

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION

Hart, Jones and Macdonald, JJ.A.

BETWEEN:

NOVA SCOTIA BUILDING SUPPLIES)	Joseph M. J. Cooper
LIMITED,)	A. Lawrence Graham
)	for the appellant
Appellant)	
)	Robert W. Wright
-and-)	for the respondents
)	
)	
)	
)	
T & R CONSTRUCTION LIMITED)	Appeal heard:
and CASTLE DEVELOPMENTS)	September 18, 1985
LIMITED,)	
)	Judgment delivered:
Respondents))	October 9, 1985
)	

THE COURT: Questions submitted by stated case answered in the negative and the case remitted for disposition in accordance with reasons for judgment by Jones, J.A.; Hart and Macdonald, JJ.A. concurring.

JONES, J.A.:

This is a case stated by The Honourable Judge N. R. Anderson to determine priorities under the Mechanics' Lien Act between a mortgage holder and registered lien claimants.

The respondent companies were engaged in the home construction business. In order to finance construction Castle Developments Limited (Castle) entered into a demand debenture dated June 14, 1979 with the Royal Bank of Canada to secure advances of \$350,000.00. The debenture contained both fixed and floating charges on all the property of Castle, both present and future. The debenture was registered in the Registry of Deeds on June 20, 1979. It contained a clause that the floating charge would not prevent Castle from selling or otherwise disposing of any property subject to the floating charge, in the ordinary course of business, until such time as the charge became enforceable. As construction contracts were arranged between Castle and T & R Construction Limited (T & R) Castle would arrange a specific mortgage on the property being developed with the Bank, through which advances were made to Castle.

Castle arranged to construct a house on Lot 98, Beechwood Park Subdivision, Halifax for \$150,000.00. There is a dispute as to when the house was completed by T & R in 1982. Nova Scotia Building Supplies Limited (Nova Scotia

Building) registered a lien against the property on April 6, 1982 and a Certificate of Lis Pendens on May 6, 1982. On June 14, 1982 an amending agreement to the debenture was entered into by Castle giving the Bank a specific mortgage under the debenture on the property. Between July 16, 1982 and January 6, 1983 six other lien claims were registered against the property.

On February 17, 1983 the Bank called the loan of Castle which was then \$236,464.30. On payment of the loan by Castle's guarantors, Robert and Jane Dexter, the Bank assigned its interest in the debenture to JaRo Investments Limited as trustee. On April 13, 1983 JaRo Investments Limited commenced a foreclosure action against Castle. The lienholders agreed to a consent order for the foreclosure and sale of the property reserving to a future date determination of the competing priorities among the parties. The property was sold for \$180,000.00. Between October 30, 1981 and May 21, 1982, the construction period, the Bank advanced \$155,500.00 to Castle. After April 6, 1982 a further \$20,280.00 was advanced to Castle. The advances were not made solely in relation to the construction on the subject property. The parties agreed that the subsequent lien claims were preserved by the commencement of the Nova Scotia Building action pursuant to ss.24 and 25 of the Mechanics' Lien Act.

The following questions were submitted for determination by this Court:

"(a) Does the Demand Debenture held by JaRo Investments Limited as Assignee of the Royal Bank of Canada rank in priority to the Mechanics' Lien Claim of Nova Scotia Building Supplies Limited?

(b) If the answer to the first question is no, do the other six lien claimants above described have priority over the Demand Debenture held by JaRo Investments Limited?"

Turning to the first question, Nova Scotia Building contended that the Bank's debenture did not affect its lien as the Bank did not acquire any interest in the property until the debenture was amended on June 14, 1982 at which time a specific mortgage was placed on the property. On the other hand, Castle argued that under the Mechanics' Lien Act a lien only has priority over subsequent mortgages. The Castle mortgage, counsel submitted, was simply a mortgage under the Act and having been registered before the Nova Scotia Building lien it had priority.

The relevant provisions of the Mechanics' Lien Act, R.S.N.S. 1967, c.178, are:

"7(1) The lien shall attach upon the estate or interest of the owner in the property mentioned in Section 5."

"8 Such lien, upon registration, as in this Act provided, shall attach and take effect from the date of the registration as against subsequent purchasers, mortgagees, or other encumbrances."

"14(1) The lien shall have priority over all judgments, executions, assignments, attachments, garnishments and receiving orders recovered, issued or made after the lien arises, and over all payments or advances made on account of any conveyance or mortgage after notice in writing of the lien to the person making such payments or after registration of a claim for such lien as hereinafter provided."

"22(1) Where the claim for lien is so registered the person entitled to the lien shall be deemed the purchaser pro tanto and within the provisions of the Registry Act but, except as in this Act provided, the Registry Act shall not apply to any lien arising under this Act.

