P.C.
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Judgment 1964

In the Privy Council

No. 12 OF 1964

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

FARRIER-WAIMAK LIMITED — Appellant

AND

THE BANK OF NEW ZEALAND — Respondent

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

RECORD OF PROCEEDINGS

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78664

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In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

FARRIER-WAIMAK LIMITED — Appellant

AND

THE BANK OF NEW ZEALAND — Respondent

RECORD OF PROCEEDINGS

In the Supreme Court of New Zealand.

No. 1 Statement of Claim A105/61.

No. 1

STATEMENT OF CLAIM A.105/61.
IN THE SUPREME COURT OF NEW ZEALAND
CANTERBURY DISTRICT
CHRISTCHURCH REGISTRY.

IN THE MATTER of the Wages Protection and Contractors' Liens Act, 1939

— and —

IN THE MATTER of a Claim for Enforcement of a Lien thereunder

10

between

FARRIER-WAIMAK LIMITED, a duly incorporated Company having its Registered Office at 140 King Street, Christchurch, and carrying on business there and elsewhere as Shingle Merchants and Contractors

Plaintiff

and

20

HORNBY DEVELOPMENT LIMITED, a duly incorporated Company having its Registered Office at Christchurch

First Defendant

and

HALFORD ROBERT PARKER, of 456 Main South Road, Islington, Stockman

Second Defendant

In the Supreme Court of New Zealand.

No. 1 Statement of Claim A105/61.

continued.

The Plaintiff by its solicitor FREDERICK JOHN SHAW says:

1. THAT at all material times the First Defendant was registered as proprietor of all that land firstly referred to in the Schedule hereto and at all such times the Second Defendant was registered as proprietor of all that land secondly referred to in the Schedule hereto.

2. THAT between the 17th day of November 1960 and the 31st day of March 1961 the Plaintiff carried out and performed sewerage work on and affecting the said lands under a Contract with the First Defendant.

3. THAT the First Defendant has made default under the said Contract and it and the Second Defendant have failed to pay to the plaintiff the Contract price now owing amounting in all to NINE THOUSAND FIVE HUNDRED POUNDS (£9,500.0.0). 10

4. THAT between the 2nd day of August, 1960 and the 20th day of April, 1961 the Plaintiff carried out and performed work on and affecting the said lands, that is to say: hire of machinery and supply of metal under a Contract with the First Defendant.

5. THAT the First Defendant has made default under the said Contract and it and the Second Defendant have failed to pay to the Plaintiff the Contract price now owing amounting in all to TWO THOUSAND SIX HUNDRED POUNDS (£2,600.0.0). 20

6. THAT on the 28th day of April, 1961 the Plaintiff caused to be served upon the First Defendant a Notice of Lien pursuant to the said Act requiring the First Defendant to take the necessary steps to see that the said amount of £9,500.0.0 was paid or secured to the Plaintiff.

7. THAT the First Defendant has failed to take any such necessary steps and there is still due and owing by the First Defendant to the Plaintiff the said sum of £9,500.0.0.

8. THAT on the 2nd day of May, 1961 the Plaintiff caused to be served upon the First Defendant a Notice of Lien pursuant to the said Act requiring the First Defendant to take the necessary steps to see that the said sum of £2,600.0.0 was paid or secured to the Plaintiff. 30

9. THAT the First Defendant has failed to take any such necessary steps and there is still due and owing by the First Defendant to the Plaintiff the said sum of £2,600.0.0.

10. THAT on the 26th day of May, 1961 the Plaintiff caused to be served upon the Second Defendant a Notice of Lien pursuant to the said Act requiring the Second Defendant to take the necessary steps to see that the said amounts of £9,500.0.0 and £2,600.0.0 were paid or secured to the Plaintiff.

11. THAT the Second Defendant has failed to take any such necessary steps and there is still due and owing by the Second Defendant to the Plaintiff the said sums of £2,600.0.0 and £9,500.0.0 totalling TWELVE 40

THOUSAND ONE HUNDRED POUNDS (£12,100.0.0).

WHEREFORE the Plaintiff claims:—

(a) A Declaration that it is entitled to a lien over the lands described in Schedule hereto under the said Act.

(b) An order directing the sale of the lands described in the said Schedule to satisfy the said amount of £12,100.0.0.

(c) An Order directing the First Defendant and/or the Second Defendant to pay to the Plaintiff the said sum of £12,100.0.0.

(d) Such further Order or other relief as to this Honourable Court may seem just or equitable.

THE SCHEDULE HEREINBEFORE REFERRED TO

The Land secondly hereinbefore referred to:—

All that piece of land situated in Blocks IX and XIII of the Christchurch Survey District containing ELEVEN ACRES THREE ROODS AND TWENTY-SEVEN PERCHES (11 acres 3 roods & 27 perches) being Lot 2 on Deposited Plan No 7326 part Rural Section 1791 and being the whole of the land in Certificate of Title Volume 367 Folio 284 Canterbury Registry.

The Land secondly hereinbefore referred to:

All that piece of land situated in Blocks IX and XIII of the Christchurch Survey District containing FIFTEEN ACRES ONE ROOD AND TWENTY-FOUR AND ONE TENTH PERCHES (15 acres 1 rood & 24 & 1/10th perches) being part Lot 2 on Deposited Plan No. 15666 part of Rural Sections 1792 and 3353 and being the whole of the land in Certificate of Title Volume 589 Folio 82 Canterbury Registry.

THIS Statement of Claim is filed by FREDERICK JOHN SHAW Solicitor for the Plaintiff whose address for service is at the offices of Messieurs Ralph Thompson, Thomas and Shaw, 168-170 Hereford Street, Christchurch.

No. 2.

In the Supreme Court of New Zealand.

No. 2
Amended Statement of Defence
A105/61
20th October, 1961.

AMENDED STATEMENT OF DEFENCE A105/61

Dated the 20th day of October, 1961.

The Third Defendant by its Solicitor Peter Wynn Williams says:

1. IT admits the allegations contained in Paragraph 1 of the Statement of Claim.

2. IT does not know and therefore denies the allegation contained in Paragraph 2 of the Statement of Claim.

In the Supreme Court of New Zealand.

No. 2
Amended Statement of Defence A105/61 20th October, 1961.

continued

3. IT does not know and therefore denies the allegation in Paragraph 3 of the said Statement of Claim.

4. IT does not know and therefore denies the allegation in Paragraph 4 of the said Statement of Claim.

5. IT does not know and therefore denies the allegation in Paragraph 5 of the said Statement of Claim.

6. IT does not know and therefore denies the allegation in Paragraph 6 of the said Statement of Claim.

7. IT does not know and therefore denies the allegation in Paragraph 7 of the said Statement of Claim. 10

8. IT does not know and therefore denies the allegation in Paragraph 8 of the said Statement of Claim.

9. IT does not know and therefore denies the allegations in Paragraph 9 of the said Statement of Claim.

10. IT does not know and therefore denies the allegations in Paragraph 10 of the said Statement of Claim.

11. IT does not know and therefore denies the allegations in Paragraph 11 of the said Statement of Claim.

12. AND for a further defence the Third Defendant says that if the sewerage work referred to in Paragraph 2 of the Statement of Claim was in 20 fact done then it was completed on or before the 29th day of March 1961 and that the Plaintiff's claim for a lien in respect of such work (which the Third Defendant denies) was commenced after the time prescribed by the above Act and therefore any such lien is deemed to be extinguished.

13. AND for a further defence the Third Defendant says that if the hire of machinery and supply of metal referred to in Paragraph 4 of the Statement of Claim was in fact wholly or partly carried out then it was completed before the 30th day of March 1961 and that the Plaintiff's claim for a lien in respect of such work (which the Third Defendant denies) was commenced after the time prescribed by the above Act and 30 therefore any such lien is deemed to be extinguished OR ALTERNATIVELY that the alleged hiring of machinery and supply of metal referred to in Paragraph 4 of the Statement of Claim does not comprise a continuous contract but a series of contracts each of which was completed before the 30th day of March 1961.

14. AND for a further defence the Third Defendant says that if the work described in Paragraphs 2 and 4 of the Statement of Claim was in fact done then any liens to which the Plaintiff is entitled (which the Third Defendant denies) over the separate parcels of land firstly and secondly described in the Schedule to the Statement of Claim is limited to the value of 40 work actually done to each separate parcel of land.

In the Supreme Court of New Zealand.

No. 2 Amended Statement of Defence A105/61 20th October, 1961.

continued.

15. AND for a further defence that advances made by the Third Defendant to the First Defendant on the security of a Memorandum of Mortgage dated the 15th day of August 1960 affecting the land firstly described in the Schedule to the said Statement of Claim and given by the First Defendant to the Third Defendant have priority over any lien claimed by the Plaintiff in respect of the alleged sewerage work and hire of machinery and supply of metal.

16. AND for a further defence that the contract for hiring of machinery referred to in paragraph 4 of the Statement of Claim is not work
10 in respect of which a lien can be claimed.

17. AND for a further defence the Third Defendant says that the Plaintiff cannot claim liens in respect of the alleged sewerage work and hire of machinery and supply of metal because no monies have become payable by the First Defendant to the Plaintiff in respect of either of such works.

This Amended Statement of Defence was filed by Peter Wynn Williams, Solicitor for the Third Defendant, whose address for service is at the offices of Messrs Duncan Cotterill and Co., 97 Worcester Street, Christchurch.

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No. 3

STATEMENT OF CLAIM A.114/61

In the Supreme Court of New Zealand.

No. 3. Statement of Claim A114/61.

The Plaintiff by its Solicitor FREDERICK JOHN SHAW says

1. THAT at all material times the Defendant was registered as Proprietor of all that land referred to in the Schedule hereto.

2. THAT between the 6th day of February, 1961 and the 8th day of May, 1961, the Plaintiff carried out and performed water reticulation work on and affecting the said land under a Contract with the Defendant.

3. THAT the Defendant has made default under the said Contract and it has failed to pay to the Plaintiff the Contract Price now owing,
30 amounting in all to ONE THOUSAND SEVEN HUNDRED AND SIXTY-FIVE POUNDS (£1,765.0.0).

4. THAT between the 17th day of December, 1960 and the 31st day of March, 1961 the Plaintiff carried out and performed Sewerage Work on and affecting the said land under a Contract with the Defendant.

5. THAT the Defendant has made default under the said Contract and it has failed to pay to the Plaintiff the Contract Price now owing amounting in all to EIGHT HUNDRED AND SIXTY-FOUR POUNDS EIGHTEEN SHILLINGS (£864.18.0).

In the Supreme Court of New Zealand.

No. 3. Statement of Claim A114/61.

continued.

6. THAT on the 9th day of June, 1961 the Plaintiff caused to be served upon the Defendant a Notice of Lien pursuant to the said Act requiring the Defendant to take the necessary steps to see that the amounts hereinbefore referred to of £1765.0.0 and £864.18.0 were paid or secured to the Plaintiff.

7. THAT the Defendant has failed to take any such necessary steps and there is still due and owing by the Defendant to the Plaintiff both the sums hereinbefore referred to, totalling TWO THOUSAND SIX HUNDRED AND TWENTY-NINE POUNDS EIGHTEEN SHILLINGS (£2,629.18.0). 10

WHEREFORE the Plaintiff claims:—

(a) A Declaration that it is entitled to a Lien over the land described in the Schedule hereto under the said Act.

