BURNS PHILP COMPANY LIMITED v. MORGAN

HIGH COURT. Apia. 1956. 1957. 2, 9, November; 29 January. WOODWARD C.J.

Claim for moneys and goods advanced under security of mortgaged leasehold - covenant by defendant mortgagor to repay - leasehold surrendered by defendant himself - rights of parties.

The action of the plaintiff claimed that by deed of mortgage the defendant had covenanted to repay on demand certain advances of money and goods made to him by the plaintiff. The defendant was lessee of certain lands which he had mortgaged in favour of the plaintiff. One of the defences raised by the defendant was that the plaintiff was debarred from suing on the covenant in the mortgage because it was the result of unjustified actions of the plaintiff that compelled the defendant to surrender his leasehold.

Held: That on the facts, it was the defendant himself who surrendered the lease; and accordingly the inability of the plaintiff to restore to the defendant the mortgaged property, not being due to any dealing with that property by the plaintiff, the plaintiff is not debarred from suing on the covenant in the mortgage.

Judgment for plaintiff.

Metcalfe, for plaintiff.
Phillips, for defendant.

Cur. adv. vult.

WOODWARD C.J.: The plaintiff company claims that by deed of mortgage of 4th May 1940, the defendant covenanted to pay the plaintiff company on demand the sum of £1,537.4.9 and further advances; that on the 28th March 1956 the plaintiff company made a legally sufficient demand on the defendant for the sum of £3,669.9.3, being the original sum of £1,537.4.9 plus a further sum of £2,132.4.6, particulars of which are given in a statement of account running from the date of the mortgage to 1st February 1956 in which the defendant is debited with further advances, the cost of goods supplied to him by plaintiff company and interest, and is credited with the value of cocoa delivered by him to the company. The defendant admits that he received the necessary demand.

Two defences are set up. One goes to the root of the claim as a whole, the other is concerned with certain items in it.

The first defence rests on a principle of law relating to mortgages which is thus stated in Ball on Mortgages in New Zealand at page 152:

> "The right of the mortgagee to sue on the covenant is conditional on his ability to restore the mortgaged property to the mortgagor on payment of all moneys due to him under the mortgage. If the mortgagee has so dealt with the property that he cannot restore it on payment of all moneys secured by the mortgage the Court will prevent him from proceeding against the mortgagor on his covenant."

It is necessary therefore to ascertain whether the facts in the present case are, as defendant's counsel submits, or are not, as plaintiff company's counsel submits, such as to prevent the plaintiff company as mortgagee from suing on the covenant in its mortgage.

The mortgage is a mortgage by demise given by the defendant over two leases registered under Nos. 5772 and 5782 from the Crown, comprising New Zealand Reparation Estates property known as the Casala Plantation on which the defendant was growing cocoa. The leases are dated 12th December 1939 and expire on 31st March 1953. The defendant surrendered these leases by deed dated 6th February, 1950. As they are identical in date and provisions I refer to them as "the lease".

Owing to the fact that Mr Brown, the former Manager of the plaintiff company up to the year 1945 is not available to give evidence, some of the further facts of the case, in so far as they bear upon that part of the defence which I am now considering, have to be gathered from correspondence (see copies of letters attached and marked "A" to "I") and from the running account furnished with the statement of claim.

The defence that the plaintiff company so acted as to be debarred from suing on the covenant in its mortgage rests upon the submission of defendant's counsel that it was as the result of certain unjustified actions of the plaintiff company that the defendant was compelled to sign the deed of surrender of his lease.

The first of these actions of which the defendant complains is the company's refusal by letter "D" of 20th February 1946, to continue to pay the rent of his lease, which it had paid up to that date. This refusal was, his counsel submits, a breach of an agreement to pay, or at any rate a failure to make good a representation that it would pay the rent throughout the period of the lease.

The second action by the plaintiff company of which the defendant complains is the company's announcement in the same letter "D" of its decision to abandon its leasehold security and its willingness to surrender that security if the lessor requires it for the purpose of clearing the title.

I think that the defendant's first complaint of a breach of agreement by the plaintiff company is answered by the earlier correspondence. Letter "A" of 9th May 1940 shows that as a condition of the consent of the Crown to the mortgage deed the plaintiff company was required to pay a considerable sum to New Zealand Reparation Estates to cover arrears of rent already owing by the defendant under his lease at the date of the mortgage. Letter "B" of 17th May 1940 makes it clear that the rent which the plaintiff company's solicitor then paid was arrears of rent only. In letter "C" of 24th June 1943, from the plaintiff company's solicitor to the defendant he says that the plaintiff company is growing anxious about the small deliveries of cocoa by the defendant against his account and his neglect of the plantation and adds that the company will cease to pay the rent from the end of that month. The company did in fact continue to pay the rent but this letter negatives any suggestion that it considered itself under any obligation to do so. After such a warning the defendant could not fail to understand that the company continued to pay only in order to preserve its own security and under the provision for further advances to him "in its absolute discretion", to use the words of the mortgage.

I am satisfied that the company was guilty of no breach of agreement when it refused by letter "D" of 20th February 1946 to continue to pay the rent of the lease. To the suggestion of counsel that there was, if not an agreement to continue payments, then a representation that it would continue, the answer is that a representation by a party of his intention to do something is either a promise or it is nothing, and here there was no promise.

I deal now with the second matter in reference to which the defendant says he finds cause of complaint in that it led, so he claims, along with the first, to his being compelled to surrender his lease. He finds it in the announced decision of the company contained in the following words in letter "D" of 20 February 1946 from the Manager of the plaintiff company to Mr Eden, Manager of New Zealand Reparation Estates.

