E. H. M. FOOT (*Defendant*) ..... APPELLANT;

AND

LEON H. RAWLINGS (*Plaintiff*) ..... RESPONDENT.

1962
*Dec. 13, 14
1963
Mar. 7

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contracts—Agreement to forbear from taking action on promissory notes—Undertaking by debtor to perform certain obligations—Good consideration—Creditor's right to sue suspended—Action on notes premature.

An action was brought for the balance owing on six promissory notes, all of which were made by the defendant payable to the plaintiff. Before the commencement of the action the parties had executed an agreement as to five of the notes, whereby it was agreed that the defendant would pay, and the plaintiff would accept, $300 per month at 5 per cent, instead of $400 at 8 per cent, until the account was fully paid. It was orally agreed that payment of the sixth note should be postponed until the first five had been paid pursuant to the terms of the written agreement. The payments, starting on August 16, 1958, were to be paid on or before the 16th of each month. From time to time the defendant was to give the plaintiff a series of six post-dated cheques, each series to cover a period of six months. The several series were so given, but the cheques for the period July to December, 1960, were in each case dated on the 18th instead of the 16th, apparently as the result of inadvertence. These cheques

*PRESENT: Taschereau, Cartwright, Abbott, Martland and Ritchie JJ.

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were accepted by the plaintiff as being in compliance with the agreement; those for July to November were cashed as they came due.

The writ was issued on December 7, 1960. The defendant argued that the action was premature by reason of the written and oral agreements. However, the trial judge found that there had been default on the part of the defendant in respect of the cheques payable in October and November, 1960, and directed that the plaintiff recover the full amount of principal and interest outstanding on the notes. An appeal from this judgment was dismissed by the Court of Appeal, one member dissenting. The defendant appealed to this Court.

Held: The appeal should be allowed.

At the date of the issue of the writ the agreement between the parties was in existence and the defendant was not in default under its terms.

The giving of the several series of post-dated cheques constituted good consideration for the agreement by the plaintiff to forbear from taking action on the promissory notes so long as the defendant continued to deliver the cheques and the same were paid by the bank on presentation. *Sibree v. Tripp* (1846), 15 M. & W. 23, applied; *Foakes v. Beer* (1884), 9 App. Cas. 605, referred to. The inclusion in the agreement of a privilege of prepayment did not affect the question. The defendant did not reserve any option to himself to refrain from delivering the cheques or from providing for their payment by the bank.

As held by the Court below, the plaintiff's right of action on the six promissory notes had not been extinguished. It followed that should the defendant have made default under the agreement, it would thereupon have been open to the plaintiff to bring action for the amount remaining unpaid on the notes; but an agreement for good consideration suspending a right of action so long as the debtor continues to perform the obligations which he has undertaken thereunder is binding. To hold that the claimant in such a case may, in breach of the agreement, pursue his right of action leaving the defendant to a cross-action or counterclaim would be to countenance the circuity of action and multiplicity of proceedings which it was one of the chief objects of the Judicature Acts to abolish and would be contrary to the terms of subs. 7 of s. 2 of the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213. *British Russian Gazette & Trade Outlook Ltd. v. Associated Newspapers Ltd.* [1933] 2 K.B. 616, distinguished; *Stracy v. The Governor and Company of the Bank of England* (1830), 6 Bing. 754, applied.

So long as the defendant in the instant case continued to perform his obligations under the agreement, the plaintiff's right to sue on the notes was suspended; consequently, the action brought on December 7, 1960, was premature and accordingly should have been dismissed.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Maclean J. Appeal allowed.

Joseph McKenna, Q.C., for the defendant, appellant.

[1] (1962), 37 W.W.R. 289, 32 D.L.R. (2d) 320.

Robert A. Price, for the plaintiff, respondent.

The judgment of the Court was delivered by

CARTWRIGHT J.:—This is an appeal from a judgment of the Court of Appeal for British Columbia[1], dismissing an appeal from a judgment of Maclean J. directing that the respondent recover the full amount of principal and interest outstanding on six promissory notes and that there be a reference to ascertain the total outstanding. Davey J.A., dissenting, would have allowed the appeal and dismissed the action.

The particulars of the notes sued on, all of which were made by the appellant payable to the respondent, are as follows:

1. Promissory Note dated February 4, 1952, to secure the sum of $4,000 with interest thereon at the rate of 8% per annum, payable on demand.

2. Promissory Note dated February 4, 1952, to secure the sum of $5,000 with interest thereon at the rate of 8% per annum, payable on demand.

3. Promissory Note dated February 4, 1952, to secure the sum of $5,000 with interest thereon at the rate of 8% per annum, payable on demand.

