

In the Privy Council.

ON APPEAL

FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

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BETWEEN—MONTREAL TRUST COMPANY ... (*Defendant*) APPELLANT
AND
THE BRITISH COLUMBIA LAND AND
INVESTMENT AGENCY LIMITED ... (*Plaintiff*) RESPONDENT.

CASE FOR THE APPELLANT.

1.—This is an Appeal from a final Judgment of the Court of Appeal for British Columbia dated the 8th January, 1935, affirming a final Judgment of the Supreme Court of British Columbia pronounced on the 19th June, 1934, as amended by an Order dated the 20th July, 1934.

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2.—The question in this Appeal is, in effect, whether the Appellant is liable to the Respondent in respect of the principal and interest secured by a Mortgage dated the 15th January, 1925, and made between the Prudential Holdings Limited of the first part and the Respondent of the other part. The said Supreme Court and a majority of the said Court of Appeal (the Honourable Mr. Justice M. A. Macdonald dissenting) have held that the Appellant is so liable.

3.—By the said Mortgage dated the 15th January, 1925, the Prudential Holdings Limited mortgaged to the Respondent a certain parcel or tract of land therein more particularly described, and situate in the City of Vancouver, in the Province of British Columbia, to secure a loan of \$13,000.00 with interest thereon at 6 per centum per annum. The said mortgage contained a covenant by the Prudential Holdings Limited as mortgagors for payment of the said mortgage money and interest.

4.—The property comprised in the said mortgage is hereinafter referred to as “the Powell Street property.”

20 5.—In addition to the Powell Street property the Prudential Holdings Limited was also entitled (subject to a mortgage thereon) to certain other property in the said City of Vancouver, which is hereinafter referred to as “the Burrard Street property.”

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6.—The Prudential Holdings Limited is a Company which one T. R. Nickson caused to be incorporated in or about the year 1924 for the purpose of acquiring and dealing in parcels of real estate. The said Nickson was at all material times the president and the principal shareholder of the said Company. He held all the shares of the Company except two, one of which was held by one H. S. Coulter (who was the secretary of the Company) and the other of which was held by another person. At the date of the Indenture dated the 15th February, 1926, hereinafter mentioned, the said Nickson and Coulter were the only directors of the said Company.

7.—The principal business of the said Nickson was that of a contractor, and he carried on such business through a company called the Nickson Construction Company, which he controlled. The last-named company banked with the Vancouver branch of the Royal Bank of Canada, and the manager of such branch was one B. L. Mitchell. 10

8.—In February, 1925, the Nickson Construction Company was indebted to the said Bank to the extent of at least \$15,500.00 and the Bank was pressing the said Nickson for payment of this amount. The said Nickson accordingly approached a friend of his, one C. V. Cummings, for financial assistance to enable him to pay off the said Bank debt. The said Cummings also banked with the Vancouver Branch of the said Bank. 20

9.—It was eventually agreed between the said Nickson (on behalf of the Prudential Holdings Limited) and Cummings, that the latter should lend to the Prudential Holdings Limited a sum of \$15,500.00 on the security of a mortgage of that Company's equity of redemption in the Powell Street and the Burrard Street properties. Before paying over any money in pursuance of the said agreement the said Cummings, who was desirous that his name should not be disclosed in connection with the proposed transaction, asked the said Mitchell if he (Cummings) could make the said advance on the said security without his name appearing in any way. Cummings also indicated to the said Mitchell that, with a view to simplifying realisation in the event of a sale, the transaction should take the form of a conveyance of the said properties. The said Mitchell advised him that it could be arranged for his name to remain undisclosed with the aid of the Appellant and telephoned to one Robert Bone, who was the Appellant's manager, advising him of the proposed transaction (but without disclosing Cummings' name), informing him that an indemnity would be taken from the party concerned and inviting the Appellants' assistance in carrying the matter through. The said Bone agreed to the proposal, and it was arranged between him and the said Mitchell that the said properties should be transferred to the Appellant as the nominee of or trustee for the undisclosed party concerned. 30

