Privy Council Appeal No. 28 of 1938

Douglas George Wright and another - - - *Appellants*

v.

The New Zealand Farmers Co-operative Association of Canterbury Limited - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH APRIL, 1939

Present at the Hearing:

LORD ATKIN
LORD RUSSELL OF KILLOWEN
LORD MACMILLAN
LORD WRIGHT.
LORD ROMER.

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal was brought by the plaintiffs in an action against the New Zealand Farmers Co-operative Association of Canterbury, Limited (hereinafter referred to as the Association) from a judgment of the Court of Appeal of New Zealand which affirmed the judgment of the trial Judge, by which judgment was entered for the defendants in the action, and judgment was entered for the defendants on a counterclaim by them for, (amongst other relief) a sum of £13,384 13s. 9d.

Two questions only were argued before their Lordships' Board; they are unconnected, and may be dealt with separately.

The relevant facts upon which the first question is founded may first be stated.

In July, 1928, the plaintiff Wright owned a farm called "Cattle Peaks," which was subject to a first mortgage for £9,425. By memorandum of mortgage dated the 27th July, 1928, the plaintiff Wright mortgaged "Cattle Peaks" to the Association, subject to the beforementioned mortgage. By virtue of the Land Transfer Act, 1915, the mortgage of the 27th July, 1928, conferred upon the Association a power of sale in the following terms:—

> "The mortgagee may sell the mortgaged property, or any part thereof, either altogether or in lots, by public auction or by private contract, or partly by the one and partly by the other of such modes of sale, and subject to such conditions as to title

> or evidence of title, time or mode of payment of purchase-money or otherwise as the mortgagee thinks fit, with power to the mortgagee to buy in the mortgaged property or any part thereof at any sale by auction or to rescind any contract for the sale thereof, and to resell the same without being answerable for any loss or diminution in price, and with power to execute assurances, give effectual receipts for the purchase-money, and do all such other acts and things for completing the sale as he may think proper: And also that the mortgagee may exercise such other incidental powers in that behalf as are conferred upon mortgagees by the Land Transfer Act, 1915: And, lastly, that the mortgagee will apply the moneys arising from any such sale as aforesaid, in the first place in payment of the costs and expenses incidental to the sale or otherwise incurred in respect of the mortgage, and in the second place in satisfaction of the principal interest and other moneys for the time being owing under the mortgage, and in the third place in payment of the moneys owing under subsequent registered mortgages (if any) in the order of their priority; and will pay the surplus (if any) to the mortgagor."

By an agreement dated the 8th May, 1929, the power of sale being then exercisable, the Association as mortgagee agreed to sell "Cattle Peaks" to one Little for the sum of £15,317 5s. 0d. The purchase money was to be paid as to £2,000 on the signing of the agreement; this was duly paid. The sum of £9,425 was to be paid by Little assuming liability for the first mortgage of that amount, and the balance of £3,892 5s. 0d. was to be paid on the 23rd March, 1934. Interest on the unpaid purchase money was payable by Little at the rate of 9 per cent. per annum. Little was given possession of the land, but no transfer of the property to him was ever effected. The agreement, however, provided that if Little made default, the Association might re-enter on the land, and (whether it had re-entered or not) resell the land. Little failed to carry out the contract, and the Association rescinded the agreement with Little and sold "Cattle Peaks" to another purchaser, but for a price considerably lower than that payable under the first agreement. The second agreement has been carried to completion and the land has been vested in the second purchaser. The second purchaser was in fact Little's wife, but nothing turns on this. Neither the propriety nor the validity of that sale is questioned. The Association has credited the plaintiff Wright with all moneys received from Little under the agreement of the 8th May, 1929, and with the full price for which the property was sold under the second agreement. The plaintiff Wright, however, is not satisfied; he claims that he is not concerned with the second sale, but that he is entitled to be credited with the whole of the price for which the property was contracted to be sold under the first agreement. The first question arising on this appeal is whether that claim is well founded or not.

It is to be observed that in the present case the mortgagee's power of sale authorised a sale "subject to such conditions as to . . . time or mode of payment of purchase money . . . as the mortgagee thinks fit," words wide enough to constitute an authority to the mortgagee from the mortgagor to sell on credit. This feature, however, appears to be of no materiality to the point

under consideration; its only importance lies in the fact that it makes it impossible for the mortgagor to contend that the contract with Little was in excess of the mortgagee's power. That he does not seek to do; indeed his whole contention is based upon the view that the contract constituted an effective sale under the power, and that the price payable thereunder must be credited to him by the mortgagee.

