Privy Council Appeal No. 1 of 1946

The Australian Provincial Assurance Association Limited - - - - - - - *Appellants*

v.

E. T. Taylor and Company Ltd. - - - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH JUNE, 1947

Present at the Hearing:

LORD DU PARCQ
LORD NORMAND
LORD OAKSEY
LORD MORTON OF HENRYTON

[*Delivered by* LORD NORMAND]

This is an appeal from a judgment of the Court of Appeal of New Zealand in so far as it affirmed that part of a judgment of the learned Chief Justice in the Supreme Court which held that the appellants had accepted interest for the period 1st July, 1933, to 30th June, 1937, at the rate of 4 per cent. per annum in full satisfaction of the interest due to them under a mortgage and that the respondents were entitled to recover the sum paid by them to the appellants in excess of the amount payable at that rate.

By the appellants' mortgage, which is dated 2nd July, 1927, George Spriggens mortgaged the licensed premises known as the Grand Hotel, Wanganui, to secure the repayment of the principal sum of £20,000 with interest at 9 per cent. per annum, reducible to 7 per cent. on punctual payment. After 10th May, 1932, however, 5.6 per cent. was the maximum rate of interest legally exigible under the provisions of the National Expenditure Adjustment Act. By a second mortgage, dated 21st May, 1928, Spriggens mortgaged the same subjects to the respondents to secure repayment of the principal sum of £4,000 with interest. Spriggens subsequently granted two other mortgages over the same premises. It is common ground that Spriggens' personal obligation was at all material times worthless. In August, 1931, the respondents, after the mortgagor had defaulted under their mortgage, entered into possession and they remained in possession and carried on the hotel business until the sale of the property by the Registrar of the Court at Wellington under the provisions of the Land Transfer Act, 1915. This was done on the respondents' application after the commencement of the present action, and they purchased the property at the sale at a price which was insufficient to meet the aggregate amounts admittedly due under the first and second mortgages.

The respondents paid interest to the appellants at 4 per cent. per annum from 1st July 1932 to 30th June 1937 but the appellants have conceded, without making any admission, that for the year 1st July 1932 to 30th June 1933 they would make no claim against the price of the property in the respondents' hands. They do, however, claim that for the period 1st July 1933 to 30th June 1937 they are entitled to payment out of

the price of the difference between the sum received by them from the respondents as interest and the sum representing interest at the rate of 5.6 per cent.

The questions for decision are whether the appellants accepted the payments of interest at 4 per cent. under a binding agreement between the parties; and, if so, whether the agreement affects the appellants' right on a realization of the property subject to the mortgage to claim payment of the interest at the mortgage rate, as reduced by the Act, so far as not already paid.

It would be unprofitable to spend time on considering the form of the action or the pleadings or the incidental proceedings in the Courts below. It is enough to say that the plaintiffs (the present respondents) base their case on an alleged agreement constituted by an oral offer made by the appellants' representatives at a meeting with their representative on 7th December 1932 and their own acceptance by letter of 19th December 1932; and they maintain that under this agreement the appellants agreed to accept from them interest at the rate of 4 per cent. for the twelve months beginning 1st July 1932, that the parties tacitly continued this agreement after 30th June 1933 till 30th June 1937, when, as is now admitted, the agreement was terminated by the appellants, and that by the agreement the appellants are disabled from maintaining against the respondents that they are entitled to payment at the mortgage rate of interest, as reduced by the Act, and are accordingly disabled from claiming out of the price of the property subject to the mortgage the difference between the interest paid at 4 per cent. and interest at 5.6 per cent. for the disputed period. The learned Chief Justice decided in favour of the respondents and his judgment was unanimously affirmed by the Court of Appeal. The appellants, however, maintain *inter alia* that there was merely a voluntary concession allowed by them without contractual intent; they maintain next that, if there was contractual intent, there was no consideration given by the respondents, and further that, if there was a binding agreement, it merely bound them not to enforce their remedies as mortgagees till after the 30th June 1933 in return for the respondents' undertaking to pay interest at the rate of 4 per cent. for the year ending on that date, and accordingly that there was no agreement about the rights of parties in the event of the realization of the appellants' mortgage or the respondents' mortgage; they also maintain that in the period after 30 June 1933 there was certainly no more than a voluntary concession on their part even if there was a binding agreement for the year ending on that date.