10.—The said Mitchell (who from that time onwards acted as intermediary in the matter for all parties concerned) then asked a Mr. Tupper, who was the Solicitor for the said Bank, to act in the matter on behalf of the Appellant and to investigate the title of the Prudential Holdings Limited to the said properties. 40

11.—By an Indenture dated the 15th February, 1926, and made between

the Prudential Holdings Limited (thereinafter called "the Grantor") and the Appellant (thereinafter called "the Grantee") it was witnessed that in consideration of \$15,500.00 then paid by the Grantee to the Grantor the Grantor did grant unto the Grantee, his heirs and assigns for ever, the Burrard Street property and the Powell Street property, subject to the said mortgage on the Burrard Street property, and subject also to the said Mortgage dated the 15th January, 1925, on the Powell Street property in favour of the Respondent. By the said indenture the Grantor covenanted with the Grantee (*inter alia*) that he had the right to convey the said lands to the Grantee notwithstanding any act of the Grantor, and that the Grantee should have quiet possession of the said lands free from all encumbrances, and that the Grantor had done no acts to encumber the said lands.

12.—At the date of the said indenture the Prudential Holdings Limited well knew that the Appellant was taking a grant of the said properties as nominee of or trustee for the said Cummings, and was entering into the said indenture in such capacity and no other.

13.—At the date of the said indenture it was the mutual intention of the Prudential Holdings Limited and the said Cummings that, notwithstanding the form of the said indenture, the properties comprised therein were to stand only as security for the repayment of the said advance of \$15,500.00 by Cummings. The said indenture was executed for the purpose of carrying into effect the agreement between the said Nickson (on behalf of the Prudential Holdings Limited) and the said Cummings referred to in paragraph 9 hereof and for no other purpose, and it was not the intention of the parties concerned, or alternatively it was not the intention of the said Cummings, that the said properties should be transferred by the Prudential Holdings Limited otherwise than by way of mortgage.

14.—It appears from the minute book of the Prudential Holdings Limited that at a meeting of the directors of that Company, held on the 15th February, 1926, it was moved by the said Nickson, and seconded by the said Coulter, that the said Company authorised and confirmed the sale of the Powell Street and Burrard Street properties to the Appellant at the price of \$15,500.00, "the said Montreal Trust Company to assume all mortgages against the properties hereby authorised "to be sold." Neither the said Cummings nor the Appellant knew of the said resolution (which did not accurately describe the intention of the Prudential Holdings Limited or of the said Cummings or of the Appellant in regard to the transaction which was to be effected) until some time after the said Indenture of the 15th February, 1926, had been executed.

15.—On the 18th February, 1926, the said Mitchell drew upon funds provided by the said Cummings a cheque in favour of the Appellant for \$15,500.00 so that the Appellant might be in funds to play its part in the said transaction, and the Appellant drew two cheques dated the 18th and 19th February, 1926, for \$15,033.11 and \$466.89 respectively in favour of the Prudential Holdings Limited. The said cheques were subsequently endorsed by the said Nickson and applied in payment off of the said indebtedness of the Nickson Construction Company to the Bank.

p. 111

16.—At the instance of the said Mitchell the said Cummings executed a Deed of Indemnity, dated the 18th February, 1926, in favour of the Appellant. The said Mitchell sent a copy of this deed (but with the name of the said Cummings left blank) to the Appellant, and retained the original to be delivered to the Appellant should the necessity for enforcing it arise.

17.—Some months later the Appellant sold the Burrard Street property to a purchaser and paid over the net proceeds of the sale to the said Bank, which accounted for the same to the said Cummings.