4. Promissory Note dated February 4, 1952, to secure the sum of $2,000 with interest thereon at the rate of 8% per annum, payable on demand.

5. Promissory Note dated October 10, 1956, to secure the sum of $5,000 payable to the plaintiff on May 1, 1957.

6. Promissory Note dated May 5, 1958, to secure the sum of $4,576.01, with interest thereon at the rate of 6% per annum, payable to the Plaintiff on December 10, 1958.

All the notes were dated at Victoria, B.C.; the first five were payable "at Victoria B.C."; the sixth was payable "at the Canadian Bank of Commerce here".

No question is raised as to the making or the validity of the notes or as to the finding of the learned trial judge that the sixth note was duly presented for payment. The defence is that the action was premature by reason of a written agreement between the parties as to the first five notes and an oral agreement as to the sixth note.

[1] (1962), 37 W.W.R. 289, 32 D.L.R. (2d) 320.

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The written agreement was in the form of a letter addressed by the respondent to the appellant. It reads as follows:

July 7th, 1958.

E. H. M. Foot, Esq.,
Bank of Toronto Building,
Douglas St., Victoria, B.C.

Dear Sir:—

I have been thinking matters over regarding your indebtedness to me and after a good deal of thought I think that you may be interested in the following proposal:

(1) That I accept the sum of $300.00 per month provided that it is paid on the sixteenth of each and every month without fail, and I agree to lower the interest from eight per cent to five per cent.

(2) The above offer only to take place provided you do not miss any of the Three hundred dollar payments, which are to be paid monthly, starting on August 16th, 1958 and to be paid to me on or before the sixteenth of each and every month following until the full account is paid.

(3) These cheques to be for $300.00 each and the first to be payable on the 16th day of August 1958, and every month following, these cheques to be given to cover the following six months starting on the 16th of Angust 1958 and to the 16th of February 1959, after which you are to give me six more such cheques to carry on the next six months, that would take it to August 1959 after which you are to give me six more such cheques to cover another six months and so on until the account is fully paid.

(4) Should any of these cheques be turned down by the C.B. of C. the whole of the unpaid indebtedness will go back to the present state namely, the interest will revert to the present eight per cent, and the monthly payments revert to $400.00 per month.

(5) My reason for making this offer is not only to help you in your finances but to help me carry on. I realize that I am not going to have many more years to live and would like to be able to do several things before that time comes. This is clearly an advantage to you, as first of all you save three per cent in interest which at the present rate you are paying saves you Fifty dollars per month.

(6) You of course to have the privilege of paying off the whole debt to me at any time you may wish to do so, this offer must be accepted in writing on or before August next.

(7) I, E. H. M. Foot, agree to the above terms of payment.

This was signed by both parties on July 17, 1958.

It was orally agreed between the parties that payment of the sixth note should be postponed until the first five had been paid pursuant to the terms of the written agreement.

The respondent sent to the appellant from time to time the several series of six post-dated cheques called for by paragraph 3 of the agreement; but the six cheques dated in the months of July 1960, to December 1960, inclusive, were in each case dated on the 18th instead of the 16th of the month. These were sent in a letter from the appellant to the respondent dated July 26, 1960, which stated that they were sent "in accordance with our continuing agreement of the past several years relating to the balance of the monies I owe you". It would seem that dating these cheques on the 18th was the result of inadvertence.

It may be that the respondent could have elected to regard the lateness in sending the July cheque and the dating of all six on the 18th instead of the 16th as a default entitling him to rescind the agreement but he did not do so. He acknowledged them by letter to the appellant dated July 28th, 1960, in which he said:

> I wish to acknowledge receipt of six $300.00 cheques, dating from July 18th to Dec. 18th '60 as per your letter to me of July 26th, these cheques to be cashed as dated.

This was followed by a statement of the balance of the account to date.

The cheques dated in July 1960, to November 1960, were all cashed by the respondent. The writ was issued on December 7, 1960.