(b) An order directing the sale of the land described in the said Schedule to satisfy the said amount of £2,629.18.0.

(c) An Order directing the Defendant to pay to the Plaintiff the said sum of £2,629.18.0.

(d) Such further Order or other relief as to this Honourable Court seems fit.

THE SCHEDULE HEREINBEFORE REFERRED TO 20

All that piece of land situated in Blocks IX and XIII of the Christchurch Survey District Containing ELEVEN ACRES THREE ROODS AND TWENTY-SEVEN PERCHES (11 acres 3 roods & 27 perches) being Lot 2 on Deposited Plan No. 7326 Part Rural Section 1791 and being the whole of the land in Certificate of Title Volume 367 Folio 284 Canterbury Registry.

THIS Statement of Claim is filed by FREDERICK JOHN SHAW Solicitor for the Plaintiff whose address for service is at the office of Messieurs Ralph Thompson Thomas and Shaw, 168-170 Hereford Street, Christchurch. 30

No. 4

In the Supreme Court of New Zealand.

No. 4 Amended Statement of Defence A114/61 20th October, 1961.

AMENDED STATEMENT OF DEFENCE A.114/61.

Dated the 20th day of October, 1961.

The Second Defendant by its Solicitor Peter Wynn Williams says:

1. IT admits the allegation contained in Paragraph 1 of the Statement of Claim.

2. IT does not know and therefore denies the allegation in Paragraph 2 of the Statement of Claim.

3. IT does not know and therefore denies the allegation in Paragraph 3 of the Statement of Claim.

4. IT does not know and therefore denies the allegation in Paragraph 4 of the Statement of Claim.

5. IT does not know and therefore denies the allegation in Paragraph 5 of the Statement of Claim.

6. IT does not know and therefore denies the allegation in Paragraph 6 of the Statement of Claim.

7. IT does not know and therefore denies the allegation in Paragraph
10 7 of the Statement of Claim.

8. AND for a further defence the Second Defendant says that if the water reticulation work referred to in Paragraph 2 of the Statement of Claim was in fact completed on the 30th day of March 1961 the action claiming a lien in respect of such work was commenced after the time provided in the above Act and therefore any such lien is deemed to be extinguished.

9. AND for a further defence the Second Defendant says that if the sewerage work referred to in Paragrah 4 of the Statement of Claim was in fact completed on or before the 31st day of March 1961 the action claiming
20 a lien in respect of such work was commenced after the time provided in the above Act and therefore any such lien is deemed to be extinguished.

10. AND for a further defence the Second Defendant says that advances made by the Second Defendant to the First Defendant on the security of memorandum of mortgage from the First Defendant to the Second Defendant dated the 15th day of August 1960 affecting the land described in the Schedule to the Statement of Claim have priority over any liens claimed by the Plaintiff in respect of the alleged water reticulation work or sewerage work.

11. AND for a further defence the Second Defendant says that the
30 Plaintiff cannot claim liens in respect of the alleged sewerage work or water reticulation work because no monies have become payable by the First Defendant to the Plaintiff in respect of either of such works.

This Amended Statement of Defence was filed by Peter Wynn Williams Solicitor for the Second Defendant whose address for service is at the offices of Messrs Duncan Cotterill and Co. 97 Worcester Street, Christchurch.

In the Supreme Court of New Zealand.

No. 5 Reasons for Judgment by Henry J.

No. 5

REASONS FOR JUDGMENT OF HENRY J.

These two actions, brought under the provisions of the Wages Protection and Contractors' Liens Act 1939, were heard together. The claims are for liens for roading, sewerage, water reticulation and excavation work done and metal supplied by plaintiff at the request of the defendant Hornby Development Limited (hereinafter called "the Development Company") for the purpose of carrying out a subdivision into residential sections of two adjoining freehold properties containing 11 acres 3 roods 27 poles and 15 acres 1 rood 24.1 poles respectively. These two blocks have been, and will 10 in the judgment, be referred to respectively as "the 11 acre block" and "the 15 acre block". At all material times the Development Company has been the registered proprietor of the 11 acre block. At all material times the defendant Halford Robert Parker has been, and still is, the registered proprietor of the 15 acre block, but, on October 28, 1959, he entered into an agreement with one Sydney Raymond Forsyth to sell the said land to Sydney Raymond Forsyth "as agent". A deposit of £500 was paid and possession given. It appears that Sydney Raymond Forsyth was the agent of the Development Company. Throughout the hearing, and in all dealings, the Development Company has been treated as the person entitled to the 20 beneficial interest created by the said agreement for sale and purchase. Nothing turns on the naming of Sydney Raymond Forsyth in the said agreement. 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 30, 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 the reason that a Caveat No. 531003 entered on August 4, 1960, by the Staffordshire Finance Corporation Limited prevented registration. Letters 30 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. 40 The mortgage document was then amended by the Bank inserting thereon the following 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".

On July 25, 1961, the mortgage was accepted for registration in the altered form. It should be noticed that the caveats prevented registration whilst no such bar was created by the liens although the Registrar would not accept the mortgage unless the charge given by the mortgage was made subject to the liens entered on the title at the date of registration. It should also be noticed that the District Land Registrar was bound to enter the liens when required to do so and that the caveats could not prevent such liens from being entered on the relevant Certificate of Title. The only document of charge produced in this Court on behalf of the Bank in the
10 said mortgage, now registered as No. 543319, in which the charge created is expressly stated to be subject to both the said liens. The Development Company is now in liquidation with insufficient assets to pay its secured creditors. The liquidator, since the unsecured creditors have no interest, sought and obtained leave to take no part at the hearing.

The scheme of subdivision, which was drawn up on behalf of the Development Company by a firm of registered surveyors known as J. L. Davis and Son, applied to the whole of both blocks and all work was done without reference to the fact that there were separate titles and without reference to the fact that Halford Robert Parker was still the registered owner
20 of the 15 acre block. The scheme of subdivision and work in roading it and providing for sewerage and water reticulation was such that the two blocks lost their individual identity and were being developed as one composite area in the name of the Development Company and irrespective of the dividing boundary between the two properties.

The present actions claim liens forthe following work done or machinery equipment and material supplied by plaintiff for the Development Company's use in the development of the said scheme of subdivision, namely:—

(1) Sewerage work done on both properties between November 17, 1960, and March 30, 1961. The claim is for £9,500.

30 (2) The use of machines together with their operators for road excavation work and the supply of metal. The sum of £2,597.10.7d is claimed. The supply of metal was to the 11 acre block only but the other work appears to apply to both blocks.

(3) Water reticulation work done on the 11 acre block. The whole area was intended to be reticulated but the work claimed for was done only on the 11 acre block. The sum claimed is £1,765.

Items (1) and (2) are claimed in Action A.105/61 which was commenced on May 29, 1961. Item (3) is claimed in Action A.114/61 which was commenced on June 12, 1961. In each case the defence has contended
40 that plaintiff has not proved that the actions were commenced within the period of sixty days after the completion of the "work" as required by s.34 (4) of the Act. In respect of Item (2) it is claimed that the use of the machinery with the services of the operators supplied by plaintiff was not "work" within the meaning of the Act, and further that the various items were individual contracts and not a continuous contract for the sum

claimed. If it is established that the actions are in time and that plaintiff is entitled to liens for one or more of the items claimed, then a number of incidental questions arise. The first is whether or not the respective liens rank in priority to the Bank's mortgage, and, if so, for what amount. It will be appreciated that the Bank has a charge over only the 11 acre block, whilst a very substantial proportion of the work was done on the 15 acre block. The next question is to define the charge which attaches to the 15 acre block which is still registered in the name of Halford Robert Parker and is still held under the said agreement for sale and purchase by Sydney Raymond Forsyth "as agent." If the bank mortgage is held to be subject to prior charges in respect of liens in favour of plaintiff, then it is agreed that the further question of requiring plaintiff to marshall its charges so that its remedy against the 15 acre block is first enforced, is to be reserved for further argument. There is also a question whether or not a period of credit has been allowed thus limiting the remedies presently available. The first question is, therefore, to determine, irrespective of the block on which the work was actually done, whether the plaintiff has established that it has done work and commenced within time an action which will support a lien under the Act, and, if so, the amounts in respect of which it can so support a lien. When a decision has been made on these points, the remaining questions can then be considered in the light of the findings made.

[Several pages of His Honour's judgment, dealing with matters irrelevant to the subsequent Appeals, are omitted by consent of the parties.]

The lien to which plaintiff is entitled is, by s.21, upon the estate or interest of the employer in the land. The Development Company (or Forsyth) is the employer, so the lien attaches to its (or his) interest. It is claimed by the Bank that the liens should be so apportioned that the 11 acre block, over which the Bank holds a mortgage, should bear only that amount which represents a fair value of the work done on the 11 acre block. There is no authority on this point. It has been held that, while work is done on one portion only, the charge attaches to the employer's title to the whole of the piece of land: see **Bassett v. Spurdle and McLeod** 26 N.Z.L.R. 84, and **Black v. Shaw and Official Assignee in Bankrupty of Walter Shaw** (supra). However, at the end of his judgment in **Black v. Shaw and Official Assignee in bankruptcy of Walter Shaw,** Denniston J. said (p. 197):— "The lien, in my "opinion, attaches to all the land included in any instrument of title over "any part of which the road is constructed. It would follow that there "should be separate liens over the part included in each separate parcel "owned by the employer in respect of the part of the road included in such "parcel." Counsel for the Bank argued that, in this passage, "separate liens" must be read as "separate liens for a proportionate part of the work "which was done on the land in each title", this because it is the only meaning which can reasonably be given to the concluding words "in respect of the "part of the road included in such parcel". Although these latter words are by no means clear, a perusal of the case shows that no question of apportionment of the nature now under consideration arose. Indeed, the Court was

called upon to answer two specific questions and it was in answer to the second that the passage referred. The question was: "If a lien exists is it "limited to the road, or does it extend to the land through which the road "has been formed?" (p. 195). No reference is made as to amount or as to apportionment of amount so it seems clear that the point now under consideration was not in the mind of the Court.

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 con-
10 tracts 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 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 subdivisional scheme as a whole without distinction
20 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 shown 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
30 on each title, should show on its face that it secures the same sum as that which is charged on the other.

Although the registered mortgage produced by the Bank clearly states on its face that the charge is subject to the liens now established by the findings already made, it is claimed that the Bank's charge ranks in priority to the liens. 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
40 in favour of the Bank. This proposition is founded on **Commercial Property and Finance Coy v. Official Assignee of Waghorn and A. and T. Burt** Vol XXIV (1905) N.Z.L.R. 65/5. 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 545555 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. It was claimed that notwithstanding the alteration and subsequent registration as a charge inferior to the liens, the mortgage still operated as a charge in priority to the liens. It will be appreciated that by complying with certain requisitions, the Bank could have registered its mortgage long before the liens appeared on the title. The Bank held its mortgage from August 15, 1960, until January 30, 1961, when it was first presented for registration. Through failure to comply with requisitions the document was not entered on the register until July 25, 1961. In the meantime the liens were entered on May 30, and June 13, 1961. The question was not sufficiently argued at the hearing so I requested that fuller submissions be made in writing. These were filed on March 16, 1962.

To pose the question in short form it is: Can the Bank, having registered the mortgage which ex facie 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? The only document which the Bank can produce is a registered document which clearly creates a charge inferior to the liens. The Bank does not seek to contradict its written document. It, of course, cannot do so in these proceedings. What it seeks to do is to show that the alteration was not material and that the document has always, without the alteration, created, and still creates, a prior charge which exists notwithstanding the alteration and subsequent registration.