18.—The Appellant proceeded to manage the Powell Street property, collecting the rents, effecting repair, etc. So far as the rents collected would extend the Appellant applied the same to discharging the outgoings on the said property and paid the interest to the Respondent on its said mortgage. The rents received were not sufficient for all these purposes, and from time to time the Appellant applied to the said Bank for further moneys, and the Bank obtained such moneys from the said Cummings. 10

p. 123

19.—At all material times subsequent to the said Indenture of the 15th February, 1926, Nickson continued to regard himself, or the Prudential Holdings Limited, as still being the owner of the Powell Street property, and (as appears from a letter written by him on the 20th June, 1927, to the said Mitchell) granted an option to purchase the said property to one P. Burns. By the same letter he requested Mitchell to get ready a statement showing how much was owing to the Appellant. 20

p. 148

20.—By an Indenture dated the 1st June, 1933, it was witnessed that for the consideration therein mentioned, the Prudential Holdings Limited assigned to the Respondent the benefit and advantage of all claims or rights which the assignor had or thereafter might have against the Appellant either at law or in equity, or whether by way of claim for indemnity in respect of the said Mortgage dated the 15th January, 1925, or the principal, interest or any other moneys remaining unpaid thereunder or otherwise howsoever, and did assign unto the Respondent all the right, title, interest, claim and demand which the assignor had or thereafter might have against the Appellant under or with respect to the said mortgage and the said Conveyance dated the 15th February, 1926, or either of them, and whether the said claim arose or should arise under an express or under an implied covenant. 30

p. 150

21.—On the 23rd June, 1933, the Respondent gave notice of the said assignment to the Appellant.

22.—On the 2nd August, 1933, the Respondent instituted

THE PRESENT SUIT

p. 1

p. 3

claiming \$1,085.95 representing interest alleged to be due under the said Mortgage dated the 15th January, 1925. The Respondent delivered an Amended Statement of Claim whereby it pleaded (*inter alia*) that by virtue of the said Indenture, dated the 15th February, 1926, the Prudential Holdings Limited became entitled to be indemnified by the Appellant against its obligation to pay the moneys payable 40

by it under and by virtue of the terms of the said mortgage : alternatively that for the reasons therein alleged the Appellant bound itself and specifically agreed to assume and pay the said mortgage and to indemnify Prudential Holdings Limited against its said obligation : and the Respondent further pleaded the said Deed of Assignment, dated the 1st June, 1933.

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23.—By paragraphs 4 to 7 of its Amended Defence the Appellant pleaded p. 6 as follows :—

10 “ 4. In further answer to the whole of the Amended Statement of Claim, the Defendant says that on or shortly before the 15th day of February, 1926, the late Charles Victor Cummings, who is hereinafter referred to as ‘ Cummings,’ verbally agreed to advance by way of loan to the said Prudential Holdings Limited the sum of \$15,500.00 and the said Prudential Holdings Limited verbally agreed to secure repayment to Cummings of such sum, together with interest thereon, by conveying to Cummings inter alia the lands described in paragraph 1 of the Amended Statement of Claim.

20 “ 5. In accordance with his said agreement Cummings advanced the said sum of \$15,500.00 to the said Prudential Holdings Limited by causing the Montreal Trust Company to pay the same to the said Prudential Holdings Limited for him and on his behalf and he requested the said Prudential Holdings Limited in accordance with its said agreement to convey the said lands to his nominee, the Defendant, to be held by the Defendant in trust for Cummings upon the terms aforesaid, that is to say, as and by way of a mortgage to secure the repayment of the said sum and interest.

“ 6. Pursuant to the said request the said Prudential Holdings Limited conveyed the said properties to the Defendant by a Conveyance dated the 15th day of February, 1926.

30 “ 7. The Defendant acted at all times solely as the nominee of and trustee for Cummings.”

24.—By its Reply and Joinder of Issue the Respondent contended that the Appellant was estopped from alleging the matters pleaded by paragraphs 4 to 7 of its Amended Defence as aforesaid for the reasons therein alleged. p. 7

25.—The Appellant brought in as third parties the executors of the said Cummings, who had died, and such executors admitted liability under the Deed of Indemnity referred to in paragraph 16 hereof.

