G. W. HAROLD MILLICAN, THOMAS WILLIAM SNOWDON, and HOWARD COOK, carrying on business under the firm name and style of MILLICAN, SNOWDON & COOK and the said MILLICAN, SNOWDON & COOK (*Defendants*) .....APPELLANTS;

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AND

TIFFIN HOLDINGS LTD. (*Plaintiff*) ....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Solicitors—Professional negligence—Solicitor retained by lender in preparation and registration of chattel mortgage on certain equipment as security for loan—Later discovery that equipment not at reported location and probably not owned by borrower—Whether solicitor negligent in failing to anticipate borrower's criminal conduct.

On Thursday, July 17, 1958, the appellant S, a partner in the appellant firm of solicitors at Calgary, was asked to represent the respondent in the preparation of a chattel mortgage on some industrial equipment as security for a loan of $13,000 to be made by the respondent to one A. The latter in describing the equipment gave a serial number which S, on making inquiry, discovered could not be the proper number. T, who controlled and was the president of the respondent, was advised by S to make a personal inspection of the equipment but he said that he did not have time. He intimated to S that the matter was urgent, as A required the funds promptly in order to accept an option.

A told S that the location of the equipment was at Hinton, Alberta. This would necessitate registration of the chattel mortgage in Edmonton. He also gave the name of the company which he said was using the equipment. S telephoned to his agents in Edmonton, giving the information which he had obtained and asking them to check it.

At a further meeting the next day A furnished what he alleged was the correct serial number of the equipment. S was advised by a finance company that they had financed equipment for A in the past of the kind described by him. This information was confirmed in writing by the company on Monday, July 21. The confirmation gave the serial number of the equipment and stated that a lien of $22,000 had been satisfactorily retired by the debtor.

On the Friday, the chattel mortgage was drawn and executed and was forwarded to S's agents at Edmonton for registration with a letter asking that it be ascertained that there was no prior encumbrance against it. T delivered to S the respondent's cheque for $13,000 payable to the appellant firm. S was instructed to deposit with the bank on which it was drawn a letter confirming the registration of the chattel mortgage in order to have it certified.

The chattel mortgage was registered on Monday, July 21, and, after certification of the respondent's cheque, S delivered to A the appellant firm's cheque for $13,000. At the time he had received the written confirmation of the finance company. On the same day, in the late afternoon and subsequent to delivery of the cheque, S received a

* PRESENT: Abbott, Martland, Judson, Ritchie and Hall JJ.

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telegram from his Edmonton agents advising that they were unable to locate the officers of the company which, according to A, had been using the equipment.

It later transpired that the equipment was not at Hinton, and probably was not owned by A. The sum of $5,000 was collected by the respondent from him. The respondent's action against the appellants for the balance of $8,000 advanced, and interest, was dismissed by the trial judge, who held that S was not negligent in failing to anticipate criminal acts on the part of A. The trial judgment was reversed on appeal, and an appeal was then brought to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

S had explained to T that it was impossible to obtain absolute proof of ownership of the equipment. His understanding of his duty was that he was to ascertain that there was a properly described piece of equipment, that he was to register a chattel mortgage against it, not subject to any prior encumbrance, and that if he had some evidence of ownership which he considered satisfactory the money could be released. He felt that the information from the finance company did constitute evidence of ownership, sufficient to satisfy him that, within the terms of his instructions, the money could be disbursed.

In the light of these circumstances the Court was not prepared to disturb the finding with respect to negligence made by the trial judge.

APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division[1], reversing a judgment of Riley J., dismissing an action against solicitors for professional negligence. Appeal allowed.

W. R. Brennan, Q.C., for the defendants, appellants.

G. R. Forsyth, for the plaintiff, respondent.

The judgment of the Court was delivered by

MARTLAND J.:—This is an action for professional negligence brought by the respondent company against a firm of solicitors in Calgary in respect of the payment of certain funds of the respondent to one Arnoldussen.

