13th June 1961 and it was not until the 27th July 1961 that the Bank, having obtained the consent of the first and several subsequent caveators, was able to register its mortgage. To comply with the formalities of registration the Bank altered its mortgage document by adding after the description of the land the words "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."

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pp.33 and 37 20

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Farrier-Waimak Limited then proceeded to take

its lien claims to a hearing in the Supreme Court at Christchurch and joined the Bank as a Defendant.

5. At the conclusion of the Supreme Court hearing, Henry J., in considering the question of the respective priorities of the Liens and the Bank's mortgage, raised two questions:

- 10 (a) Could he look beyond the Bank's mortgage as registered and consider evidence as to the circumstances under which words were added to the original document for the purpose of registration.
- (b) If the answer to (a) is "Yes" then what was the effect of the additions to the document on the priorities of the mortgage and the liens.

Henry J. requested written submissions on these questions.

20 6. Counsel for Farrier-Waimak Limited submitted that extrinsic evidence should not be allowed to vary or modify the terms of the Bank's registered mortgage and supported that submission by reference to the general principle laid down in Countess of Rutlands Case 1604 5 Ce. Reports 25 and Bolsom Investment Trust v. Karmois (1956) 1 Q.B. 529. He submitted then, that if the Court held that extrinsic evidence was admissible, the Bank's mortgage prior to registration was an equitable one only and that it was second in

30 priority to the Liens because:

- (a) Section 25(1) of the Wages Protection and Contractors Liens Act implies that only a registered mortgage can have priority.
- (b) An equitable mortgage cannot affect a third party without notice.
- (c) Section 42(1) of the Land Transfer Act states that pending registration no estate or interest in land is made
- 40 liable as security for payment of money.

Counsel for Farrier-Waimak Limited further

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submitted that the unregistered mortgage, being a deed, the common law rule that the contract merged in the deed applied and the Court should look only at the mortgage in its final form.

7. Counsel for the Bank submitted that evidence could be given as to when the Bank's mortgage had been altered by addition of the words "SUBJECT to Liens Numbers 552266 and 553184" and referred to Barker v. Weld Vol. 3 N.Z.L.R. 1885 Page 104 where evidence was admitted as to when similar words were added to a mortgage and as to the circumstances under which they were added. It was further submitted that the mortgage, being dated prior to the date of registration of the liens, was self evident of the fact that words had been added later and that evidence was admissible to decide the question of for whose benefit the words were added. Donaldson v. Tracey & Anor. 1951 N.Z.L.R. Page 684. 10 20

Counsel for the Bank further submitted that the words added by the Bank to its mortgage were a formality incidental to registration and not a material alteration to the mortgage itself and did no more than recognise the state of the register.

8. Counsel for the Bank also submitted that a lien is not an instrument under the Land Transfer Act 1952 so as to obtain its priority under that Act, but obtains its priority from the Wages Protection and Contractors Liens Act 1939 only and therefore a claimant for a lien applies for security against such interest as the owner of land may then have, having regard to existing legal and equitable charges. 30

9. Henry J. considered that Barker v. Weld was decided on its own special circumstances and could be distinguished. He accordingly held that the addition of the words "SUBJECT to Liens 552266 and 553184" were material alterations which clearly made the Bank's charge inferior to the Liens. 40

10. In his judgment Henry J. said that the question could be put shortly, "Can the Bank, having registered the mortgage which ex facie

p. 12  
Lines 16-  
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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?" He answered the question in the negative and held that the liens had priority over the Bank's mortgage. He also held that the liens were not apportionable but did not decide the question of whether a lien is an "instrument" under the Land Transfer Act.

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11. From part of the judgment the Bank appealed on the ground that it was erroneous in law in deciding two questions:

- (a) The conflict in priority between the liens and the Bank's mortgage.
- (b) Whether the liens were apportionable between the 11 acre block over which the Bank's charge is registered and an adjoining block.

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12. The Appeal was heard on the 11th and 12th June 1963 and Judgment reserved and delivered on the 6th September 1963 in which the Court of Appeal allowed the Bank's appeal on Question (a) and dismissed its appeal on Question (b). The Bank accepts the finding of the Court of Appeal on Question (b). The Judgment of the Court of Appeal was delivered by Turner J.

p.18

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13. The Court of Appeal Judgment recites the facts relevant to the conflict in priority between the Lien of Farrier-Waimak Limited and the Bank's mortgage over the 11 acre block. The judgment then points out that Henry J.'s reasoning of his judgment was firstly that the Bank had an equitable mortgage before it was registered and as such it had priority over the liens for its equitable estate executed before Contractors commenced their work. Commercial Properties & Finance Co. Ltd. v. O.A. of Waghorn and A. & T. Burt Ltd. 1905 N.Z.L.R. 655. On this first point the Court of Appeal agreed with Henry J.'s opinion that the Bank's mortgage, while still unregistered, gave it an equitable priority which the registration of the liens did not affect.

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L. 24 to

p. 19 L.25

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L. 15 to

L. 23

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p. 21

L. 10 to

L. 13

14. The Court of Appeal judgment held that liens

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L.14

derive their efficacy solely from the provisions of the Wages Protection and Contractors Liens Act and pointed out that it is the beneficial estate or interest of the employer which is charged by the claim of lien - Waghorn's case (Supra) and that in the present case the estate or interest of Hornby Development Limited as Employer is exclusive of the interest of the Bank as equitable mortgagee. This also accorded with the view of Henry J. but the Court of Appeal differed from Henry J.'s opinion that by amending the mortgage and registering it in an amended form the Bank accepted that its security must thereafter rank as inferior.