> "....we have decided to abandon our leasehold security given for advances made to the above and accordingly we as mortgagees have no further interest in Mr Morgan's leasehold at Casala...Our security consists of a mortgage by sub-demise of Mr Morgan's lease so that if the lessor requires it for the purpose of clearing the title we will formally surrender the estate to Morgan while retaining his personal covenant for moneys due under the mortgage."

The question here is not what decision the plaintiff company professed to have made but what effective action, if any, it actually took in pursuance

of its announced decision, and what effective action, if any, it caused the lessor to take.

The immediate result of letter "D" was letter "E" of 15th March, 1946 from the General Manager of New Zealand Reparation Estates to the defendant in which, after referring to the advice received from the plaintiff company of its decision to abandon its leasehold security, he writes -

> "I have no option....but to re-enter the Casala plantation on the grounds of non-payment of rental and of the unsatisfactory condition of the area. Will you please accept this letter as notice of intention to re-possess the property as from 1st April next. You will, in the meantime be permitted to occupy the property until such time as the disposal of the area will be decided on."

In letter "F" of 29th March, 1946 to the defendant the General Manager writes - "My letter of 15th March (letter "E") is suspended" and he continues that in consideration of the defendant paying his rent regularly "the New Zealand Reparation Estates will agree to (a) allow the present lease to continue undisturbed until the end of 1946". (The underlining is mine.)

I am unable to agree with defendant's counsel that after, and as a result of the foregoing correspondence the defendant was occupying the plantation no longer under the original lease, but under a new arrangement effected by letter "F". There is no evidence of physical re-entry, and re-entry to be effective to determine a lease, must be a physical re-entry. It is significant that it was not till more than three years later, namely on 31st October 1949 that the defendant applied for relief against forfeiture and that the relief applied for then was against forfeiture of the original lease. It is significant too that the date on which the defendant finally quitted the plantation and removed his effects from it was the day before he, by deed, surrendered the original lease.

By letter "G" of 28th October 1948 the plaintiff company's solicitor advises the defendant that he has been instructed by the General Manager of New Zealand Reparation Estates to give the defendant "formal notice that the lessor has exercised his right of re-entry" as from the previous day but is prepared to allow the defendant one calendar month to vacate the property. The defendant is to understand that he remains on the property in sufferance only and not as lessee.

By letter "H" of 15th September 1949 the plaintiff company's solicitor advises the defendant that "on 5th February next your right of occupation of the plantation terminates in accordance with arrangements made between Mr Eden, General Manager of the New Zealand Reparation Estates and yourself on 5th February, 1949," and desires the defendant, in order to clear the title, to make a formal surrender of his lease to take effect from 5th February 1950.

In letter "I" of 26th September 1949, the General Manager of New Zealand Reparation Estates writes to the defendant that "in view of the estate's almost complete abandonment I have no option but to cancel the arrangement made for you to continue tenancy of the plantation until February 1950" and adds, "You are required to vacate the property by the 31st October 1949." (The underlining is mine.)

In letter "J" of 2nd November 1949 the plaintiff company's solicitor writes to the General Manager:-

> "Morgan has filed an application in the High Court for relief against re-entry and forfeiture.....The filing of the application has stayed the matter of re-entry and as Morgan is still on the plantation the Registrar has fixed a date for hearing on 3rd February, 1950." He adds "I explained to him that his registered lease actually terminated on your re-entry in February last and that his present tenancy is only for one year."

In letter "K" of the 11th January 1950, the plaintiff company's solicitor writes to Mr Morgan as follows:-

> "I have been instructed by the Assistant General Manager of The New Zealand Reparation Estates to advise you that the Minister of Island Territories has now directed that you must vacate your leaseholds on the 5th February 1950 as previously arranged and that your formal surrender of the leases be accepted.
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> In view of these instructions, I am requested to present the Deed of Surrender for registration on the 6th February next and I trust that you will make the necessary arrangements to vacate the plantation on the 5th of that month."

Finally on 6 February 1950 the defendant surrendered his lease by deed. The application for relief was dismissed on the ground that the lease had been surrendered. My conclusion from the whole correspondence is that there never was, in the five years since letter "D", which the defendant complains caused him to be robbed of his lease, an effective re-entry on the leased land so as to determine the lease, and that it was determined only when the defendant himself surrendered it, and quitted the plantation. The plaintiff company's justified refusal to continue to pay rent in 1946 and its offer to surrender its security while retaining its right of action under the covenant, may indeed have advanced the date at which Mr Morgan's affairs reached their crisis, but that crisis was clearly due to the deterioration of the plantation and the consequent increase in his indebtedness, owing probably in part to the difficulty of getting labour at that time to which he refers in his notes, and to the disappointment of the hope that he seems to have had of getting a considerable sum of money to re-habilitate the plantation.

The inability of the plaintiff company to restore to the defendant the mortgaged property, not being due to any dealing with that property by the plaintiff company, the company is not debarred from suing on the covenant in the mortgage.

During the course of the hearing the plaintiff company's counsel, in view of some admitted and some other possible errors in the account sued upon, made certain offers to the defendant's counsel which he, in view of his defence to the claim as a whole, found himself unable to accept. I suggest that now that defence is disposed of, counsel may be able to agree to such a reduction of the sum claimed as will, with reasonable certainty cover proved and possible errors. If such a sum can be agreed on, I will give judgment for the plaintiff company for that sum.