Counsel for the respondents submitted that the real question at issue was one of fact and that as there were concurring judgments in his favour there was no need to enter upon a consideration of the evidence. He was able to point to passages not only in the judgment of the Chief Justice but also in the judgments in the Court of Appeal and particularly in that of Mr. Justice Fair in which the issues seem at least to be treated as questions of fact. The learned Chief Justice, for example, says " the first question, which is one of fact, is whether there was during the period in dispute an agreement between the parties and, if so, what the terms of that agreement were," and his answer to this question is that " there was an agreement to the effect that the A.P.A." (the appellants) " would accept payment of interest at 4 per cent in full satisfaction of the interest payable under the mortgage." Their Lordships are unable to accept this view of the case. Whether a meeting of the parties' representatives took place on 7th December, 1932, and what was there said, are pure questions of fact. But whether what was said was said with contractual intent, whether there was consideration, and what was the effect of the agreement if there was one, are all at least in part questions of law. That is a proposition too trite to need the support of authority, and in spite of the apparently unambiguous language of the learned Chief Justice it may be doubted whether he intended to affirm anything contrary to it.

It is therefore necessary to consider the evidence relating to the alleged agreement. There is no doubt that a meeting took place between the representatives of the parties on 7th December, 1932. The best evidence

of what passed at that meeting is to be found in a letter written on the 19th December by the respondents' solicitor to the appellants' manager. It is in the following terms:—

" Dear Sir,

Re Mortgage Spriggens.

We have now been able to convey to the Managing Director of Messrs. E. T. Taylor & Co. Ltd. your Association's offer for a further reduction of interest payable under their mortgage to 4 per cent. per annum from 1st July last, and we are instructed by our client Company to accept this offer and to express its appreciation of the way in which the Association has met it. It is understood that the arrangement is to operate for a period of twelve months, and the position is to be again reviewed. A cheque for the interest at present outstanding will be forwarded to you within a few days."

The evidence of the witnesses who were present at the meeting confirms the account of it given by this letter. But their evidence shows that the meeting took place in consequence of a request for a concession made by the respondents' solicitor in a letter of 22nd November 1932. This is of considerable importance because Counsel for the respondents submitted that the agreement was constituted by the offer made at the meeting and the acceptance in the letter of 19th December, and that it was not competent to have regard to earlier negotiations in order to determine the terms or the effect of the agreement, and he cited *Inglis* v. *Buttery*, 1877, 3 Appeal Cases 552. That was a case in which after previous negotiations and communings the agreement come to by parties was embodied in a written memorandum and specification of a contract for the repair of a ship. It was with reference to this document that Lord Gifford said in the Court of Session " Where parties agree to embody, and do actually embody, their contract in a formal written deed, then in determining what the contract really was and really meant, a Court must look to the formal deed and to that deed alone. This is only carrying out the will of the parties. The only meaning of adjusting a formal contract is that the formal contract shall supersede all loose or preliminary negotiations, that there shall be no room for misunderstandings such as may often arise and which do constantly arise in the course of long and it may be desultory conversations, or of correspondence and negotiations in the course of which the parties are often widely at issue as to what they will insist on and what they will concede. The very purpose of a formal contract is to put an end to the disputes which would inevitably arise if the matter were left upon verbal negotiations and upon mixed communings, partly consisting of letters and partly of conversations." In the present case there is no formal document embodying the contract, and the terms of the contract must admittedly be gathered partly from the parole evidence of the conversation at the meeting and partly from the letter of 19th December. But the evidence of what took place at the meeting relates it to a previous letter of 22nd November, and that letter in turn refers back to the beginning of the correspondence in March 1932. The correspondence from 10th March as well as the parole evidence relating to the meeting and the letter of 19th December must therefore be regarded, on the principle that when a contract has to be found in letters or partly in a letter or letters and partly in parole evidence the whole of that which passed between the parties must be taken into consideration. Now it is apparent from the letter of 10th March 1932 that the respondents were greatly concerned about current losses suffered by them in the management of the hotel, and that they could only obtain relief through a concession by the appellants. They therefore requested " a reduction in the rate of interest under the mortgage to 5 per cent.", which they said would reduce their annual loss from £1,000 to £700. They also stated that the relief would justify them in assuming certain increased liabilities " in the hope that when conditions improved they would be able to more than recover the ground being lost in the meantime." They did not suggest that the reduction should be permanent but that it should