Their Lordships agree with both of the Courts in the Dominion in rejecting this claim. They know of no principle legal or equitable upon which can rest the proposition that a mortgagee who has contracted to sell in exercise of his power of sale, and who (the land not having become vested in the purchaser) rescinds the contract, is accountable to the mortgagor for purchase money which he has never received. Authority is against such a proposition. The exact point has been decided, and their Lordships think rightly decided by the Courts in New South Wales (*Irving* v. *Commercial Banking Co. of Sydney*, 19 N.S.W. L.R. Cases in Equity, 54).

The case is patently different from those cases in which it has been held that a mortgagee, who sells upon the terms that part of the purchase price shall remain on mortgage, is accountable to the mortgagor for the whole purchase money. In such cases the contract has been carried to completion, the property has been vested in the purchaser, and the power of the mortgagor to get back his property freed from the mortgage has been, not merely suspended, but destroyed. The transaction is only consistent with the view that the whole purchase money was received by the mortgagee in the first instance, and subsequently, as to part, advanced by way of loan to the purchaser.

Moreover the terms of the power of sale which is here in question, negative the existence of the right claimed. The mortgagee's obligation as to the application of the sale moneys is only expressed to exist in relation to " the moneys arising from any such sale "; and moneys which have never been forthcoming, cannot be said to " arise " at all. Further the power includes a power in the mortgagee to rescind and resell " without being answerable for any loss or diminution of price." Such a provision seems inconsistent with the view that he is answerable for the larger price. Their Lordships feel no doubt that the plaintiff Wright's first contention must fail.

The facts relevant to the second point must now be stated.

By a guarantee in writing dated the 11th August, 1909, the plaintiff Wright guaranteed to the Association payment by two sheep farmers named Nosworthy, of their indebtedness to the Association in the following terms:—

> " In Consideration of your supplying goods and making advances to William Nosworthy and Robert Nosworthy both of Mt. Somers, Sheepfarmers, I, Douglas George Wright of Windermere, Sheepfarmer, hereby agree with you as follows:—
>
> > " 1. To guarantee to you the payment by the said William Nosworthy and Robert Nosworthy of all goods already supplied or hereafter supplied by you to them and

of all advances already made or hereafter made by you to them together with interest thereon at the current rate charged by you and together with such charges as are usually made by you.

" 2. THIS guarantee shall be a continuing guarantee and shall apply to the balance that is now or may at any time hereafter be owing to you by the said William Nosworthy and Robert Nosworthy on their current account with you for goods supplied and advances made by you as aforesaid and interest and other charges as aforesaid.

" 3. YOU shall be at liberty without discharging me from liability hereunder to grant time or other indulgence to the said William Nosworthy and Robert Nosworthy in respect of goods supplied and advances made by you to them and the interest thereon and other charges as aforesaid and to accept payment from them in cash or by means of negotiable instruments or otherwise and to treat them in all respects as though I were jointly liable with them as a debtor instead of being merely a surety for them. You shall also be at liberty to take any securities you may think fit from the said William Nosworthy and Robert Nosworthy for the purpose of securing payment of the moneys which I hereby guarantee to pay and such securities at your own discretion to release and discharge or otherwise deal with.

" 4. IN order to give full effect to the provisions of this guarantee I hereby waive all suretyship and other rights inconsistent with such provisions and which I might otherwise be entitled to claim and enforce."

By letter dated the 25th April, 1931, the plaintiff Wright terminated his said guarantee. The balance due on that date by the Nosworthys to the Association was the sum of £11,816 10s. 4d. The account was ruled off in the Association's books at that figure; and all subsequent debits and credits to the Nosworthys were entered in a fresh account called the I.A account. The Nosworthys having made default, the Association counterclaimed in the action for payment by the plaintiff Wright of the said sum of £11,816 10s. 4d. with interest thereon. The plaintiff Wright pleaded that the claim was barred by the Limitation Act (21 James I, c. 16) or in the alternative by the Statute 3 & 4 Wm. IV. c. 42, his contention being that, upon the authority of the decision in *Parr's Banking Co. Ld.* v. *Yates* ([1898] 2 Q.B. 460 and 67 L.J. Q.B.D. 851), his liability as guarantor was barred in respect of each advance made to the Nosworthys on the expiration of six years from the date of the advance. The second question to be decided is whether that contention is sound.