26.—The suit came on for hearing on the 19th June, 1934, before the Hon. Mr. Justice D. A. McDonald.

27.—The said Coulter was called as a witness for the Appellant and he stated p. 33, l. 16 40 (amongst other things) as follows :—

“ Well, as I remember the transaction, Mr. Cummings asked me as Secretary of the Prudential Holdings the particulars of the land and stated to me that he did not want the land, that he would not hold it in his own name and that the Montreal—well, this is hearsay of

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“course—he had been told by his bank it could be arranged for a trust company to hold the land for him. He further stated that he did not intend to keep the land, that he took it, he would sell it, but that anything above, anything received upon the sale above what he had advanced to Nickson was to be Nickson’s.

“Mr. Robertson: Q. Now was Nickson a party to this transaction too?—A. Nickson talked that over with me also on that same basis.”

* * * * *

p. 34, l. 8

“Mr. Robertson: Q. Mr. Coulter, as secretary of Prudential Holdings and one of its directors who passed the resolution authorising the execution of the deed, what was your knowledge of the position of the Montreal Trust in the transaction?—A. That they were to hold the land as for Mr. Cummings.

“The Court: Q. Had you any communication with them whatever about it?—A. I don’t remember, my Lord. Just the one fixed memory I have is that Mr. Cummings was not to hold it in his own name.”

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p. 34, l. 24

“Mr. Robertson: Q. Did you get this same information from Mr. Nickson?—A. Yes; it was understood.

“Q. He was president of the Prudential Holdings then?—A. Yes.” 20

p. 35, l. 10

28.—The Appellant’s Counsel also asked the said Coulter whether the said resolution of Prudential Holdings Limited, dated the 15th February, 1926, did correctly describe the transaction, but the learned Judge (wrongly, as the Appellant contends) excluded his evidence on this point.

p. 45, l. 40

29.—The said Bone was also called as a witness. When asked in cross-examination whether the said resolution did set out the transaction between the Appellant and Prudential Holdings Limited, he said: “Other than the assumption—no definite intention as to the assumption of the mortgages. Q. Why do you say that?—A. Well it was not our intention to assume the mortgages,” and again: “Q. Does not the resolution, Mr. Bone, correctly state your understanding of the transaction?—A. Not in this assumption of the mortgages. We had no intention of assuming those mortgages. We are very specific in that line.” 30

p. 47, l. 41

p. 52, l. 44

30.—The evidence of the said Mitchell was taken on commission. He was asked (amongst other things): “Q. Do you recall in February of 1926 any dealings that you had with Mr. Nickson and with Mr. Cummings?—A. I do. Q. Now I would like you, as briefly as possible, to just tell us what those dealings were?—A. At that time in early February, 1926, the Nickson Construction Company Limited were indebted to the bank in the amount of \$15,500. As the loan developed very unsatisfactorily and the security which we held proved to be worthless, consequently I sent for Mr. Nickson and told him this loan must be repaid immediately. The following morning I had a visit from the late C. V. Cummings wherein he told me that he had a call from Mr. Nickson to ask him to make him an advance of \$15,500 to be used to retire the advance which Mr. Nickson claimed he had from the bank. Cummings called to verify this 40

“ as to amount and stated that Nickson had offered security of two parcels of real estate. This real estate was held by the Prudential Holdings Limited, a company which Nickson controlled. Cummings then said to me ‘ I don’t want to get mixed up in this transaction personally if I can avoid it. I don’t want to have my name appear.’ And he asked me if there was any way whereby I could suggest it might be handled without his name appearing. I told him the only way I knew to handle such transactions would be to call upon a trust company.”