operate for at least twelve months and then be reviewed as it was apprehended that no very material improvement in the country's economic condition could be hoped for within that period. The appellants' solicitor replied on 26th April that the board was quite prepared to reduce the interest as from 1st January, 1932, by 20 per cent. and added that this arrangement was " without prejudice to the terms of the mortgage itself and only to endure for twelve months." That was accepted, and interest was paid accordingly at the rate of 7 per cent. less 20 per cent. On 22nd November, however, the respondents' solicitor wrote to the appellants' manager reminding him of the 20 per cent. reduction and adding " we have now been instructed by our client Company having regard to the heavy losses still being made, to approach your Association for some further concession." The purpose of this was, he explained, " to enable the respondents to carry on the business for the benefit of those concerned without being required to sink further funds in the venture." He suggested a retrospective reduction in the interest rate to 4 per cent. for the twelve months ended 31st July, 1932, and that for the next twelve months the appellants should accept in settlement of the interest the whole of the net profits made in the hotel, and that the position should be reviewed again after 31st August, 1933. The appellants did not agree to this proposal, and it was then that the meeting of 7th December was arranged. From this correspondence it is clear that the appellants were asked to deal by way of a temporary interest concession with a financial difficulty which was believed to be transient, that the purpose was to enable the respondents to carry on the hotel " for the benefit of those concerned till things improved," and that the appellants were careful from the first to hedge their concession with the proviso " without prejudice to the terms of the mortgage itself." There is no evidence to suggest any departure from this position. Though the words " reduction of the rate of interest payable under the mortgage " as they occur in the letter of 19th December, may suggest the substitution in the mortgage itself of 4 per cent. for the mortgage rate, at least for the purpose of any question which might arise between the parties, it is scarcely maintainable that the similar words in the letter of 10th March mean more than a temporary reduction of interest payments as a temporary relief till the hotel business became profitable again, and it is reasonable to give the words when they occur in the letter of 19th December the same unambiguous meaning which they have in the letter of 10th March. The appellants did not challenge when it was made the suggestion that the concession asked of them was in a business sense for the common advantage of the parties. Their Lordships are therefore of opinion that the relevant evidence establishes that the parties had in conducting their negotiations a contractual intention. They are further of opinion that at the meeting of 7th December the respondents undertook to pay 4 per cent. for the year beginning 1st July 1932 and the appellants undertook in return not to enforce their rights as mortgagees. There was therefore consideration to support the contract. But their Lordships do not find in the correspondence any sign that the parties had in view the rights of the respective parties in the event of the redemption of the first mortgage, and they hold that the agreement made no provision for this event. It therefore becomes unnecessary to consider whether the parties tacitly carried forward the agreement beyond the twelve months in which it expressly applied. For, if they did, the agreement in the years of its tacit operation could have no greater power to affect the appellants' rights than it had in the year when it operated expressly.