The trial Judge held that it was not, and entered judgment for the Association for £13,384 13s. 9d. in respect of the guarantee, representing the said sum of £11,816 10s. 4d. and interest to judgment, after taking into account a credit existing on the I.A account. The appeal from that judgment was dismissed.

Their Lordships agree with those decisions. In their opinion the matter is determined by the true construction of the guarantee which they proceed to consider, and in the first instance, apart from authorities. It is no doubt a guarantee that the Association will be repaid by the Nosworthys advances made and to be made to them by

the Association together with interest and charges; but it specifies in clause 2 how that guarantee will operate, viz., that it will apply to (i.e., the guarantor guarantees repayment of) the balance which at any time thereafter is owing by the Nosworthys to the Association. It is difficult to see how effect can be given to this provision except by holding that the repayment of every debit balance is guaranteed as it is constituted from time to time, during the continuance of the guarantee, by the excess of the total debits over the total credits. If that be the true construction of this document, as their Lordships think it is, the number of years which have expired since any individual debit was incurred is immaterial. The question of limitation could only arise in regard to the time which had elapsed since the balance guaranteed and sued for had been constituted.

It is said, however, that the decision in the *Parr* case is inconsistent with this view, and excludes its entertainment. In that case there was in terms no guarantee of every debit balance existing from time to time; nor does the clause as to evidence, which appears in the Law Journal report, operate to create such a guarantee. There had been no debits to the account of the guaranteed party, except debits of interest and charges, since the 3rd December, 1890, but payments to its credit had been made down to March or April, 1897, when the guaranteed party disappeared. The writ was issued on the 3rd September, 1897. Counsel for the plaintiff argued that on the true construction of the guarantee it did guarantee payment of whatever was from time to time due on the account of the principal debtor, and that what was sued for was the guaranteed payment of the balance due in 1897. As their Lordships read the judgments, the Court of Appeal refused to accept that construction of the guarantee there in question; they construed it as a guarantee of the repayment of each individual item debited to the guaranteed party whether in respect of advances, interest, commission or other charges. Thus A. L. Smith L.J. said as to the guarantee that " upon the true construction of it, no advances having been made for a period of more than six years before the date of the writ in the action, the plaintiff's right of action in respect of the advances is barred by the Statute of Limitations "; but he held the defendant bound to pay the interest, commission and charges, the repayment of which had also been guaranteed, because they had accrued against the guaranteed party within the six years. Rigby L.J. also rejected the construction which gave a fresh right of action from day to day, in other words he rejected the construction that the repayment of balances was guaranteed. Vaughan Williams L.J. also rejected that construction in holding that under the guarantee the cause of action arose as to each item, whether principal, interest, commission or other banking charge, as soon as that item became due.

Their Lordships express no opinion whether that particular decision was right or wrong. They would wish to keep that question open for further consideration should the

necessity to determine it ever arise. They are, however, satisfied that it has no application to the rights and liabilities of the parties to the guarantee which is under examination on this appeal. That document, in their opinion, clearly guarantees the repayment of each debit balance as constituted from time to time, during the continuance of the guarantee, by the surplus of the total debits over the total credits, and accordingly at the date of the counterclaim the Association's claim against the plaintiff for payment of the unpaid balance due from the Nosworthys with interest was not statute-barred. It is not necessary to decide the exact point of time from which the limitation period would commence to run in a case such as this, because no claim was made before their Lordships to alter the amount of the judgment on the guarantee, in the event of the contention as to the Statutes of Limitation being unsuccessful.

For the reasons indicated their Lordships are of opinion, and they will humbly advise His Majesty, that this appeal should be dismissed. The appellants must pay the costs of the appeal.

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In the Privy Council

DOUGLAS GEORGE WRIGHT AND ANOTHER

v.

THE NEW ZEALAND FARMERS CO-OPERATIVE ASSOCIATION OF CANTERBURY LIMITED

DELIVERED BY LORD RUSSELL OF KILLOWEN

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