Before proceeding to deal with this argument it is necessary to observe that this is not a case where the Bank is claiming to enforce rights against a party to the document. What the Bank is seeking to establish is that, vis-a-vis the plaintiff as lienor, the charge which the Bank now has is not, as appears on the face of the document, a charge which is subject to the liens at all, but is, on the contrary, a charge with a priority over the liens. 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 certain 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.

In the Supreme Court of New Zealand.

No. 5 Reasons for Judgment by Henry J.

continued.

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 execu-
10 tion? 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.

It seems to me that the Bank maybe in a dilemma. If the alteration and registration had the effects which I hold did ensue, and such alteration was not done with the express or implied authority of the mortgagor, then the
20 Bank might well find itself unable to enforce the mortgage against the mortgagor. If so, it would be no more successful against an interested encumbrancer who was not a party to the alteration or in any way concerned with it but who was affected by it. On the other hand, if the Bank had either express or implied authority, in the circumstances, to take, upon registration, an inferior charge, then, of course, that is all the Bank got. Neither view will advance its cause. However, I do not solve the problem merely by posing a dilemma which may not exhaust all possibilities. The real difficulty facing the Bank is that it cannot now treat the document, nor ask this Court in the present proceedings, to treat the document as if it were unregistered. The
30 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:** 1 Coke 99.

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 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
40 instrument which, of course, it now is. It seems to me further that, since the registered charge is clearly inferior to 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 none has been cited, which would permit a registered document, to which the person taking the benefit still adheres, to be

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continued.

treated as if it were still an unregistered document and in a different state from the document as registered.

It is pertinent to examine, step by step, the process of reasoning by which it is claimed that the prior superior charge created by the unregistered instrument still exists nothwithstanding the alteration and subsequent registration. First, it is claimed that it can be shown that the alteration was made after execution. That may be so, and it is clear as a matter of historical sequence that the alteration was so made. Then it is said that the document took full effect and could not be prevented from taking full effect merely because it was subsequently altered. For this proposition a passage from Norton on Deeds, 2nd edn. p. 35 was cited as follows: 10

"No case can be found in which aDeed . . . . which produced its full "effect at the instant of execution, such as a conveyance of land, has "been prevented from taking its full effect because the Deed was altered "after execution."

This passage does not apply for the simple reason that it concerns deeds which produce full effect at the instant of execution. The mortgage did not produce full effect until the right to register it was exercised. This is clear from counsel's argument that registration gave unarguable priority as from registration, a priority which could have been defeated unless registration were effected. I have also drawn attention to the fact that registration had other effects including the fact that the Bank acquired the status of a registered proprietor of a mortgage and the document became part and parcel of the register. 20

Estoppel was the next point dealt with by counsel for the Bank, but, since opposing counsel has not argued this, I do not propose to deal with it. The argument then proceeds on the basis that the adding of the words was a mere formality incidental to registration and was not a material alteration to the mortgage itself. For this proposition **Barker v. Weld** (1885) 3 N.Z.L.R. (S.C.) 104, and in particular the passage at p. 108, was cited. The passage, which I reproduce with the underlinings made by counsel, reads:—**"I am of opinion that the words inserted had no material "effect upon the document or the registration.** Whether they were inserted "or not the mortgage was a second mortgage, although the mortgagee be-"lieved it to be a first mortgage. **The words inserted were only such as the "law would supply.** The mortgagee had the right to have the instrument "registered, and both parties must have contemplated that it was to be regis-"tered, and the insertion of the words in question was necessary to procure "the registration." It was further contended that a passage from **Baalman's Commentary on the Torrens System of New South Wales,** at p. 194, supports the view that the noting of encumbrances was not material. The passage reads:— 30 40

"Except that it clarifies the state of the title for the benefit of the "incoming party, this provision serves little purpose, for a registered

"proprietor cannot hold otherwise than subject to such encumbrances "liens estates or interests as may be notified on the foilum of the Regis- "ter Book."

Barker v. Weld was a decision on its own facts and has been judicially stated "to go a long way". It can readily be distinguished from the instant case. The words had a material effect because, by their addition, prima facie, they altered the first charge which existed on execution to a second charge at the time of registration and enabled the mortgage to be entered on the register as a registered charge subject to the said liens. Entry on the
10 register could not have been effected unless the first equitable charge which the mortgage created on execution was first reduced to the status of a charge which was expressly subject to the liens which had been registered in the meantime. No such state of affairs existed in **Barker v. Weld** which was a case where a first mortgage was executed with the intention that the moneys should be used to discharge an existing first mortgage thus enabling the new mortgagee to take a first charge on the title. By fraud the moneys were not so applied, whereupon the mortgagee altered the document by making it subject to the existing mortgage and registered it as a second mortgage. Johnston J. held that, in those circumstances, the inserted
20 words had no material effect on the document or on registration. This for the reason that the document on execution could not take priority over the registered mortgage so it was second charge although the mortgagee believed otherwise. The learned Judge also held that the law would supply the inserted words. With respect, it is difficult to see the grounds for this observation. But, be that as it may, the alteration in the instant case, ex facie, converted a mortgage which on execution was a first mortgage in every sense into a second mortgage. There is no law which would, in those circumstances, supply the added words. **Barker v. Weld** does not help. The passage from **Baalman's Commentary on the Torrens System in New**
30 **South Wales,** as I read it, merely states that a registered proprietor cannot hold otherwise than in accordance with the state of the title when his estate or interest is entered. That is to say, the Bank, whether or not the alteration was made, would take an inferior registered charge and could take no other charge as a registered proprietor. The extract merely shows that the Bank might have found itself in its present position even if it had not made the alteration. We are not dealing with that case because the Registrar refused to register unless the Bank made its document expressly subject to the liens which had been registered at an earlier time. The Bank made the alteration and took the benefit of registration.

40 **Barker v. Weld** is valuable for the proposition that a mortgagee is entitled to make an immaterial alteration to enable registration to be effected and should be read as being strictly applicable to its own peculiar facts. It does not hold that the addition of the words in question can be made irrespective of the circumstances and that they are always immaterial. The contrary was held in **Brunker v. Perpetual Trustee Co. (Ltd.)** (1937) 57

C.L.R. 555, by a majority (Rich and Dixon JJ.) with Latham C. J. dissenting. That case again was a decision on its own facts. In the circumstances the majority held that the addition was material whilst the dissenting opinion of the Chief Justice construed the circumstances differently and he was able to hold a contrary view. **Barker v. Weld** was discussed. I do not think it is profitable to take extracts from the judgments because they turned on the special facts which, in essence, dealt with an attempt to perfect a gift of Land Transfer land.

The final submission was in the following form:—

> "It is submitted finally that the Bank's mortgage which immedi- 10
> "ately on execution created an equitable charge and was initially pre-
> "sented in a registerable form, having been delayed by a caveat beyond
> "the control of the Bank, should not be deprived of priority over liens
> "which were immune to any delay from the same cause."

To concede this submission would be tantamount to disregarding the registered document and the benefits which the Bank obtained from registration. The price of registration was known to the Bank and it elected to register its mortgage as creating a security subject to the liens. No delay was caused by plaintiff. On the question of delay it will be noted that the Bank was inactive from August 15, 1960 till January 30, 1961, and, 20 according to the correspondence produced, not very active from January 30, 1961, till May 30, 1961, when the first lien was entered. This submission requires no further comment.

It was also submitted that the registration of a lien is simply a notice of a claim for a lien and that any right to a lien is dependent upon a judgment to confirm that right. Plaintiff's counsel argued to the contrary. I do not agree that entry of the lien is simply a notice and that the lien is dependent upon judgment. If judgment is obtained it confirms the fact that the lien was from the moment of entry validly registered as a lien. If judgment is to the contrary, then the lien, although entered on the register, never had 30 validity as a registered charge on the land. As to the nature and effect of a lien generally see **J. J. Craig Limited v. Gillman Packaging Limited** (1962) N.Z.L.R. 201.

It will be noticed that I have not directly dealt with the statutory priority which is conferred on registered "instruments" by s.37 of the Land Transfer Act. If the liens are "instruments" then registration would give undoubted priority over the Bank's mortgage. Counsel for the Bank argued that the definition of "instrument" is not wide enough to include liens under the Wages Protection and Contractors' Liens Act 1939. The matter presents difficulty and can be determined when necessary. I have not found it 40 necessary to determine the question.

The further consideration of the case is adjourned. Any counsel may move for such judgment or other relief as he may think proper on the present

findings. All further questions are reserved accordingly.

Solicitors:

For plaintiff: Wyn-Williams and Co., Christchurch.

For first defendant: Raymond Donnelly Mahon and McKenzie, Christchurch.

For second defendant: T. D. Harman and Son, Christchurch.

For third defendant: Duncan Cotterill and Co., Christchurch.

No. 6.

FORMAL JUDGMENT OF SUPREME COURT

10 THURSDAY THE 10th DAY OF MAY, 1962

BEFORE THE HONOURABLE MR JUSTICE HENRY

UPON READING the Notice of Motion of the Plaintiff herein dated the 3rd day of May, 1962 AND UPON HEARING Mr B. McClelland of Counsel for the Plaintiff, Mr A. B. Harman of Counsel for the Second Defendant and Mr J. R. Woodward of Counsel for the Third Defendant IT IS ORDERED that the Plaintiff is entitled to a Lien under the Wages Protection and Contractors' Liens Act, 1939 in the sum of TWELVE THOUSAND AND NINETY-SEVEN POUNDS TEN SHILLINGS AND THREE PENCE (£12,097.10.3) over all that piece of Land situated in 20 Blocks IX and XIII of the Christchurch Survey District containing ELEVEN ACRES THREE ROODS TWENTY-SEVEN PERCHES (11 acres, 3 roods and 27 perches) being Lot 2 on Deposited Plan Number 7326 part of Rural Section 1791 and being the whole of the Land in Certificate of Title Volume 367 Folio 284 Canterbury Registry AND IT IS FURTHER ORDERED that the Third Defendant shall pay to the Plaintiff the sum of THREE HUNDRED AND FIFTY POUNDS (£350.0.0) inclusive by way of costs and disbursements.

By the Court,

L.S. "P. D. CLANCY"

30 DEPUTY REGISTRAR

In the Court of Appeal of New Zealand

No. 7
Reasons for Judgment (delivered by Turner J.)
6th September, 1963.

No. 7

REASONS FOR JUDGMENT OF THE COURT OF APPEAL DELIVERED BY TURNER J.

This is an appeal from a judgment of Henry J. delivered at Christchurch on May 10th 1962 in two actions heard together by consent before him, wherein he determined the respective priorities of a mortgage given over certain land in favour of appellant and of certain liens registered against the same land and other land by first respondent. The learned Judge held (inter alia) that the liens took priority over the mortgage, and this conclusion is the first of two points involved in the present appeal. 10

The facts are to be found comprehensively surveyed in the judgment appealed from, and it will be necessary in this judgment only to refer to the more important of them. It may be helpful to observe by way of introduction that of three respondents cited, the second and third respondents took no part in the hearing before us. It will be convenient in this judgment to refer to appellant as "the Bank", to first respondent as "the Contractor", to second respondent as "the Development Company", and to third respondent as "Parker" for the sake of clarity. Though, as will be seen, Parker and the Development Company play their parts in the history to be narrated, they had no submissions to make to us as to the outcome 20 of this appeal. The Development Company is now in liquidation, and its unsecured creditors can have no interest in the result; and Parker, as matters stand, cannot be affected.