On Thursday, July 17, 1958, R. W. Tiffin, who controlled and was the president of the respondent, attended at the office of the appellants along with Arnoldussen to consult Mr. T. W. Snowdon, a partner in the appellant firm. Snowdon was asked to represent the respondent in the preparation of a chattel mortgage on some industrial equipment, in the principal amount of $16,000, as security for a loan of $13,000 to be made by the respondent to Arnoldussen. A question arose as to the proper description of the equipment. Arnoldussen gave a serial number, which

[1] (1965), 53 W.W.R. 505, 53 D.L.R. (2d) 674.

Snowdon checked, by telephone, which he learned could not be the proper number for equipment of the kind described. Arnoldussen then undertook to get the proper description the next day.

Snowdon suggested to Tiffin that he go and actually examine the equipment's serial number and determine its existence, but was told that Tiffin did not have time and also that time was not available if Arnoldussen was to be accommodated. It was intimated to Snowdon that the matter of the loan to Arnoldussen was urgent, because he required the funds to accept an option before it expired on the following day. Later, according to Tiffin, the option was extended until Monday, July 21.

Arnoldussen told Snowdon that the location of the equipment was at Hinton, Alberta. This would necessitate registration of the chattel mortgage in Edmonton. He also gave the name of the company which he said was using the equipment. Snowdon telephoned to his agents in Edmonton, giving the information which he had obtained and asking them to check it.

A further meeting occurred on the following day, Friday, July 18. At this time Arnoldussen gave the serial number of the equipment and referred to prior financing of the equipment by a finance company with an office in Calgary. Snowdon checked this information with the finance company by telephone, and was advised that they had financed equipment for Arnoldussen in the past of the kind described by him. This information was confirmed in writing by the company on Monday, July 21. The confirmation gave the serial number of the equipment and stated that a lien of $22,000 had been satisfactorily retired by the debtor.

On the Friday, the chattel mortgage was drawn and executed and was forwarded to the Edmonton agents for registration with a letter asking that it be ascertained that there was no prior encumbrance against it. Tiffin delivered to Snowdon the respondent's cheque for $13,000, payable to the appellant firm. Snowdon was instructed to deposit with the bank on which it was drawn a letter confirming the registration of the chattel mortgage in order to have it certified.

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The chattel mortgage was registered on Monday, July 21, and, after certification of the respondent's cheque, Snowdon delivered to Arnoldussen the appellant firm's cheque for $13,000. At that time he had received the written confirmation of information from the finance company. On the same day, in the late afternoon and subsequent to delivery of the cheque, Snowdon received a telegram from his Edmonton agents advising that they were unable to locate "officers of Pinto". This was the name of the company which, according to Arnoldussen, had been using the equipment.

It later transpired that the equipment was not at Hinton, and probably was not owned by Arnoldussen. The sum of $5,000 was collected by the respondent from him. The respondent sued the appellants for the balance of $8,000 advanced, and interest.

The action was dismissed by the learned trial judge, who pointed out that Snowdon had been advised by Tiffin that the transaction had to be completed by the Friday, later extended to the Monday; that Snowdon had advised Tiffin that there was no way of determining absolute ownership on the part of Arnoldussen; that Tiffin had been advised to make a personal inspection of the equipment, but did not do so; that Tiffin feared a possible claim by Arnoldussen if the moneys were not advanced within the time promised; that Snowdon did make inquiries and believed Arnoldussen owned the equipment; that Snowdon was never instructed not to pay over the money to Arnoldussen, but the matter was left to Snowdon's discretion, Tiffin's conduct throughout being one of indecision; and that Arnoldussen had sworn an affidavit as to his ownership of the equipment, clear of encumbrances. He held that Snowdon was not negligent in failing to anticipate criminal acts on the part of Arnoldussen.

This judgment was reversed on appeal[1]. The reasons for the decision of the Appellate Division are summarized in the following passages from the judgment:

> In the instant case Tiffin stated he told the solicitor his concern about the integrity of Arnoldussen. A manager of an acceptance corporation to whom enquiries were directed by Tiffin stated he told the solicitor over the telephone "to be extremely careful, make sure that the security

[1] (1965), 53 W.W.R. 505, 53 D.L.R. (2d) 674.

involved in this deal exists and that Arnoldussen is in a position to give clear title to it". Arnoldussen at the first meeting had given false serial numbers for the equipment in question. There can be no doubt that the solicitor knew he was dealing with a possible rogue, as indeed Arnoldussen turned out to be.

