S.C.A. No. 02665

IN THE SUPREME COURT OF NOVA SCOTIA

APPEAL DIVISION
Cite as: Bedford Ready-Mix Ltd. v. Canadian Imperial Bank of Commerce, 1992 NSCA 19

Hallett, Matthews and Freeman, JJ.A.

B E T W E E N:

BEDFORD READY-MIX LTD.	Thomas J. Burchell, Q.C., and John A. McKiggan for Bedford Ready Mix Ltd.
- and -	
HI-TECH WOODWORKERS LIMITED, ARTHUR PITTMAN and KATHERINE PITTMAN	
appellants	
CANADIAN IMPERIAL BANK OF COMMERCE	Robert W. Carmichael for Canadian Imperial Bank of Commerce
- and -	
LONDON LIFE INSURANCE COMPANY	Steven G. Zatzman for London Life
respondents	
	Appeal Heard: October 16, 1992
	Judgment Delivered: December 22, l992

THE COURT: Appeal dismissed from judgment upholding validity of debenture and other instruments despite flaws in description related to subdivision approval; per reasons for judgment of Freeman, J.A.; Hallet and Matthews, JJ.A., concurring

FREEMAN, J.A.:

In this appeal a mechanic's lien claimant seeks to establish priority over the first and second mortgagees of a failed lumber mill on grounds that their security documents were invalidated by the provisions of the **Planning Act**, R.S.N.S. 1989, c. 346 and the operation of the **Registry Act,** R.S.N.S. 1989, c. 392.

The respondent Canadian Imperial Bank of Commerce held a first mortgage debenture in the principal amount of $4,200,000 on assets of the appellant Hi-Tech Woodworkers Limited, including the 21-acre mill site in issue in this appeal. London Life Insurance Company held a second mortgage for $900,000. Bedford Ready-Mix Ltd. filed a mechanics' lien for $42,049.09. The priorities established by registration of instruments affecting the lands now relate not to the property itself, which has been sold, but to the $1,250,000 proceeds of the sale which were paid into court.

Hi-Tech acquired a 101-acre lot known as the Bezanson lands on the Hammonds Plains Road in Halifax County early in 1990 and had the 21-acre mill site surveyed out of it. As of March 1, 1990, before subdivision approval was obtained, Hi-Tech entered into a demand debenture with the bank. The debenture document created a fixed charge on the 101-acre lot, which was described in Schedule A. Schedule A also included a separate survey description of the 21-acre lot, which was called "Parcel A." The description of the 101 acre lot, of course, included Parcel A.

The appellant's chief argument was that the inclusion of Parcel A was an intended subdivision of land without subdivision approval and therefore an illegality which rendered the debenture void. This contention is without merit.

The understanding among the bank, Hi-Tech and its principals was that the bank would retain its security only on the 21-acre mill site lot and release the

remaining lands back to Hi-Tech as soon as the smaller lot was approved for subdivision from the original 101-acre lot. The redundant inclusion of the 21-acre lot, Parcel A, in the original debenture was an ineffective conveyance, surplus to the debenture, and without legal effect. Once security was taken on the 101-acre lot, as it clearly was, it could not be taken again on a 21-acre portion of the same lot by the same parties in the same instrument. It may have been intended to facilitate the later release, to identify the relevant portion of the property or to give evidence of intention; its only real effect was to create uncertainty.

I would agree with the careful analysis of the trial judge, Mr. Justice Gordon A. Tidman, that the security given to the bank over the 21-acre lot by the debenture of March 1, 1990 was never lost. Much of the incidental conveyancing which followed was, however, flawed, and the effect of this has also been called into question by the appellant.

Subdivision approval was obtained with respect to the 21-acre lot, less a small triangle, as of May 16, 1990, and an approved plan was recorded in accordance with the requirements of **The Planning Act.** Approval was not granted for a 263-square foot triangle of land next to the highway required for access to the remaining 80-acre lot. The approved 21-acre lot was identified as Lot 1 to distinguish it from Parcel A, the unapproved survey description. Parcel A was 263 square feet larger than Lot 1 by virtue of its inclusion of the unapproved triangle, but in all other respects the two descriptions were identical. The Canadian Imperial Bank of Commerce executed a partial discharge of debenture recorded July 16, 1990, releasing all of the original Bezanson lands except for the 21 acre lot; the Parcel A description was used to describe the property over which it retained its charge. The document also erroneously released "other assets of the company" which would have included personal property charged by the debenture. The second mortgage to London Life was recorded immediately following

the partial discharge, and described the 21-acre lot by the Parcel A description.