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10 “ Q. Was anything said by Mr. Nickson or Cummings as to any possible surplus that might be?—A. It was distinctly understood that any surplus resulting from the sale of the properties over and above the amount of the advance would go to Nickson. Q. Would it go to Nickson?—A. The Prudential Holdings.”

p. 59, l. 1

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“ Q. Did Mr. Nickson ever say anything to you that would indicate that he still considered himself as owner of these properties?—A. In every conversation I had with him.”

p. 59, l. 44

31.—Much of the evidence of the said Coulter, Bone and Mitchell was objected to by the Counsel for the Respondent, and in many instances such objection was (wrongly, as the Appellant contends) upheld by the learned Judge.

20 32.—By his Judgment, the learned Judge, after stating that “ in view of the documents that were executed and registered it is my opinion that the Defendant Company cannot now be heard to aver as against the Plaintiff that it had some secret transaction with third parties of whom the Plaintiff knew nothing, as a result of which it is now said that the Prudential Holdings Company, and the Plaintiff as its assignee, lost the right to be indemnified,” gave Judgment for the Respondent for the amount claimed.

p. 50

30 33.—The Appellant appealed against the said Judgment and the Appeal was heard on the 8th January, 1934, by the Hon. the Chief Justice, the Hon. Mr. Justice M. A. Macdonald and the Hon. Mr. Justice McQuarrie, who dismissed the Appeal, the Hon. Mr. Justice M. A. Macdonald dissenting.

40 34.—The Hon. Mr. Justice M. A. Macdonald in his Judgment stated that “ it is clear to me that the written documents presently referred to were not intended to finally embody the entire agreement between the parties. Parol evidence was therefore admissible to show that a document *ex facie* a deed was in fact a mortgage,” and after reviewing the evidence which had been given in the Court below found “ that Appellant as a nominee for Cummings held this property as security for a debt ” and that accordingly the Appellant never came under any obligation to indemnify Prudential Holdings Limited in respect of the said mortgage to the Respondent. He also held that the Respondent’s plea of estoppel was ill-founded and in addition found that Nickson was “ well aware that the Appellant Company was Cummings’ nominee holding the security for him.”

p. 78, l. 11

p. 84, l. 11

p. 80, l. 26

35.—On the 18th April, 1935, the Appellant obtained final leave to appeal to His Majesty in Council from the said Judgment of the Court of Appeal. The Appellant humbly submits that this Appeal should be allowed for the following, amongst other

REASONS.

- (1) Because to the knowledge of the Prudential Holdings Limited the Powell Street property was conveyed to the Appellant, by the Indenture dated the 15th February, 1926, not as the real purchaser thereof, but merely as a nominee or trustee, namely, as the nominee of or as trustee for the said Cummings and in no other capacity. 10
- (2) Because the Powell Street property was conveyed to the Appellant by the said indenture by way of mortgage only and not by way of sale.
- (3) Because the relationship of vendor and purchaser never existed between the Prudential Holdings Limited and the Appellant in relation to the Powell Street property.
- (4) Because the Prudential Holdings Limited never acquired any right to be indemnified by the Appellant against liability to the Respondent under the said Mortgage dated the 15th January, 1925.
- (5) Because the Respondent acquired no right from the Prudential 20 Holdings Limited to be indemnified by the Appellant in respect of the said mortgage.
- (6) Because the Judgment of the Hon. Mr. Justice D. A. McDonald and the Judgments of the majority of the Court of Appeal were wrong and ought to be set aside.
- (7) Because the Judgment of the Hon. Mr. Justice M. A. Macdonald in the Court of Appeal was right for the reasons given therein.

CHARLES R. R. ROMER.

In the Privy Council.

ON APPEAL

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BETWEEN

MONTREAL TRUST COMPANY

(Defendant) APPELLANT

AND

THE BRITISH COLUMBIA LAND AND
INVESTMENT AGENCY LIMITED

(Plaintiff) RESPONDENT.

CASE FOR THE APPELLANT.

LINKLATERS & PAINES,

2 Bond Court,

Walbrook, London, E.C.4,

Solicitors for the Appellant.