Two adjoining blocks of land are referred to in the proceedings—the "11-acre block" and the "15-acre block". The Development Company was at all material times the registered proprietor of the 11-acre block. Parker was at all material times the registered proprietor of the 15-acre block; but on October 28th 1959 he entered into an agreement with one Forsyth to sell the said land to Forsyth "as agent". A deposit of £500 was paid, and possession was given. Forsyth was the Development Company's agent, 30 and throughout the proceedings the Development Company has been treated as the person entitled to the beneficial interest created by the agreement for sale and purchase to which we have referred. In August 1960, then, the Development Company was the registered proprietor of the 11-acre block, and also the equitable owner (subject to an outstanding liability for purchase-moneys) of the 15-acre block. On August 15th, requiring financial assistance from the Bank, it executed a Memorandum of Mortgage to the Bank mortgaging the 11-acre block only, to secure moneys to be advanced. This mortgage appeared to be in registrable form, but it was held unregistered until January 30th 1961, when it was presented for registration at the 40 Land Transfer Office by the Bank. It was received for registration and given a number; but before registration was completed, the District Land Registrar notified the Bank that Caveat No. 531003 (presented on August 4th 1960, presumably by the purchaser of a section) prevented registration.

While the Registrar's requisition was still unsatisfied, several other caveats were lodged by other persons with equitable interests. Several letters on the subject of the caveats passed between the Registrar and the Bank. While the Bank's mortgage still remained unregistered, the Contractor presented for registration Statements of Claim setting up two liens. The Statement of Claim in Action No. 105/61 was presented for registration on May 30th 1961 and that in Action No. 114/61 on June 13th, 1961.

It will be remembered that the Bank's mortgage was still not finally registered. At this stage, the Bank, having obtained the consents of the
10 several Caveators, apparently decided to make sure of registration without further argument with the Registrar, and it met his requirements by amending the mortgage document, inserting therein the following words:

> "**Subject** to Liens Numbers 552266 and 553184 **and subject** to Building Line Restrictions in Notices 545555 and 548467 and to Caveats Numbers 531003, 545600, 549383, 552740 and 552955."

With this alteration the mortgage was accepted for registration by the Registrar, and was registered as on July 25th 1961. The Registrar's entry on the back of the registered mortgage reads as follows:—

> "Particulars entered in the Register Book Vol. 367 Fol. 284. Particu-
20 lars produced the 30th January 1961 at 9.47 a.m. and entered 25th July 1961 at 11.54 a.m.

To complete the narrative it will be relevant to point out that the Bank appears to have acted without a solicitor, and to have accepted the responsibility of registering and amending its own mortgage and of conducting the correspondence with the Registrar.

It will be seen, then, that the relevant chronology as regards the mortgage is as follows. The document was executed on August 15th 1960. It was originally presented for registration on January 30th 1961 and was finally registered on July 25th 1961. It is necessary to add one other fact
30 as to time—the Bank advanced moneys on the security of its mortgage, and by 16th September 1960, £9088.6.8d had been paid out. As regards the liens, Action No. 114/61 contained a claim for lien against the 11-acre block only, for water reticulation on that block; the work was commenced about the beginning of February 1961 and certainly long after the date of the Bank's mortgage. Action No. 105/61 contained a double claim (a) for sewerage work done on both properties between November 17th 1960 and March 30 1961, the amount claimed being £9,500 and (b) for use of machines and supply of metal applicable principally, but not (as regards the use of machines) entirely to the 11-acre block, the amount claimed
40 being £2597.10.7d. The time when this last work was done was left obscure by the evidence, but counsel on both sides agreed before us that the appeal could be argued as if the work was not begun until after the date of execution of the Bank's mortgage. It was agreed that the actual date of commencement of the work could be readily ascertained by the parties

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continued.

themselves from their records, and that, if it should turn out to be before the date of the Bank's mortgage, the first point in this appeal would be dealt with on this factual basis as regards the amount of this particular lien. This judgment will therefore proceed upon an assumption of fact which both counsel have agreed that the Court should make, viz. that the work under this claim of lien did not commence until after the date of execution of the Bank's mortgage and the advancement of the moneys thereunder. The scheme of subdivision and the work done in roading the land and in providing for sewerage and water reticulation generally was such that the two blocks ultimately lost their original identity so far as the work was concerned, and were in course of development by the Development Company as one composite area, the boundary line existing on the title being ignored. It will be appreciated that the principal question involved in this appeal turns on priorities as between the Bank and the Contractor as regards their claims against the 11-acre block. Henry J. held in favour of the Contractor. The reasoning of his judgment was briefly as follows: the Bank, he said, had an equitable mortgage before it registered. As such it had priority over the liens, for its equitable estate as mortgagee, supported by its cash advance, existed before the Contractors commenced their work. But (he said) the Bank surrendered the priority which it possessed before registration; he was of the opinion that, by amending the mortgage document and registering it with the inclusion of a memorandum stating that it was subject to the liens, the Bank accepted the priority of the earlier-registered Statement of Claim. He gave judgment accordingly, giving priority to the liens of the Contractor.

We put aside at the outset a question that seems to us interesting and which could have had its importance—viz. the question of the date from which the Bank's mortgage takes priority on the Register. It seems to have been accepted by all parties in argument before Henry J. that the mortgage was registered only on July 25th 1961. It is clear, however, that it was originally presented for registration on January 30th. If it were possible to contend on the facts that though temporarily uplifted, it was never formally withdrawn, then those facts might conclude this litigation in favour of the Bank. It was contended before us, however, by Counsel for the Contractor that it was too late to raise here the argument that, though registration of the mortgage was completed in terms of Section 34 of the Land Transfer Act 1952 only on July 25th, yet once registration had so been completed the priority of the document on the Register was determined by its original date of presentation viz January 30th, the provisions of Section 37 being invoked in this regard. We agree that it would indeed be dangerous to allow this argument to be raised for the first time in the Court of Appeal, when, had it been presented in the Court below, it could possibly have been the subject of evidence which might have led to a different view of the facts —for it appeared before us that the mortgage did not remain continuously in the Land Transfer Office after its first presentation, but was at some time (when, and for how long, and on what terms is not made clear) "taken out"

for alteration, and it could perhaps have been contended that the circumstances in which this was done amounted to withdrawal followed by new registration. In all the circumstances we have been constrained to treat this interesting and perhaps important argument as not open at this stage to appellant.

Treating the Bank's mortgage, then, as having been presented for registration only in July 1961, after the liens were safely on the title, we turn to consider the questions: had the Bank's security priority over the liens before it was registered, and, if so, did it lose this priority by the amendment of
10 the terms of the mortgage and its registration? On the first point we are in agreement with the tenor of Henry J.'s judgment, that the Bank's mortgage while still unregistered gave it an equitable security which the registration of the liens did not affect.

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. The estate or interest, for instance, of an employer who holds under an agreement for
20 sale and purchase may be the subject of a lien, though his name does not appear on the certificate of title against which the lien is registered—**Pollock v. Miramar North Building Deposit and Mortgage Co.** (1910) 29 N.Z.L.R. 1014, 1018 per Stout C. J. Conversely a claim for lien made against the registered proprietor of land as employer will not be effective to charge the estate or interest of an equitable mortgagee of the land unless that mortgagee is himself also an employer, but will in such a case charge only the residuary estate of the registered proprietor — **Commercial Property and Finance Co. v. O.A. of Waghorn and A. & T. Burt Ltd.** (1905) 24 N.Z.L.R. 655 per Williams, J. As to what persons are "employers" that term is de-
30 fined by s. 20 of the Act as follows:—

> "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."

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
40 liens; but that estate or interest is exclusive of the interest of the Bank as equitable mortgagee—**Commercial Property and 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

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totalling £9088.6.8d, ante-dated, in the case of each lien, the commencement of the work. This is actually conceded to be the fact in the case of two of the liens, and it has been agreed that it shall be assumed in the case of the third. If this be so, then the Bank clearly never became an "employer" at all in this case, since it cannot be said on any view that its rights were acquired after the work was commenced. 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". 10

So far the conclusion at which we have arrived on the plain words of the Statute and on old authority decided thereunder is the same as is tacitly accepted by Henry J. in the introductory stages of the judgment from which this appeal is brought. But did the Bank later lose the security which it had before it amended its mortgage and registered the amended document? Henry J. was of the opinion that by amending the mortgage and registering it in an amended form the Bank accepted that its security must thereafter rank as inferior to the registered liens of the Contractor. Holding that the Bank's security at the time when the present proceedings were brought was neither more nor less than a registered mortgage, he treated the mortgage as registered only on July 25th 1961; thence he continued: 20

"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."

The learned Judge thought that the Bank was in a dilemma. The Bank (he said) amended the document either with the mortgagor's authority or without it. If without it, the bank might find itself unable to enforce the security against the mortgagor. But if with it, then the parties had agreed that the mortgage should be registered in such a way as to accept an inferior charge and "that is all the Bank got". On this aspect of the matter, Henry J. concluded:— 30

"However, I do not solve the problem merely by posing a dilemma which may not exhaust all possibilities. The real difficulty facing the Bank is that it cannot now treat the document, nor ask this Court in the present proceedings, to treat the document as if it were unregistered. 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:** 1 Coke 99." 40

It will be seen that notwithstanding that he did raise the point as one horn of his "dilemma," Henry J. did not base his judgment on any firm conclusion that the Bank's mortgage, originally given between the parties

thereto as a first mortgage, had been amended by agreement between mortgagor and mortgagee so as to rank subject to the liens. No such submission, indeed, seems to have been made by Counsel, and certainly no evidence was led to suggest that there had ever been any amendment of the old mortgage by the contractual act of both the parties thereto, so as to substitute for the original document by agreement an amended one given subject to the liens. All the evidence leads to the conclusion that the amendment to the mortgage was made unilaterally by the Bank with the sole and simple object of obtaining registration without further delay. We do not feel able to
10 hold—nor was the Court invited by Counsel to hold—that the amendment was a matter of agreement between mortgagor and mortgagee. As between the Development Company and the Bank the position clearly always was that the Bank was entitled to a mortgage ranking prior to all other encumbrances and charges. Neither was it seriously argued before us that the mortgage was avoided by the amendment.