(2) A mortgage lender who has registered his mortgage obtains priority with respect to funds advanced in good faith, over any lien then existing for which a claim for lien has not been filed at the time the funds are paid to the owner."

It is clear from the decisions in this Court in Bank of Montreal v. Glendale (Atlantic) Limited, 20 N.S.R. (2d) 216, and Royal Bank of Canada v. Madill, 43 N.S.R. (2d) 574, that a floating mortgage of after-acquired property could not affect the interest of a subsequent purchaser or encumbrancer. The mortgagee in this case acquired no interest in the legal estate until a specific charge was executed and registered. At that time the mortgagee became a subsequent mortgagee under the Mechanics' Lien Act. I think this view is perfectly consistent with the provisions of the Statute. Section 7(1) of the Act provides that the lien shall attach upon "the estate or interest of the owner". Under the decision of this Court in Madill, supra, it is

clear that the owner Castle had the legal estate in the property when the lien was filed. That being so, the lien of Nova Scotia Building attached to that interest in priority to the subsequent mortgage. I would answer the first question in the negative.

Turning to the second question, the subsequent lienholders claim they are entitled to shelter under the Nova Scotia Building lien and thereby gain priority over the Bank's mortgage. In addition to those provisions of the Mechanics' Lien Act which I have quoted, counsel referred to s.24 which provides as follows:

"24 Every lien for which a claim is not registered shall absolutely cease to exist on the expiration of the time hereinbefore limited for the registration thereof, unless in the meantime an action is commenced to realize the claim or in which claim may be realized under this Act, and a certificate thereof (Form E) is registered in the registry office in which the claim for lien might have been registered."

While the provisions of ss.24 and 25 may preserve the rights of unregistered lienholders I am unable to find any provision in the Act which would give the liens priority over a prior mortgage. In Waynco Ltd. v. Terrace Manor Ltd., 127 D.L.R. (3d) 142, the Ontario Divisional Court considered the issue. I quote from the headnote which adequately summarizes the decision of the Court:

"The plaintiff, respondent, registered a claim for lien against the lands in question. Subsequently

the appellant mortgagee registered its mortgage and made several advances. Thereafter, several other lien claimants registered their claims for lien. They had not previously given notice in writing to the appellant of their claim. In the mechanics' lien action, it was held at trial that the subsequent lien claimants could shelter under the first lien and, thus, gain priority over the mortgagee. On appeal, held, the appeal should be allowed.

Section 14(1) of the Mechanics' Lien Act, R.S.O. 1970, c.267 (now R.S.O. 1980, c.261, s.15(1)), provides that a lien has priority over all advances made on a mortgage after notice in writing of the lien is given to the mortgagee and that upon failure to give such notice or to register the claim for lien, the mortgage advances have priority over it. The effect of the section is that the plaintiff's lien has priority over the appellant's mortgage, but the subsequent lien claimants cannot shelter under that lien since they failed to give notice or register their claims. Section 14(2), which provides that each class of lienholders ranks pari passu for the amounts owing to them, deals only with the rights of lienholders inter se and does not affect the rights of the appellant mortgagee."

The Waynco Ltd. decision was adopted and applied by this Court in Mercantile Bank v. Eastern Elevator, 55 N.S.R. (2d) 237. In the Mercantile Bank case two liens were filed before various advances by the mortgagee. The rest of the liens were filed after the advances. This Court held that only the two liens filed before the mortgage advances had priority. MacKeigan, C.J.N.S. in delivering the judgment of the Court applied the reasoning in the Waynco case to s.14(1) of our Act. He stated at p.241:

"Section 14(1), in my view, unambiguously provides that 'the lien' has priority over advances made on a mortgage after notice in

writing has been given, and none has been here given, or over advances made after registration of a claim for 'such lien'.


Judge Anderson appears to have considered that the subsequent liens can 'shelter' under the prior liens and by such sheltering can obtain or share the priority over the mortgage advance acquired by the prior liens. The sheltering doctrine has, however, no application in this case. It is a theory, based on ss.24 and 25 of the Act that the validity of an unregistered lien may in some circumstances be preserved by the commencement of an action where another lien has been registered; it has nothing to do with priorities."

Counsel for Nova Scotia Building raised a question as to the validity of the debenture. The parties agreed to the foreclosure of the mortgage. That fact may very well preclude the issue from being raised at this time. In any event I am satisfied that it was not raised in the case as stated and I therefore do not propose to deal with the issue.

I would also answer the second question in the negative and remit the case to the learned County Court Judge for disposition in accordance with the judgment of the Court. In the circumstances there will be no costs on the case stated.


J. A.

Concurred in —

Hart, J.A. 

Macdonald, J.A. 