* * *

In a case such as this the solicitor should have anticipated that Arnoldussen might try to defraud the appellant (now respondent). The solicitor here was employed to prevent the very thing that happened. I do not think it is any defence to the solicitor that the acts of Arnoldussen were criminal.

The statement by Tiffin to Snowdon concerning Arnoldussen was said to have been made in a telephone conversation on the Friday morning, July 18. Concerning this conversation Tiffin gave the following answer on cross-examination:

> Q. But you never did tell Mr. Snowdon that you were concerned because of past experience with Mr. Arnoldussen as to Arnoldussen's integrity?
>
> A. I don't know if I said it in so many words but I think I said we should be very careful.

It is also important to note that it was after this conversation that the meeting occurred on Friday afternoon at which the arrangements for the loan were agreed upon. Whatever concern Tiffin may have had, he was quite prepared to proceed with the loan, to be made on Monday, July 21.

The telephone conversation with the manager of the acceptance company occurred after that meeting. It appears that subsequent to that meeting Tiffin telephoned a Mr. Forster in Lethbridge, the manager of an acceptance corporation, who says that he phoned Snowdon on Saturday morning, July 19, and told him to be absolutely sure the security was in existence and that Arnoldussen was in a position to give clear title to it.

The error as to the serial number has already been mentioned. However, Arnoldussen did, on the Friday, furnish the serial number which checked with that of the equipment which had been subject to the finance company lien.

Tiffin's evidence is that he had known Arnoldussen for three to four years and that he had had previous business dealings with him. It was he who brought Arnoldussen to Snowdon's office. This appears to have been the first time that Snowdon had met either of them, as the evidence

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shows that, on this occasion, Tiffin did not take the matter to the solicitor who usually looked after legal matters for him. It was indicated by Tiffin to Snowdon that the matter was urgent, as Arnoldussen required the funds promptly in order to accept an option.

Snowdon's evidence is that the deal had been completed on the Friday, subject to the confirmation to be obtained from the finance company.

The learned trial judge, who heard all of the evidence, reached the conclusion that negligence could not be imputed to Snowdon for failing to anticipate Arnoldussen's criminal conduct. In my opinion, it was open to him, on the evidence, to reach this conclusion, and I do not think that it should be disturbed.

The Appellate Division has defined the terms of Snowdon's retainer in the terms of the following question put to Snowdon, and his answer to it, on cross-examination:

> Q. Now, sir, in summary do I understand it is your evidence that Mr. Tiffin on behalf of the plaintiff Tiffin Holdings Ltd. left it up to you as that company's solicitor to obtain and establish satisfactory proof of ownership before the funds were advanced as well as, of course, obtaining satisfactory proof of registration of the chattel mortgage?
>
> A. Yes, to my satisfaction, that is correct.

The words used by Snowdon are "to my satisfaction" and, in my view, the answer should not be considered in isolation, but in the context of the other evidence. Snowdon had explained to Tiffin that it was impossible to obtain absolute proof of ownership of the equipment. His understanding of his duty was that he was to ascertain that there was a properly described piece of equipment, that he was to register a chattel mortgage against it, not subject to any prior encumbrance, and that if he had some evidence of ownership which he considered satisfactory the money could be released. He felt that the information from the finance company did constitute evidence of ownership, sufficient to satisfy him that, within the terms of his instructions, the money could be disbursed. He understood that the deal was completed on the Friday, subject to the confirmation from the finance company.

In the light of these circumstances I would not be prepared to disturb the finding with respect to negligence made by the learned trial judge.

In my opinion, the appeal should be allowed and the judgment at trial restored. The appellants should be entitled to costs here and in the Appellate Division.

Appeal allowed with costs.

Solicitors for the defendants, appellants: Fenerty, Fenerty, McGillivray, Robertson, Prowse, Brennan & Fraser, Calgary.

Solicitors for the plaintiff, respondent: Howard, Bessemer, Moore, Dixon, Mackie & Forsyth, Calgary.