The judgment under appeal will be seen to rest, not on any alleged agreement between mortgagor or mortgagee, but rather on the ground that unilateral acts of the Bank resulted in its obtaining an inferior charge. In coming to this conclusion, Henry J. did not rely on an estoppel as preclud-
20 ing the Bank from setting up its equitable priority. Indeed, he expressly disclaimed estoppel as a support for his judgment, and pointed out that Counsel for the Contractor had not contended that the Bank was estopped—no doubt for the very good reason that it was impossible to allege any respect in which the lien-holder had moved to its detriment in reliance on any express or implied representation by the Bank. 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:—

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

30 On consideration we have reached the conclusion that the learned Judge was wrong in applying the doctrine of election to the particular facts in this case. It is clear that if "election" is to be invoked it must be the 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 the will or instrument and also claim adversely to it—**Lissenden v. C. A. V. Bosch Ltd.** (1940) A.C. 412, 419, per Viscount Maugham. Unless it is possible to point to someone in the position of a testator or donor who may be presumed intentionally to be putting the claimant to his election between two rights
40 there can be no equitable election—**ibid** per Viscount Maugham at page 420. The only person who can possibly comply with this requirement on any view of the facts in this case is the mortgagor; but it could hardly be contended that the Development Company, in executing this mortgage, could ever be said **intentionally** to have put the Bank to any election. It always intended that the mortgage should be a first mortgage, and intended that

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it should be registered to take effect as a first mortgage. It never contemplated, or could be deemed by any legal fiction to have contemplated, anything else. For this reason equitable election can have no place in this case, and it is clear that if there is election it is the Common Law doctrine 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 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. 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 has been altered to his detriment—**Spencer Bower op. cit.** 248. This may not infrequently occur, not through any positive act of the representee, but by the fact that the representor has taken as against the representee some benefit which is inconsistent with the alternative course against which he is said to have elected. 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 the amendment and registration of the mortgage. See **United Australia Ltd. v. Barclays Bank Ltd.** (1941) A.C. 1 per Viscount Simon L.C. at page 21. Moreover as will later be pointed out any choice which the Bank may be said to have made between holding under an unregistered or a registered instrument does not necessarily import a choice deliberately and irrevocably made to accept any inferior security, for the part played in the matter by the District Land Registrar must not be underestimated. For these reasons we find it necessary to differ from the conclusion of the learned trial Judge and are of the opinion that as between the Bank and the Contractor there were never the essential elements to support the application of the doctrine of election.

Nor in our opinion can Mr McClelland's submission of merger be any more successful. This argment was to the effect that the equitable rights which the Bank originally held before registration merged on registration in the legal mortgage which registration perfected. It may be observed in the first place that this was not a case of rights given by an earlier and less formal contract merging in those derived from a later and more formal document, given and accepted in substitution for the first, such as is the case where a debt arising from a simple contract merges in one secured by a subsequently-given deed; cf. **Hammond v. Commissioner of Inland Revenue** (1956) N.Z.L.R. 690. 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 wherever the 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. Where an intention to merge is evidenced by the circumstances of the case an equitable estate will merge in a co-extensive legal estate coming into the same hands—**Fung Ping Shan v. Tong Shun** (1918) A.C. 403,411. But
10 where an intention is expressed or implied that the original rights should not merge they will be kept alive—**ibid** per Lord Parker of Waddington at page 411; **Adams v. Angell** (1877) 5 Ch. D. 634.

Fung Ping Shan v. Tong Shun supra affords a striking instance of the promotion of an intermediate estate by the process of merger. But the intention of the parties was clear. He who acquired the legal state by taking a covenant from his grantor to pay interest on the intermediate security was taken to have unequivocally recognised its promotion by the extinguishment of his previously-held equitable estate. It is not always so, and the Court will refuse to allow the equitable and legal estates to merge where
20 the equity of the case sufficiently requires such a course, as is shown by the decision of the House of Lords in **Whiteley v. Delaney** (1914) A.C. 132. There, on a different set of facts, a series of transactions which might well in other circumstances have supported a merger was held not to promote an intermediate security because of equitable considerations which, had they been invoked (as they were not) to support rectification proceedings, could have relieved, by way of rectification of the documents, the party against whom the merger was claimed. It is apparent from the judgments of both Viscount Haldane L.C. and Lord Dunedin (with which both Lord Kinnear and Lord Atkinson concurred) that these equitable considerations, since
30 they would have supported an equitable proceeding for rectification, could be used with equal validity to achieve the same result by refusing to allow a plea of merger. At page 150 Lord Dunedin said:

> "Actual rectification of the deeds is not necessary. It is conceded that to refuse (plaintiff) the declaration he asks is sufficient."

At this point of the discussion it is necessary to notice the provisions of s. 44 of the Wages Protection and Contractors Liens Act 1939. That section reads:

> "Any person alleging that he is prejudicially affected by a claim of lien or charge, or by registration of a lien against any land, may at any time
> 40 apply to the Court to have the claim or registration cancelled or the effect thereof modified, and such order may be made as may be just."

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

In the Court of Appeal of New Zealand

No. 7
Reasons for Judgment (delivered by Turner J.) 6th September, 1963.

continued.

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

The position of the Contractor, in our opinion, is in this case not unlike that of a judgment creditor having a charging order. Registration of the charging order prior to the registration of a mortgage earlier in date gives the judgment creditor no priority over the earlier-created mortgage, for in the nature of things the order affects only the beneficial estate of the judgment debtor—see, for instance, **In Re Mutual Benefit Building and Investment Society ex parte Baynes** (1887) 5. N.Z. L.R. (S.C.) 293 per Johnston J.; **In Re Beattie** (1887) 5 N.Z.L.R. (S.C.) 342 per Williams J.; **Butler v. Nicol** (1923) N.Z.L.R. 1339 per Stringer J., subsequently re-reported **sub nom Nicol v. Raven** (1925) N.Z.L.R. 155. In all these cases an order was made directing the removal of a charging order from the register so as to enable an earlier-executed transfer or mortgage to be registered in its equitable priority. The decisions were based upon the fact that a charging order gives a charge inferior to an earlier-executed transfer or mortgage, even if the latter has not been registered. It will be noted that these applications were brought by way of motion under R. 320 of the Code of Civil Procedure, a convenient provision enabling justice to be done by an order (e.g) removing the charge from the register to enable the mortgage to be registered in priority thereto. Section 44 of the Wages Protection and Contractors Liens Act 1939 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.**

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. "All seem agreed," said Lord Dunedin in **Whiteley v. Delaney (supra)** on page 151, "that in debateable cases merger takes place or not according to intention." Again, later in the same case, the same learned Lord says, "the difference of opinion seems to come to a question of onus . . . Must you prove an intention to merge or an intention to keep alive the security?" And yet later again: "I think, taking the cases cited as a whole, that the general view comes to this. Where by appropriate conveyancing the charge could be preserved . . . , then it will be for the party alleging the charge to be dead to show an intention to that effect." The facts in **Whiteley's** case are, of course, by no means on all fours with those which we are now considering; but the observations of Lord Dunedin lead us to say that the question here is whether the lienholder has established an intention on the part of the Bank to merge, abandoning the priority which it had by virtue of its equitable mortgage and accepting in its place a registered mortgage subject in priority to the liens. In

considering this question we think that the court must examine the reasons why the alteration was made. The form of the deed is not necessarily conclusive, and what on the face may appear to be an obvious intention may be rejected if the facts demonstrate a different interpretation: Lord Haldane in **Whiteley's** case **(supra)** 147. In the particular case we are now considering, we think that the proper 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. The
10 Bank was put in a very difficult situation, and we have no doubt that the necessity to get the document registered so as to ensure priority against any further incumbrances on the title was responsible for its decision to write the amendment into the mortgage.

In these circumstances we are of the 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.**
20 **Delaney** we have reached the conclusion that this Court should in the circumstances of this case decline to apply the doctrine of merger so as to defeat the equitable rights of the Bank as against the Contractor. We speak, of course, only of the position as between the lien-holder and the Bank in the circumstances which we have described.

Circumstances could arise on the facts of this case in which the Bank might be estopped, as against a third party, from denying that the effect of registration was to make the mortgage subject to the lien; for example, it might be estopped as against as assignee of the moneys secured by the liens from contending that its mortgage took priority over the liens, if the assign-
30 ment had been taken on the faith of the recital of incumbrances in the registered mortgage. No such question of estoppel as against any assignee arises, of course, in the present case.

But it was argued by respondent: notwithstanding that the liens when originally registered took effect only against the beneficial estate of the Development Company, yet after registration of the mortgage the priorities **inter se** of the charges on the title were determined by the order of registration of the documents in accordance with the provisions of s. 37 of the Land Transfer Act 1952. That section reads as follows:—

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

(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

In the Court of Appeal of New Zealand

No. 7 Reasons for Judgment (delivered by Turner J.) 6th September, 1963.

continued.

according to the date of registration, and not according to the date of each instrument itself."

"Instrument" is defined in s. 2 of the Act as:—

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

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. There is, therefore, no conflict between instruments here such as would arise, for instance, between two mortgagees given mortgages over the same estate in the same parcel of land. Between them, priority of registration would be decisive, for such mortgages would be instruments affecting the same estate or interest. Here, on the contrary, by definition the instruments affect different estates. In these circumstances s. 37 can have no application.

For the reasons which we have endeavoured to express we are therefore of the opinion that, notwithstanding the amendment made to the Memorandum of Incumbrances in its mortgage, the Bank never abandoned, and always effectively preserved, the priority which its earlier-executed mortgage had over the liens of the Contractor.

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. This section, which has already been quoted in full, authorises application to the Court by any person prejudicially affected to have a claim of lien or its registration cancelled or the effect thereof modified, and provides that such an order may be made as may be just. 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 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.

The second point argued before us was as to the apportionability of the claims for lien between the two titles. Before Henry J. it was argued that if the liens took priority over the mortgage the lien-holder's claims should be apportioned between the two blocks; independently of this argument, Counsel for the Bank gave notice of his contention that, even if the Court refused to apportion, the doctrine of marshalling could be invoked in the Bank's favour. By agreement, however, this latter point was not argued or decided in the Court below, but stands over for later resolution. We need not therefore advert to it here. In the view of the law to 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. We must therefore now consider it. In our opinion Henry J. was right when he refused to apportion the lien between the two blocks of land. The opinion **contra** which might appear to be indicated in the last sentence of the judgment of Denniston J. in **Black v. Shaw** 33 N.Z.L.R. 194, 197, seems to us to have been included in his judgment **per incuriam:** for, as Henry J. observes, the point does not appear to arise from the specific questions which were put to the Court in that case. We think, however, that Denniston J. was right, generally speaking, when he said that the lien " . . . attaches to all the land included in any instrument of title over any part of which the road was constructed". But this result does not always literally follow from any given set of facts. The area of land over which a lien is charged cannot, in our opinion, necessarily be limited in every case by the area contained in any certificate or certificates of title, and we are of the opinion that it must always be a question of fact how much of a given parcel of land is subject to any particular lien. The dictum of Stout C. J. in **Bassett v. Spurdle and Anor,** 26 N.Z.L.R. 84, 86, was not directed to the question now under consideration, but to a very different one—viz. whether the lien was charged only on the limited area upon which the house actually stood, or also upon the surrounding messuage. That case can therefore not be regarded as an authority in point. Cases of very diverse circumstances could easily be imagined to illustrate the difficulty of laying down any principle of general application. One employer may be imagined with a very large block of land in one title but duly subdivided by a deposited and approved plan into a great number of sections; does the erection of a house on one of them give

rise to a lien on the whole block?; on the other hand, if a road passing through two titles involves the contractor in a large expenditure in traversing a poor piece of land and a minimal expenditure in continuing the same road through a valuable piece, must he be content with apportioning his lien so as to give him an ineffectual remedy? These illustrations demonstrate the kind of circumstances which make the formulation of a general principle undesirable, if not impossible. It must always be for the Court to say, on the facts in any given case, what is the land upon which the lien is charged. Without deciding that the lien could never be apportionable, we hold that in the circumstances of this particular case the facts logically resulted, as Henry J. held, in a lien for the full amount of £2597 being chargeable without apportionment on the estate or interest of the employer in both pieces of land. This is not to say that the doctrine of marshalling may not be applicable; but this is a matter which does not arise at this stage.