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p. 23  
L. 7 to  
L. 9

15. The Court of Appeal accepted as a fact that the amendment to the mortgage by which the words "SUBJECT to Liens Numbers 552266 and 553184" were added was made unilaterally by the Bank with the sole and simple object of obtaining registration without further delay and said that Henry J. thought that the essence of the matter was to be found in the doctrine of election. His judgment was decided on acceptance of the proposition that "The price of registration was known to the Bank and it elected to register its mortgage as creating a security subject to the liens."

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p. 23 L.30  
to L.32

p. 16 L.17  
to L.18

The Court of Appeal disagreed with this opinion because there was no evidence that there had been any intention by Hornby Development Limited that the Bank should have to choose between an equitable first mortgage and a registered mortgage subject to the liens in priority. It said that Hornby Development Limited had never contemplated anything other than a registered first mortgage and that any choice it might be suggested that the Bank may have had was influenced by the fact that the Bank's mortgage had to get onto the register to hold its priority against any later registered instrument of charge.

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p. 23  
L. 42  
to p.24  
L.3

16. Counsel for Farrier-Waimak Limited had also submitted that there had been a merger of the Bank's equitable charge with the legal charge which its subsequent registration

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- perfected. The Court of Appeal referred to Section 30 of the Property Law Act 1952 which provides that there shall be no merger where the beneficial estate would not be extinguished in equity. The Court of Appeal judgment said that in equity, merger depends upon the intention of the parties, and the Courts will refuse to allow the equitable and legal estates to merge where the equity of the case sufficiently requires such a course Whiteley v. Delaney 1914 A.C. 132.
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- In that decision it was held that in doubtful cases merger takes place or not according to intention. In the present instance the Court of Appeal held that Farrier-Waimak Limited as the lien holder had not established an intention on the part of the Bank to merge its equitable charge with a legal one and admit the liens to priority.
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17. Moreover the Court of Appeal thought it clearly inequitable to permit the lien-holders to secure an advantage purely as a result of the requisition of a District Land Registrar. The Bank, it said, did no more than bow to the insistence of the Registrar and endorse on the documents the words which the Registrar demanded.
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18. The judgment of the Court of Appeal adverted to Section 44 of the Wages Protection and Contractors Liens Act 1939 which gives the right to persons suffering some hardship from registration of a lien or charge, to apply to the Court for relief. It took the view that such a course had been available to the Bank and had it acted upon it, it could have expected the same relief as equity would provide. The Court of Appeal accepted the submission by Counsel for the Bank as to the similarity between liens and charging orders under Rule 320 of the Supreme Court Code of Procedure and referred to decisions which gave priority and protection to equitable charges on land subsequently affected by a Charging Order. It considered that this was relief similar to the rectification referred to in Whiteley v. Delaney (supra).
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19. Counsel for Farrier-Waimak Limited contended
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L. 2 to  
L. 6
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L. 18 to  
L. 21
- P. 27 L.5  
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L. 33 to  
p. 28  
L.21

that the liens had priority over the Bank's mortgage by virtue of Section 37 of the Land Transfer Act. The Court of Appeal's judgment disposed of this by saying, without expressing any opinion whether a lien is an instrument or not, that Section 37 relates to instruments affecting the same estate or interest and decides the respective priorities in accordance with the dates upon which each is presented for registration. The Court of Appeal held that Section 37 had no application to the present instance because the lien was over the employer's beneficial interest only i.e. the fee simple subject to the Bank's equitable charge, while the Bank's mortgage was over the fee simple. 10

20. The Court of Appeal therefore held that the Bank had never abandoned and always effectively preserved the priority which its earlier-executed mortgage had over the liens of Farrier Waimak Limited. 20

21. The Respondent contends that the Court of Appeal could also have found for the Bank had it decided that a lien is not an instrument under the Land Transfer Act 1952. The Respondent submits that a lien is not an instrument under the Land Transfer Act 1952 and that the order of registration on the Certificate of Title can decide priority of instruments only. Registration of the claim of lien on a Certificate of Title does not give it priority, its priority having already been decided by the Wages Protection and Contractors Liens Act at the moment the Lien attached. The recording of the Liens on the Bank's mortgage did not concede any priority as this could happen only in the case of prior registered instruments. 30

22. The Respondent contends further that, apart from equitable principles, the Bank's endorsement of the words "SUBJECT to Liens Numbers 552266 and 553184" was an immaterial alteration. Barker v. Weld (supra). The Bank was, as a matter of form, reciting the state of the register and therefore conceded nothing. The Bank merely carried out an administrative act which it had implied authority to do as it in no way affected the rights or liabilities of the other party to the mortgage. The lien holder, not being a party, was unaffected. 40 50

23. The Respondent humbly submits that the

decision of the Court of Appeal was right and that this Appeal should be dismissed with costs for the following among other

R E A S O N S

- 10 (1) THAT the addition of the words "SUBJECT to Liens Numbers 552266 and 553184" to Mortgage Number 543319 were an immaterial alteration and a formality incidental to registration under the Land Transfer Act 1952 and therefore did not affect the original priority of the Bank's mortgage.
- (2) That on general equitable principles the Courts should not allow a lien holder to gain an unfair advantage over a Mortgagee as a result of an anomaly in registration procedure.
- 20 (3) That a Lien under the Wages Protection and Contractors Liens Act 1939, not being an "instrument" under the Land Transfer Act 1952, does not derive any priority under the Land Transfer Act by virtue of its order of noting on the Land Transfer Certificate of Title which it affects or by endorsement as a prior entry on a Memorandum of Mortgage.
- (4) And for the reasons given in the judgment of the Court of Appeal.

J. R. WOODWARD

A. C. SPARROW

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Counsel for Respondent

No. 12 of 1964

IN THE PRIVY COUNCIL

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O N A P P E A L

FROM THE COURT OF APPEAL IN 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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C A S E FOR RESPONDENT

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