

R v OFFICIAL ASSIGNEE IN BANKRUPTCY

High Court Apia
9 December 1930
Luxford CJ

ACTIONS (Cause of action) - Failure to claim all of remedies or relief available - Estoppel (per rem judicatum) - Dismissal by consent in an action on a current account to which money due and payable under a Mortgage Deed had been debited and credited - Mortgagee estopped from taking subsequent action for a balance of interest claimed under the Mortgage Deed: Serrao v. Noel, 15 Q.B.D. 549; Dillon v. McDonald 21 N.Z.L.R. 375, applied.

Andrews for plaintiff.
Klinkmueller for defendant.

Cur adv vult

LUXFORD CJ. The plaintiff in this action seeks to recover the sum of £221.9.2 which is the amount of interest alleged to be due and owing under a Deed of Mortgage executed by August Walter to and in favour of the plaintiff on the 12th day of February, 1925.

For many years previous to the month of October, 1930 August Walter carried on in Apia the business of a butcher. In order to commence that business he acquired premises and chattels from the plaintiff through the New Zealand Reparation Estates and entered into an arrangement to purchase from the plaintiff the cattle required for the business. A current account was opened in the books of the Reparation Estates and Walter was debited with the sum of £944.9.9 which represented the value of the premises and chattels purchased by him previous to the opening of the butchery business.

Thereafter, entries were made in the account of the various credits and debits between the plaintiff and Walter including monthly debits for interest at £6% per annum on the sum of £944.9.9. No explanation has been given to show why interest was charged on that sum and not upon the actual monthly debit balance.

The debit balance increased to £1,275 by the 31st day of January, 1925. Walter was then called upon to execute a mortgage over his Moamoa property to secure this amount.

A Mortgage was duly prepared in the form prescribed by the Property Law Act, 1908, and was executed by Walter on the 12th day of February, 1925. Subsequently this Mortgage was registered.

The Mortgage purports to secure the payment of the sum of £1,275 at the rate of £25 on the 1st day of each and every month subsequent to the 1st day of February, 1925, together with interest at £8% per annum payable monthly.

This Mortgage apparently was disregarded by the plaintiff. The current account continued as before, even to the debiting of interest at £6% per annum on the sum of £944.9.9.

Some time previous to 1927 the Manager of the Reparation Estates appointed Mr Croudace, the gentleman who is now Official Assignee of Samoa, to act as receiver for and in respect of the butchery business. The appointment was of a private nature and I assume was consented to by Walter.

In February, 1927 Walter complained to Mr Croudace that interest was being charged against him improperly, the grounds of the complaint not being material to this action, with the result that Mr Croudace discussed the matter with Mr Sasse, now deceased, who was then the Accountant and Acting General Manager of the Reparation Estates.

It is common ground in the present action that Mr Sasse concurred with Walter's contention and agreed that no further interest should be charged after the 31st day of January, 1927. Interest was in fact charged against Walter for several months after that date, but a subsequent credit entry was made to cover those debits.

During the present year, consequent upon a change in the management of the Reparation Estates, Walter's account was reviewed with the result that interest was debited to the account for the period 31st January, 1927 to 30th June, 1930. As Walter failed to comply with a demand for payment proceedings were commenced against him to recover £936.3.1. I will quote from the fifth paragraph of the Statement of Claim in that action:-

5. That on the account current between the parties there is now due and owing by the defendant to the plaintiff the sum of £936.3.1 made up as follows:-	
A. Principal outstanding (including rent and value of stock supplied) to 30 June 1930	£574.18. 6
B. Interest to 30 June 1930	£300.17.11
C. Rent due 1st July 1930	£30. 0. 0
D. Meat from Vaitele (July A/c)	£30. 6. 8
	<u>£936. 3. 1</u>

The case came before me for hearing on 2nd September last. Mr McCarthy who appeared for the plaintiff, immediately elected a non-suit in respect of the item for interest and the application for a non-suit was granted. The case proceeded and Mr Croudace was called as the first witness. He produced a statement showing an indebtedness by Walter amounting to £581.3.1 made up as follows:-

Claimed by N.Z. Reparation Estates as at 30th June 1930	£875.16. 5
Less adjustments as agreed	<u>£58. 7. 6</u>
	£817. 8.11
Less interest disputed by Walter	<u>£176.12. 6</u>
	£640.16. 5
Plus rent due 1st July 1930	£30. 0. 0
Plus meat account for month of July	<u>£30. 6. 8</u>
	£701. 3. 1
Less payment by Walter on account 1st September 1930	<u>£120. 0. 0</u>
	<u>£581. 3. 1</u>

When the statement was produced Mr Klinkmueller, who appeared for Walter, stated that he was prepared to consent to Judgment for the sum of £581.3.1, if Mr McCarthy would agree to a stay of execution for three days. The stay of execution was sought to enable Walter to move for a further stay on the ground that he had a good cause of action against the plaintiff to recover damages for breach of contract. Mr McCarthy agreed to the stay of execution and moved for Judgment by consent for the sum of £581.3.1 and costs of suit. Judgment was entered accordingly, leave being reserved to the plaintiff to proceed on his cause of action to have cancelled an agreement between the parties for the supply of meat.