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. The appellant will be given costs (one set only) in this Court against first respondent on the highest scale with an allowance of 50 per cent as from a distance and thereby a certificate for £21 in respect of a second day. Appellant must also have an Order for all necessary disbursements in both appeals including the cost of printing the case. In the Court below appellant should also have its costs to be fixed on the appropriate scale.

Solicitors for Appellant:

DUNCAN, COTTERILL & CO., CHRISTCHURCH.

Solicitors for First Respondent:

RALPH THOMPSON THOMAS & SHAW, CHRISTCHURCH.

Solicitors for Second Respondent:

RAYMOND, DONNELLY, McKENZIE & ROPER, CHRISTCHURCH.

Solicitors for Third Respondent:

T. D. HARMAN & SON, CHRISTCHURCH.

IN THE COURT OF APPEAL OF NEW ZEALAND

In the Court of Appeal of New Zealand

No. 8 Order Granting Final Leave to Appeal to Her Majesty in Council 17th December, 1963.

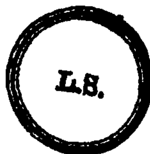
ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

Tuesday the 17th day of December 1963.

Before the Honourable Mr. Justice Turner

The Honourable Mr. Justice McCarthy

UPON READING the Notice of Motion of the First Respondent dated the 11th day of December 1963 and the Affidavit of JEREMY DAVID POPE filed herein AND UPON HEARING Mr D. F. Donovan of Counsel on behalf of the First Respondent and Mr. D. Cousins of Counsel on behalf of the Appellant consenting thereto AND the First Respondent having entered into good and sufficient security to the satisfaction of this Court THIS COURT DOTH ORDER that final leave to Appeal to Her Majesty in Council from the judgment of this Honourable Court delivered herein on the 6th day of September 1963 be and the same is hereby granted to the First Respondent.



By the Court

"G. R. HOLDER"

Registrar.

EXHIBITS

Exhibit 'M'

Certificate of Title Volume 367 Folio 284 6th August, 1925.

NEW ZEALAND.

Reference: Vol. 279, Folio 289
Transfer No.
Application No.
Order for N/C No. 1431

Register-book,
Vol. 367, folio 284

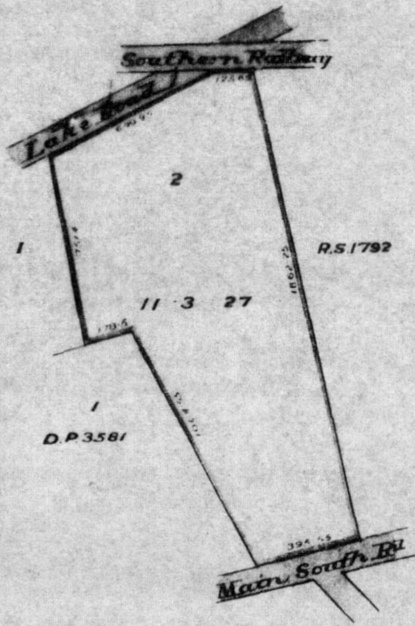
CERTIFICATE OF TITLE UNDER LAND TRANSFER ACT.

This Certificate, dated the Sixth day of August one thousand nine hundred and Twenty-five under the hand and seal of the District Land Registrar of the Land Registration District of Canterbury Witnesseth that JAMES HUGH WILLIAMS of Christchurch Solicitor

is seised of an estate in fee-simple (subject to such reservations, restrictions, encumbrances, liens, and interests as are notified by memorial under written or endorsed hereon, subject also to any existing right of the Crown to take and lay off roads under the provisions of any Act of the General Assembly of New Zealand) in the land hereinafter described, as the same is delineated by the plan hereon bordered green, be the several admeasurements a little more or less, that is to say: All that parcel of land containing ELEVEN ACRES THREE ROODS AND TWENTY-SEVEN PERCHES or thereabouts situated in Blocks IX and XIII of the Christchurch Survey District being Lot 2 on plan deposited in the Land Registry Office at Christchurch as No.7326 part of Rural Section 1791

DP 2-573

J. J. McKnight
District Land Registrar.



Scale 4 Chains to an Inch

Transfer 174950 produced 10 December 1926 at 12.45 pm James Hugh Williams to Richard May Downes Morten of Taitapu farmer and the said James Hugh Williams
W.R.

Transmission 323011 to the abovenamed Richard May Downes Morten. Entered 21 August 1940 at 12.16 p.m.
A.L.R.

Transfer 256765 produced 21 August 1940 at 12.20 p.m. Richard May Downes Morten to the said Richard May Downes Morten. Reginald Eugene Booker of Christchurch Solicitor and Tom Bassett of Whangarei farmer.
A.L.R.

Transfer 281163 produced 30 July 1943 at 2.30 pm Richard May Downes Morten, Reginald Eugene Booker and Tom Bassett to John David Parker a Retired Hotelkeeper and John Halford Robert Parker a Schoolteacher both of Christchurch.
D.L.R.

Mortgage 215267 produced 30 July 1943 at 2.31 pm John David Parker and John Halford Robert Parker to Thomas De Renzy
DISCHARGED
D.L.R.

Exhibit 'M'

Certificate of Title Volume 367 Folio 284 6th August, 1925.

continued

330090 Transmission of Mortgage 215267 to Richard Strachan [illegible] and [illegible] as Executors entered 24 October 1950 at 2.35 pm [illegible]
A.L.R.

[illegible] Transmission to the abovenamed John Halford Robert Parker entered 4th September [illegible]
[illegible]
A.L.R.

[illegible] Transmission of Mortgage 215267 to [illegible] entered 12 February 1958 at 12 noon
[illegible]

Caveat 531003 by [illegible] Finance Corporation Limited Entered 4/8/1960 at 10.34 am
[illegible]

Transfer 533167 John Halford Robert Parker to Hornby Development Limited a company having its registered office at Christchurch produced 2/9/1960 at 10.8 am (with consent of Caveator under Caveat [illegible])
A.L.R.

~~[illegible] Hornby Development Limited to the Bank of New Zealand [illegible]~~
[illegible]
A.L.R.

Proclamation 542347 closing part of the road adjoining the above described land and taking part of the abovedescribed land for road entered 5/1/1961 at [illegible]
D.R.

Caveat 545660 against part by Chief Surveyor Entered [illegible] at [illegible]
A.L.R.

545660 [illegible] in [illegible] [illegible] subject to a condition [illegible]
D.R.

Caveat 549363 against part by Chief Surveyor Entered [illegible] at 9.10 am
A.L.R.

Notice 548467 pursuant to Section 8 of the Land Subdivision [illegible] Act 1946 that Lots [illegible] on Plan [illegible] are subject to a condition as to Building Line and [illegible] Entered 13/3/1961 at 9.2 am
A.L.R.

Lien 552266 by Farmer-Wormald Limited Entered 30/5/1961 at 3 pm
A.L.R.

Caveat 552740 by John George Williams Entered 7/6/1961 at 10.38 am
A.L.R.

Caveat 552802 by Bank of New Zealand Entered [illegible] at [illegible] pm
A.L.R.

Caveat 552955 by Canterbury Holdings Limited Entered 8/6/1961 at 3 pm
A.L.R.

Lien 553184 by Farmer-Wormald Limited Entered 13/6/1961 at 9.30 am
A.L.R.

Mortgage 543319 Hornby Development Limited to the Bank of New Zealand produced 20.1.1961 at 9.47 a.m. [illegible] the consent of the Caveator [illegible] Caveats 531003, 545660, 549363, 552740 and 552855 Entered 25/7/61 at 11.[illegible] am
[illegible]

Caveat 586636 against part by The Chairman Councillors And Inhabitants Of The County Of Paparua Entered 2.10.1962 at 2.55 p.m.
[illegible]

Withdrawal of Caveat 531003 as to Lots [illegible] DP 21543 - 25.7.1963 at 10.15 am
A.L.R.

Withdrawal of Caveats 545660 [illegible] as to Lot [illegible] DP 21543 - 25.7.1963 at 10.15 am
A.L.R.

Discharge of Lien 552266 [illegible] as to Lot 6 DP 21543 - 25.7.1963 at 10.15 am
A.L.R.

Transfer 609517 of Lot 6 DP 21543 discharged from Mortgage 543319 to John George Williams - 25.7.1963 at 10.15 am
A.L.R.

38/780

Part Cancelled

Exhibit '5'

Mortgage
No. 543319
15th August,
1960.

"A"

[Approved by Registrar-General of Land, No. 2279]

[No. 439—1960—11/55]

UNDER "LAND TRANSFER ACT,"
IN DUPLICATE
OF FREEHOLD.

No. 1.

[New Zealand

Memorandum of Mortgage.

(a) Name and description of individual or firm. In case of a firm insert particulars as "James Smith and John Brown trading as Smith & Co., Merchants."
(b) Address.

Whereas I/we (a) HORNBY DEVELOPMENT LIMITED a duly incorporated company having its registered office at Christchurch

(b)

in the Provincial District of Canterbury and Dominion of New Zealand am/are registered as proprietor/s of an estate of freehold in fee simple subject however to such encumbrances liens and interests as are notified by memorandum underwritten or indorsed hereon in that piece/s of land full particulars whereof are scheduled hereunder:—

Area. A.	B.	P.	No. of Allotment and Section	Where Situated.	Instrument.	Register Book. Vol.	Folio
11	3	27	Part Lot 2 Deposit Plan 7326 part Rural Section 1791	Blocks IX and XIII Christchurch Survey District		367	284 (Balance)
Less 1		14	taken by Proclamation 542347				
11	2	13					

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

This is the paper writing marked with the letter "A" referred to in the annexed [illegible] FORSYTH declared [illegible] 1960 [illegible] Supreme Court of Christchurch

And whereas I/we keep or may hereafter keep an account with the Bank of New Zealand (hereinafter called "the Bank") and am/are now or may hereafter become indebted to the Bank on such account in a certain sum of money And whereas I/we have at the request of the Bank agreed to secure in manner hereinafter appearing the payment to the Bank of all moneys which now are or may from time to time hereafter become due from me/us or any one of us solely or together with any other person on such account or otherwise Now therefore in pursuance of such agreement and in consideration of the loans advances discounts or other banking accommodation which have been or may hereafter be made to me/us or any one of us solely or together with any other person and in consideration of the Bank's forbearing for one day from the date hereof to press for payment of past advances and in consideration of any loans advances discounts or other banking accommodation which have been or may hereafter be made to any customer of the Bank on any guarantee bond bill note cheque or other form of security now or hereafter held by the Bank on which I am/we are or any one of us is or may be liable or of any one or more of the aforesaid considerations (without prejudice to the Bank proving any consideration not hereinbefore stated) I do/we do and each of us doth hereby covenant with the Bank as follows:—

1. That I/we will on demand in writing pay to the Bank all sums of money for which I/we either solely or together with any other person may have directly or contingently become liable or responsible whether in respect of bills or notes discounted or paid (although the same shall not have arrived at maturity) or for loans credits advances made to or for the accommodation of me/us or any one of us or at my/our request either solely or together as aforesaid or for loans credits advances discounts or other banking accommodation made to any customer of the Bank on any guarantee bond bill note cheque or other form of security held by the Bank on which I am/we are or any one of us is or may be liable and all and every other sum of money that may at the time of making such demand be due owing or payable by me/us or any one of us to the Bank either solely or together as aforesaid on any account whatsoever and whether within or without the scope of the relationship of banker and customer and arising ex contractu ex delictu or otherwise howsoever and also all interest commission exchanges re-exchanges legal expenses and other usual and proper banking and commercial charges such interest to be capitalised half-yearly on the last days of March and September in each year and in all respects to be charged in the manner usual between the Bank and its Customers.