Counsel for the respondents, however, argued that it was competent to consider *ex post facto* evidence in order to determine the meaning and effect of the contract. He founded on the form of demands for interest sent by the appellants each quarter and pointed out that in the disputed period they were on the face of them demands for interest at 4 per cent. as if it were the interest due upon the mortgage without qualification. He also founded on the appellants' ledgers which do not debit the mortgagor in the disputed period with the difference between interest at 4 per cent. and interest at 5.6 per cent. and which contain entries that appear to treat 4 per cent. as the mortgage rate of interest.

There are also letters between a branch office and the head office of the appellants in which 4 per cent. is treated as the interest current for the time being upon the mortgage debt. Finally there is a correspondence between the appellants and the National Bank of New Zealand Limited which held a fourth mortgage over the security subjects. This bank wrote to the appellants enquiring whether there were any arrears of interest on their mortgage and received the misleading reply that at 5th October 1934 there was owing only the interest for the quarter ending 30th September 1934. Counsel for the appellants objected that the whole of this evidence was inadmissible on the ground that the actings of the parties under a contract during the period when it is in operation are not relevant for the purpose of construing the contract unless it is of ancient date. Whether this objection was too broadly stated and whether the actings of parties under a contract, though it is of recent date, may be relevant for the purpose of construing the contract if it is ambiguous, are questions which need not now be considered, for their Lordships discover no ambiguity, latent or patent, in the present contract which seems to them capable of no other construction than that which they have put upon it. Accordingly, since there is nothing in this *ex post facto* evidence which amounts to a conclusive admission, their Lordships reject it as inadmissible for the purpose of influencing the construction of the contract. It is right to add, however, that the evidence on which the respondents relied is of unequal value, and except for the letter to the National Bank of New Zealand, it is susceptible of an explanation not unfavourable to the appellants. For example, Mr. Paul, the chairman of the appellant company, explained that the mortgage ledger of the head office comprises two classes. There is one class where the mortgagor pays interest regularly and where the ledger account shows correctly the state of his account. But there is also a "B class" in which the payments actually received are alone recorded and there is no record of the amount remaining due by the mortgagor. Spriggens' account was in Class B and the entries against him conform to the pattern of Class B accounts described by Mr. Paul. Again the internal correspondence of the company is not significant, because it was known both at head office and in the branch that the rate of interest payable had been temporarily modified to 4 per cent. and the references to the rate of interest in the letters do not imply more than this. There are among the exhibits receipts for the interest paid in the disputed period which acknowledge the payments as payments to account of interest on the mortgage, and it is not possible to draw from the mere form of the demands any certain inference adverse to the appellants about their understanding of the footing on which 4 per cent. was paid. The appellants' letter to the fourth mortgagees of October 1934 might bar the appellants from asserting as against them that there were arrears of interest due under the first mortgage by the mortgagor. That would depend on whether the fourth mortgagees acted on the representation contained in the letter so as to alter their position for the worse, but it is not a representation made to the respondents, nor can they rely on it as an unambiguous admission that all right to interest over 4 per cent had been given up.

Their Lordships regret to find themselves differing from the learned Chief Justice and from the Court of Appeal. This difference in result arises partly from the fact that in the Courts below the correspondence which took place before the meeting of 7th December 1932 was not given its due weight. But the Courts below also relied for the construction of the contract upon evidence of the subsequent actings of the parties, which their Lordships have held to be inadmissible for that purpose, and they based on that evidence large conclusions which it seems to their Lordships to be incapable of supporting.

In the result their Lordships are of opinion that the appeal should be allowed and that the judgments of the Courts below should be set aside and judgment entered for the appellants. Their Lordships will humbly so advise His Majesty. The respondents will pay the appellants' costs of the appeal and their costs in the courts below.

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In the Privy Council

THE AUSTRALIAN PROVINCIAL
ASSURANCE ASSOCIATION LIMITED

v.

E. T. TAYLOR AND COMPANY LTD.

DELIVERED BY LORD NORMAND

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