Although Mr McCarthy elected a non-suit in respect of the claim for interest, he moved for Judgment for an amount which included interest to the extent of £124.5.5.

Strictly speaking, the claim for interest was not a separate cause of action and was not the subject-matter of a non-suit. The proper

procedure should have been an application to amend the Statement of Claim by reducing the amount claimed by the sum of £300.17.11. However, the matter does not appear to me to be of importance because the plaintiff impliedly asked for the non-suit to be set aside, and for an amendment reducing the claim by £355, when Judgment was moved by consent for the sum of £581.3.1.

Walter made his application for a further stay of proceedings. It was refused. He thereupon filed his petition in bankruptcy and was duly adjudicated a bankrupt.

The plaintiff then made a claim against the Official Assignee for £221.9.3 which the plaintiff says is the amount of interest Walter should have paid under the Mortgage of the 12th day of February, 1925.

The sum of £221.9.3 is arrived at by the plaintiff making up an account on the supposition that Walter paid every month from his current account the sum of £25 in accordance with the terms of the Mortgage. The figures produced to me in evidence show that a total sum of £221.9.3 would have become due and payable by way of interest under the terms of the Mortgage.

The account, however, which the plaintiff put in in evidence, purports that on the 1st day of every month Walter was debited with the instalment of principal and interest due under the Mortgage, but was credited with the payment of those amounts by a transfer from the current account. The final position shown by the account is that the whole of the principal and interest has been paid, but that the current account is £793.19.5 in debit. No attempt was made to reconcile that debit with the figures shown in the statement produced by Mr Croudace in the former proceedings.

When Mr Andrews opened the plaintiff's case in the present proceedings he applied for leave to amend his Statement of Claim by reducing the amount claimed to £102.3.2 because the balance of the amount claimed was included in the Judgment for £581.3.1. The amount of interest included in that Judgment is, as I have already stated, £24.5.5, but the reduction now asked for is only £119.5.11.

There may be some explanation or reason for the difference in the amounts.

The question now arises whether or not the plaintiff is estopped by the Judgment in the previous case from recovering the amount claimed in these proceedings.

The law is well settled that a plaintiff cannot split the relief to which he is entitled under any one cause of action. In other words, he must claim in the one action every remedy which can be claimed in respect of the one cause of action. I need only refer to the cases of Serrao v. Noel 15 Q.B.D. 549 and Dillon v. McDonald 21 N.Z.L.R. 375 as authorities for that statement of the law.

The cause of action in the first proceedings was the failure of Walter to pay the balance due upon the current account between the plaintiff and himself. The cause of action in the present case is Walter's failure to pay interest on the principal sum secured by a Deed of Mortgage in accordance with the terms of that Deed.

Consequently, ex facie there are two separate causes of action.

The plaintiff, however, notionally paid the principal and interest moneys due under the Mortgage by transferring them from and debiting them to the current account.

It may be that at some stage the plaintiff had separate causes of action in respect of the moneys due under the Mortgage and in respect of the balance owing upon the current account.

But once the plaintiff has transferred from and debited to the current account the whole of the moneys due and payable under the Mortgage, and has commenced and prosecuted to Judgment proceedings for the recovery of the balance owing upon the current account, he is estopped thereby from recovering subsequently under the covenants of the Mortgage.

The evidence in this case satisfies me that the plaintiff intended to and in fact did include in the claim for the balance owing upon the current account the whole of the moneys due and payable under the Deed of Mortgage. Consequently, the Judgment in that case is a bar to the present action.

Although this finding concludes the matter, I wish to add that I

would, if necessary, have upheld the arrangement whereunder interest ceased to be payable as from the 31st day of January, 1927.

Mr Andrews contended that the arrangement was ultra vires the Acting General Manager's powers unless confirmed by the Board of Control. The absence of any record in the Minutes of the meeting of the Board of Control was relied upon to prove that the Acting General Manager's action had not been confirmed.

The evidence adduced is insufficient to prove exactly what were the powers of the Acting General Manager. Prima facie I incline to the opinion that he would have authority to make arrangements with debtors in respect of their accounts and the interest payable thereon. I notice that the Board of Control did not pass a resolution requiring Walter to execute the Mortgage to secure the amount of his indebtedness nor any resolution confirming the action of the official who procured the security. On my view of the position the onus is on the plaintiff to show that the arrangement was ultra vires the powers of the Acting General Manager. That onus has not been discharged.

Judgment will be entered for the defendant with costs of suit which I fix at £12.12.0 plus Court fees and disbursements.