2. That I/we will pay interest to the Bank on the amount demanded as aforesaid from the day of such demand until actual payment of such amount such interest notwithstanding such demand or the closing of the account and notwithstanding any sale of the said land or any part thereof, to be capitalised half-yearly on the days and otherwise in the manner aforesaid and such interest to be at a rate per annum exceeding by Two (2) per centum the rate which would have been chargeable to me/us or any one of us had no demand been made.

3. That I/we will at all times during the continuance of this security keep all buildings gates fences hedges drains and ditches in upon and about the said land and also all fixtures and fittings in and about any such buildings in proper and substantial repair and condition and that I/we will not remove any buildings or erections from off the said land or alter them so as to reduce their value without the written consent of the Bank.

4. That I/we will at all times during the continuance of this security insure and keep insured in some insurance office to be named by the Bank and in the name of the Bank all the buildings now erected or hereafter to be erected on the said land against loss or damage by fire in such sum as with the amount if any in which the same shall for the time being be insured in conformity

Exhibit '5'

Mortgage
No. 543319
15th August, 1960.

continued

with any prior Mortgage on the premises shall be equal to the full insurable value thereof and will not later than the forenoon of the day on which any premium in respect of any insurance whether in the name of the Bank or any prior Mortgagee shall become due pay such premiums and produce or cause to be produced the receipt therefor to the Bank and will deliver all policies and premium receipts in respect of any insurance which is or ought to be in the name of the Bank to its Manager at Riccarton, Christchurch And in default of payment production or delivery in conformity with the foregoing Covenant it shall be lawful for but not obligatory on the Bank to insure the said Buildings or any of them in such sum as aforesaid or any less sum or to pay any such premium and all moneys expended by the Bank in so doing with interest thereon at the rate mentioned in paragraph 2 hereof shall thereupon be included in this security.

5. That I/we will at all times during the continuance of this security punctually pay all rates and taxes assessed charged or imposed in respect of the said land and produce the receipts therefor to the Bank whenever called upon and that in default thereof it shall be lawful for the Bank (but without prejudice to any other rights powers and remedies hereby conferred) to pay such rates and taxes and all costs and expenses incurred by reason of such default and all moneys so paid with interest thereon at the rate mentioned in paragraph 2 hereof shall thereupon be included in this security.

6. That I/we will at all times during the continuance of this security punctually pay the principal and interest moneys secured by the mortgage/s mentioned in any memorandum hereunder written and observe perform and keep all and singular the covenants and conditions therein contained and implied and will at all times hereafter at the request of the Bank or any person claiming through or under it produce the receipt for the last payment of interest due under the said mortgage/s and that the Bank or any persons claiming through or under it may at any time hereafter take a transfer of the said mortgage/s and that I/we will do all things necessary to enable such transfer to be taken and that the costs of the Transferee or Transferees of and incidental to such transfer with interest thereon at the rate aforesaid shall be added to this security.

7. That if I/we fail punctually to pay the principal and/or interest moneys secured by any prior mortgages hereinafter mentioned or to observe or perform the covenants conditions and agreements therein expressed or implied it shall be lawful for but not obligatory upon the Bank to pay all or any such sums of principal and/or interest or perform such covenants conditions or agreements as the case may require and that I/we will forthwith without any demand repay to the Bank all sums of money expended by the Bank in so doing together with interest for the same respectively at the rate mentioned in paragraph 2 hereof computed from the time or respective times of the Bank's paying the same until repayment thereof and that in the meantime such sums of money with interest at the rate aforesaid shall be a further charge upon the lands hereby mortgaged.

8. That I/we will not during the continuance of this security make and execute in favour of any Mortgagee or Mortgagees other than the Bank a further Mortgage or security over the land hereby mortgaged without first giving to the Bank notice in writing of my/our intention in that behalf and if the Bank shall receive notice from me/us or any one of us or any other source whatsoever that I/we have given such a further Mortgage or security then whether such further Mortgage or security shall or shall not in fact have been given the Bank shall thereafter be under no obligation to make me/us or any one of us any further advances or grant me/us or any one of us any further accommodation any agreement then subsisting between me/us or any one of us and the Bank to the contrary notwithstanding

(c)

(c) Insert here any special covenant or covenants.

Provided always and it is hereby declared and agreed—

1. That in case default shall be made in payment of any of the moneys hereby secured or any part thereof immediately upon demand as aforesaid or if breach or default shall be made in the performance or observance of any covenant or condition on my/our part herein contained or implied or contained or implied in any other security for the time being held from me/us or any one of us by the Bank then and in any or either of such cases it shall be lawful for the Bank thereupon or at any time thereafter to exercise such power of sale and incidental powers as are in that behalf vested in Mortgagees by "The Property Law Act 1952" and "The Land Transfer Act 1952" or any statutory modification or re-enactment thereof for the time being in force in as full and ample a manner as if the default and notice thereby required had been made and given and the periods of time therein mentioned had duly elapsed and no purchaser shall be concerned to see or enquire as to the fact of any such default having been made or otherwise as to the necessity regularity or propriety of any such sale And the provisions contained in Clause Eight of the Fourth Schedule to "The Property Law Act 1952" are hereby modified accordingly provided always that this clause shall be read subject to the provisions of Section 92 of that Act.

2. That all sums of money received under or by virtue of any such insurance against fire as aforesaid whether in the name of the Bank or not shall at the option of the Bank and to the extent to which the same shall not be applied in conformity with the provisions of any prior Mortgage over the premises be either allowed to be applied in or towards substantially rebuilding reinstating and repairing the insured premises or may be applied by the Bank in or towards the payment of the principal money and interest for the time being owing on the security of these presents

3. That the right of the Bank to sue and recover on any Promissory Note or other negotiable instrument representing the moneys hereby secured or any part thereof shall not be deemed to have merged in this security

4. That I/we shall not be entitled to claim credit for any moneys paid into any account other than an overdrawn account which I/we may have with the Bank as paid in reduction of the moneys hereby secured or intended so to be unless such moneys are in writing specifically appropriated thereto but this shall not preclude the Bank from applying any credit balance on any such other account in reduction of the moneys hereby secured or intended so to be or deprive the Bank of its right of lien or set off

5. That without prejudice to any other sufficient mode of demand such demand as aforesaid shall be sufficient if in writing signed by any officer of the Bank and delivered to me/us or any one of us or to my/our personal representatives (or one of them) or left at or posted addressed to the usual or last known place of abode or business of the person or one of the persons to whom it is so permissible to deliver the same and if I/we or any one of us be dead such notice shall be sufficient if addressed generally to such personal representatives as aforesaid and affixed to some part of the said land and if I/we or any one of us be out of the Dominion such notice shall be sufficient if delivered or posted to any agent of mine/ours or any one of us or if affixed to some part of the said land

6. That in making any demand as aforesaid it shall be lawful for the Bank to include in such demand the amount of all Bills of Exchange Promissory Notes or other negotiable instruments in respect of which I/we may be liable to the Bank although the same or any of them may not then have arrived at maturity

7. That nothing herein contained shall be held to discharge abate or prejudice any other security or securities now held or which may hereafter be held or taken by the Bank for payment of any of the moneys intended to be hereby secured nor shall this instrument or any such other security affect any claim or demand which the Bank now has or hereafter may have or be entitled to make against any other person or persons whomsoever as surety or sureties or on any Bill or Bills of Exchange or Promissory Note or Notes to the Bank for the moneys hereby secured or any part thereof or operate as a payment of such moneys until the same shall have been actually paid in cash

Exhibit '5'

Mortgage
No. 543319
15th August,
1960.

continued

8. That these presents shall be a running and continuing security so long as the relation of banker and customer shall subsist between the Bank and us or any one of us irrespective of any sums which may be paid to the credit of our account with the Bank and notwithstanding any settlement of account or any other matter or thing whatsoever such security shall remain in full force and extend to cover any sum of money which may hereafter become owing from us or any one of us to the Bank until a final release thereof shall have been executed by the Bank

9. That the covenants conditions and powers implied in Mortgages and set forth in the Fourth Schedule to "The Property Law Act 1952" with the exception of those contained in Clause Eight of the said Schedule being superseded by the express covenants and provisions herein contained are hereby negatived those contained in the said Clause Eight being modified as hereinbefore expressed

10. That all sums of money expressed to be secured by or which are or shall become chargeable as a condition of redemption or otherwise against any other security for the time being held from us or any one of us by the Bank and whether such security be effected by instruments of even date herewith or not shall if and to the extent to which such moneys are not included in or covered by this security by force of the other provisions of these presents be and be deemed to be included in and covered by this security by force of this present position and accordingly shall likewise be a charge with interest as hereinbefore provided on the hereby mortgaged premises

11. In this Deed where the context admits references to the singular number shall include the plural and vice versa; personal pronouns and other references to persons shall include corporations; references to death shall include the winding up of a corporation; and references to personal representatives shall include the Liquidator of a Corporation.

(d)

And for the better securing to the Bank the payment in manner aforesaid of all moneys hereby secured or intended so to be I hereby mortgage to the Bank all my estate and interest in the said land above described.

these presence have been executed
~~In witness whereof I have hereunto signed my name/s this~~ 15th day of August
One thousand nine hundred and sixty

(e)

~~Signed by the said~~ THE COMMON SEAL of HORNBY DEVELOPMENT LIMITED was hereunto affixed by and in the presence of
as Mortgagor/s in the presence of (f)

Mortgagor/s.