The next relevant document was a "restatement and confirmation of debenture" recorded February 12, 1991, intended to correct the error relating to "other assets." This too used the Parcel A description.

The Claim of Lien of the appellant Bedford Ready Mix was recorded February 19, 1991. This was the first document to use the correct Lot 1 description.

A second restatement and confirmation of debenture was recorded on March 7, 1991. This was the first security document of the bank to use the correct Lot 1 description.

Neither the partial release nor the two restatements released the security the bank had taken over Lot 1 by its original debenture of March 1, 1990, describing the full 10l acres of the Bezanson lands.

The appellant cites **Reid v. Reid** (1978), 22 N.S.R. (2d) 361 in support of its argument that the inclusion of the description of "Parcel A" in the original debenture created an illegal subdivision of land and thereby invalidated the bank's demand debenture. In that case a mother had conveyed her house and part of her lot to one son, without subdivision approval, and left the remainder of her property by will to another son. On the facts of that case, interpreting the then current provisions of **The Planning Act**, Jones, J. held that "the transaction is illegal and the deed is void."

At that time s. 49(11) of **The Planning Act** provided:

> (11) No subdivision shall be made unless and until a plan of the subdivision certified as aforesaid has been filed in the office of the registrar of deeds for the registration district in which the subdivision is situate and every person who makes or purports to make any subdivision without complying with the provisions of this Part shall be liable on conviction to a penalty not exceeding twenty dollars for every day during which such default continued and in default of payment to imprisonment for a term not exceeding ten days.

After reviewing the jurisprudence Jones, J. stated, quoting Cartwright J., in **Frobisher Limited v. Canadian Pipelines and Petroleums et al.** , [1960] S.C.R. 126:

> "Authority is scarcely needed for the proposition that a contract which is expressly or implicitly prohibited by statute is illegal..."

The Planning Act has been extensively amended since 1978 and the equivalent provision in the present **Act** is much different in its consequences. The recording of an instrument without subdivision approval is no longer an illegal act.

The present equivalent section is S. 111 of the **Act,** which provides:

> 111. (1) No subdivision of land takes effect except upon a plan or instrument of subdivision endorsed in accordance with s. 110 being filed in the Office of the Registrar of Deeds for the registration district in which the subdivision is situate.
>
> (2) No deed, mortgage, lease or other instrument which would result in the subdivision of land has effect until ss. (1) is complied with.
>
> (3) A deed, mortgage, lease or other instrument which purports to make a subdivision and which is executed before the approval and the filing or registration, as the case may be, of a plan or instrument of subdivision in the registry of deeds pursuant to Section 110 is deemed
>
> > (a) to have been executed immediately after the filing or registration of the plan or instrument of subdivision; and
>
> b) where the deed, mortgage, lease or other instrument has been registered in the registry of deeds, to have been duly registered at the time of the actual registration.

The effect of the amendments is to remove the illegality from recording an unapproved lot. A deed containing a subdivided lot is simply ineffective to pass title. But it is not void. It becomes an effective conveyance upon the recording of the plan or instrument of subdivision. The statutory foundation for **Reid v. Reid** no longer exists, and that case no longer reflects the law of Nova Scotia.

Where there is a variance between the description in an instrument referred to in ss. 2 and the plan or instrument of subdivision referred to in ss. 1, such as exists in the present case, it follows that the plan or instrument of survey would govern. The deed, mortgage, lease or other instrument referred to in ss. 2 would become effective upon the subsequent filing of the subdivision approval, but only to the extent of such approval.

The Parcel A description encompasses the approved subdivided lot, and that is all it is effective to convey. It is flawed to the extent it purports to contain 263 square feet it is incapable of conveying, but it is not void, nor ineffective as to the remainder. The parties clearly intended to deal only with the 21-acre lot which had been approved for subdivision. The minor misdescription was an error that did not render the instruments ineffective. A title searcher would quickly ascertain, by reference to the approved plan, what the instrument was effective to convey.

An issue as to rectification was raised in the appeal. In the circumstances rectification is not necessary. We are in agreement with the conclusion of Tidman, J. that the respondent bank's original debenture is a charge

against Lot 1 in priority to all other encumbrancers. The London Life second ranks immediately behind it in security; because of the shortfall on the sale of the property, this makes little difference. The appeal is dismissed with costs of $1,500 to the respondent bank and costs of $1,000 to London Life.

Freeman, J.A.

Concurred in: Hallett, J.A.

Matthews, J.A.

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