(Name) J. K. Sn... Director

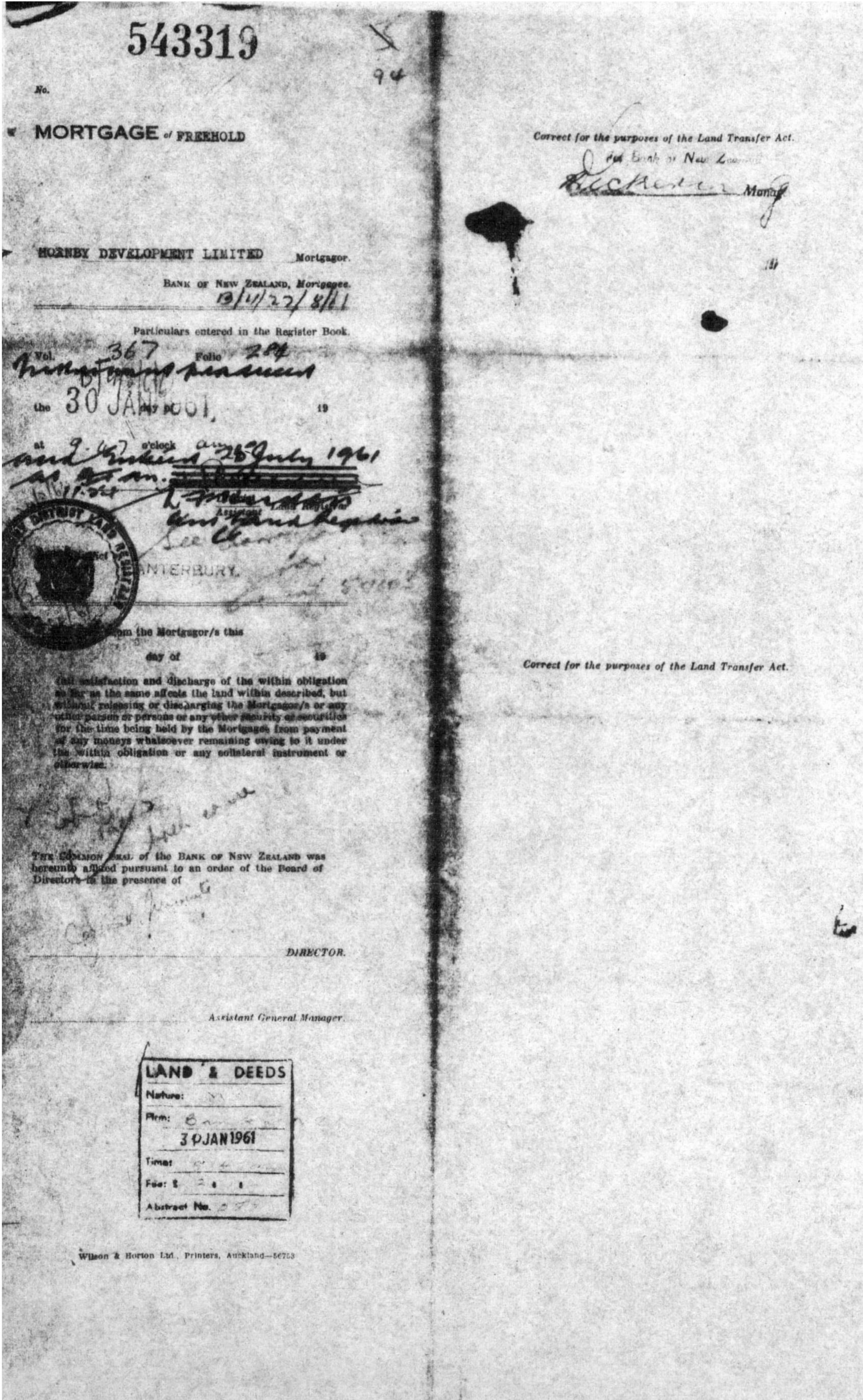
(Occupation) ... Secretary

(Address)

Exhibit '5'

Mortgage
No. 543319
15th August,
1960.

continued



543319

No.

MORTGAGE of FREEHOLD

HORNBY DEVELOPMENT LIMITED Mortgagor.

BANK OF NEW ZEALAND, Mortgagee.

Particulars entered in the Register Book.

Vol. 367 Folio 284

the 30 JAN 1961 19

at 9.47 o'clock

Assistant Land Registrar

CANTERBURY.

...from the Mortgagor/s this

day of 19

...full satisfaction and discharge of the within obligation so far as the same affects the land within described, but without releasing or discharging the Mortgagor/s or any other person or persons or any other security or securities for the time being held by the Mortgagee from payment of any moneys whatsoever remaining owing to it under the within obligation or any collateral instrument or otherwise.

THE COMMON SEAL of the BANK OF NEW ZEALAND was hereunto affixed pursuant to an order of the Board of Directors in the presence of

DIRECTOR.

Assistant General Manager.

LAND & DEEDS
Nature:
Firm:
30 JAN 1961
Time:
Fee: $
Abstract No.

Wilson & Horton Ltd., Printers, Auckland

Correct for the purposes of the Land Transfer Act.

For Bank of New Zealand

Manager

Correct for the purposes of the Land Transfer Act.

Exhibit '7'

Photocopy of Bank Statement of Hornby Development Ltd.

"M"

HORNBY DEVELOPMENT LIMITED.

IN ACCOUNT CURRENT WITH

BANK OF NEW ZEALAND

112 RICCARTON ROAD

RICCARTON, CHRISTCHURCH, W.1

MEMORANDA

Please keep your Cheque Book Butts in order to verify debits to your account. Examine this Statement promptly and report any error to the Manager or Accountant. Kindly notify any change of address.

ENSIMATIC 3/60

DATE	PARTICULARS	DEBIT	CREDIT	BALANCE
	BROUGHT FORWARD			0●
APR 1'60CB		10. 0-		10. 0●
APR 5'60DP			1. 0. 0+	10. 0●
MAY 17'60DP			3. 0. 0+	3.10. 0●
MAY 23'60	343.	2. 0. 0-		1.10. 0●
JUL 4'60	954.	2. 0. 0-		10. 0●
JUL 8'60DP			3,100. 0. 0+	3,099.10. 0●
JUL 14'60DP	345.	2,100. 0. 0-		
JUL 14'60DP	344.	1,000. 0. 0-		10. 0●
AUG 12'60	Stamp Duty on M'tge.	3. 0-		
AUG 12'60	346.	1,000. 0. 0-		1,000.13. 0●
AUG 18'60	348.	2,000. 0. 0-		3,000.13. 0●
AUG 22'60	347.	23. 2. 0-		
AUG 22'60	349.	6,064. 1. 8-		9,087.16. 8●
SEP 15'60FE		10. 0-		9,088. 6. 8●
SEP 30'60IN		66. 7. 0-		9,154.13. 8●
OCT 25'60	351.	46. 6. 6-		9,201. 0. 2●
NOV 25'60DP			600. 0. 0+	8,601. 0. 2●
NOV 25'60	352.	500. 0. 0-		9,101. 0. 2●
DEC 14'60DP			600. 0. 0+	8,501. 0. 2●
DEC 14'60	353.	600. 0. 0-		9,101. 0. 2●
DEC 21'60DP			898.18. 0+	8,202. 2. 2●
DEC 21'60	356.	800. 0. 0-		9,002. 2. 2●
DEC 23'60	354.	57. 0. 0-		
DEC 23'60	355.	5. 5. 0-		9,064.15. 2●
JAN 19'61DP			35. 5. 8+	9,029. 9. 6●
JAN 31'61DP	Registration M/Mtg	2. 1. 0-		9,031.10. 6●
FEB 1'61DP	Com for producing C/T.	1. 1. 0-		9,032.11. 6●
MAR 16'61FE		10. 0-		9,033. 1. 6●
MAR 30'61IN		292. 2. 6-		9,325. 4. 0●
AUG 4'61DP	Tfr. H/O CML. 100/121. Balance from No.2. Account.		972. 0. 1+	8,353. 3.11●

EXHIBIT "M"

A105/61

Hornby v. Hornby

Produced by Plaintiff Defendant

25/10/1961 Registrar

EXPLANATION OF ABBREVIATIONS USED.

B/c. means Bills collected for you.

C.Bk. .. Cheque Book.

Dep. .. Deposit.

Int. means Interest on Debentures, New Zealand Inscribed Stock or Bonds

Ins. .. Group Assurance Payment

Int. .. Interest on Account

CONTINUED OVERLEAF

THE LAST AMOUNT STATED

Exhibit '7'

Photocopy of Bank Statement of Hornby Development Ltd.

continued

IN ACCOUNT CURRENT WITH

BANK OF NEW ZEALAND

112 RICCARTON ROAD

RICCARTON, CHRISTCHURCH, W.1

MEMORANDA

Please keep your Cheque Book Butts in order to verify debits to your account. Examine this Statement promptly and report any error to the Manager or Accountant. Kindly notify any change of address.

DATE	PARTICULARS	DEBIT	CREDIT	BALANCE
	BROUGHT FORWARD			0
EB 2'61 DP			1,482. 0. 6+	1,482. 0. 6
EB 2'61	358.	1,000. 0. 0-		
EB 2'61	357.	213.19. 7-		268. 0.11
AR 14'61	359.	83. 6. 6-		184.14. 5
AR 16'61 FE		10. 0-		18[illegible] 4. 5
AR 27'61	360.	133.11. 6-		50.12.11
AY 11'61	Notice Release Caveat	5. 0-		50. 7.11
AY 31'61 DP			751. 7. 6+	801.15. 5
UN 1'61	365.	6. 4. 4-		
UN 1'61	367.	156. 0. 5-		
UN 1'61	361.	19. 5. 0-		
UN 1'61	368.	4. 8-		620. 1. 0
UN 2'61	363.	18.14. 0-		
UN 2'61	366.	149. 4.10-		452. 2. 2
UN 2'61	362.	1. 8. 0-		450.14. 2
UN 7'61	364.	3. 0. 3-		447.13.11
UN 9'61 DP			103.12. 0+	551. 5.11
UN 20'61 DP			132. 0. 0+	683. 5.11
UN 22'61	372.	200. 0. 0-		483. 5.11
UN 28'61	374.	50. 0. 0-		433. 5.11
UN 29'61	373.	48.13. 8-		
UN 29'61	369.	200. 0. 0-		
UN 29'61	371.	74.18. 9-		109.13. 6
UN 30'61	370.	15. 5. 3-		94. 8. 3
UL 24'61 DP			1,410.10.10+	1,504.19. 1
UL 24'61	376.	47.18. 9-		1,457. 0. 4
UL 25'61	381.	14.13. 3-		
UL 25'61	375.	387. 3. 0-		1,055. 4. 1
UL 26'61	379.	18. 0. 0-		
UL 26'61	377.	5. 5. 0-		
UL 26'61	380.	59.19. 0-		972. 0. 1
UL 26'61	Transfer No 1. a/	972. 0. 1-		0

EXPLANATION OF ABBREVIATIONS USED.

B/c. means Bills collected for you.
C.Bk. .. Cheque Book.
Dep. .. Deposit.
Dy. .. Lodgment by Dairy Company.
Exc. .. Exchange.
Fee .. Charge for keeping account.

Ide. means Interest on Debentures, New Zealand Inscribed Stock or Bonds.
Ins. .. Group Assurance Payment.
Int. .. Interest on Account.
P/N. .. Promissory Note.
Ret. .. Cheques or Bills previously unpaid [illegible]

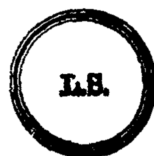
CONTINUED OVERLEAF

THE LAST AMOUNT STATED IN THIS COLUMN IS THE BALANCE OF YOUR ACCOUNT. RED FIGURES DENOTE DEBTOR BALANCE.

CERTIFICATE OF REGISTRAR OF COURT OF APPEAL AS TO ACCURACY OF RECORD.

I, GERALD RONALD HOLDER, Registrar of the Court of Appeal of New Zealand, DO HEREBY CERTIFY that the foregoing 39 pages of printed matter contain true and correct copies of all the proceedings, evidence, judgments, decrees and orders had or made in the above matter, so far as the same have relation to the matters of appeal, and also correct copies of the reasons given by the Judges of the Court of Appeal of New Zealand in delivering judgment therein, such reasons having been given in writing: AND I DO FURTHER CERTIFY that the appellant has taken all the necessary steps for the purpose of procuring the preparation of the record, and the despatch thereof to England, and has done all other acts, matters and things entitling the said appellant to prosecute this Appeal.

AS WITNESS my hand and Seal of the Court of Appeal of New Zealand this **7th** day of FEBRUARY, 1964.



G. R. HOLDER
REGISTRAR.

In the Privy Council

No. 12 of 1964

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN

FARRIER-WAIMAK LIMITED — Appellant

AND

THE BANK OF NEW ZEALAND — Respondent

RECORD OF PROCEEDINGS

Wray, Smith & Co.,
1 King's Bench Walk,
Temple,
London, E.C.4.
Solicitors for Appellant

Rider, Heaton, Meredith and Mills,
8 New Square,
Lincoln's Inn,
London, W.C.2.
Solicitors for Respondent

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