On the question whether at the date of the issue of the writ the appellant was in default under the agreement I wish to adopt the following passage in the reasons of Davey J.A.:

> In accordance with the memorandum the appellant delivered to the respondent each series of six post dated cheques. But, with the series of cheques payable from July 16th, 1960, to December, 1960, the appellant through some oversight post dated each one, including those for October, November and December, 1960, on the 18th instead of the 16th of each month. It is clear that the respondent accepted that as a compliance with the memorandum, cashed the cheques as they came due, and credited the appellant with the proceeds. From page 112 of the appeal book it would appear that the default respondent relied on in the trial Court lay in the circumstance that the cheques for these three months were dated the 18th instead of the 16th. That seems to have been the default found by the learned trial Judge. But, with deference, I am unable to regard that as a default in face of the respondent's conduct. Before us, respondent's counsel finally conceded that he didn't seriously rely on that as a default.
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> When I first read the appeal book, it occurred to me that the learned trial Judge might have concluded from the dates in respondent's accounts that the appellant's cheques for October and November, 1960,

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had not been paid until the last days of those months. But that was not argued before us, and, apparently, not below. In any event it was not raised in the evidence of either appellant or respondent. The dates entered in respondent's accounts may just as well have been due to the respondent's delay in presenting the cheques for payment or to his method of keeping his accounts. The latter explanation seems to be the more likely, since in respondent's statement for November, 1960, enclosed in an envelope post-marked November 22, 1960, he gives appellant credit for the November payment under date of November 30, 1960. Also in Exhibit 10, the respondent has credited each of the monthly payments for June to November, 1960, as of the last day of each month.

In my respectful opinion, there was no default in the payments for October or November, 1960.

It should be mentioned that before us counsel for the respondent stated that he does rely on the fact that these cheques were dated on the 18th instead of on the 16th as constituting default. In reaching my agreement with the view of Davey J.A. that there was no default I do not base my conclusion on any concession that may have been made by counsel at any stage of the proceedings.

I take it then that the factual situation at the date of the issue of the writ was that the agreement between the parties was in existence and the appellant was not in default under its terms. The question calling for decision is whether this rendered the action premature.

The learned trial judge found that there had been default by the appellant in respect of the cheques payable in October and November, 1960, and consequently did not find it necessary to deal with the other points which were fully argued before us; it is clear, however, that the point which appears to me to be decisive of the appeal was taken before him. He says:

In his reply the plaintiff pleaded lack of consideration for the agreement, and in this connection a point of some nicety arose as the defendant contended that the giving of the post-dated cheques constituted consideration sufficient to support the agreement.

I have reached the conclusion that the giving of the several series of post-dated cheques constituted good consideration for the agreement by the respondent to forbear from taking action on the promissory notes so long as the appellant continued to deliver the cheques and the same were paid by the bank on presentation. This view of the law has prevailed ever since the Court of Exchequer in

Sibree v. Tripp[1] expressed disapproval of the decision in *Cumber v. Wane*[2]. In *Sibree v. Tripp* the defendant pleaded in answer to a claim for five hundred pounds that the plaintiff had agreed to accept as full payment three promissory notes made by the defendant payable to the plaintiff for one hundred and twenty-five pounds, one hundred and twenty-five pounds and fifty pounds and that the defendant had given these notes to the plaintiff in pursuance of the agreement. It was held that this plea was a good answer to the action in point of law as the acceptance of a negotiable instrument may be in law a satisfaction of a debt of a greater amount. At pp. 37 and 38 Baron Alderson said:

> It is undoubtedly true, that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is *payment* only in part; it is not one bargain, but two, namely, payment of part, and an agreement, without consideration, to give up the residue. The Courts might very well have held the contrary, and have left the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute for a sum of money a piece of paper, or a stick of sealing-wax, it is different, and the bargain may be carried out in its full integrity. A man may give in satisfaction of a debt of One Hundred pounds, a horse of the value of five pounds, but not five pounds. Again, if the time or place of payment be different, the one sum may be a satisfaction of the other. Let us, then, apply these principles to the present case. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value. That is a case falling within the rule of law I have referred to.

There is nothing in the judgments delivered in the House of Lords in *Foakes v. Beer*[3] to throw any doubt on the rule laid down in *Sibree v. Tripp;* indeed its validity is assumed and the case is distinguished. For example, at p. 613 the Earl of Selborne L.C., says:

> All the authorities subsequent to *Cumber v. Wane,* which were relied upon by the appellant at your Lordships' Bar (such as *Sibree v. Tripp. Curlewis v. Clark* and *Goddard v. O'Brien*) have proceeded upon the distinction, that, by giving negotiable paper or otherwise, there had been some new consideration for a new agreement, distinct from mere money payments in or towards discharge of the original liability. I think it unnecessary to go through those cases, or to examine the particular grounds on which each of them was decided. There are no such facts in the case now before your Lordships.

[1] (1846), 15 M. & W. 23, 15 L.J. Ex. 318.
[2] (1721), 1 Stra. 426, 11 Mod. Rep. 342.
[3] (1884), 9 App. Cas. 605.

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Sheppard J.A., with whom Tysoe J.A. agreed, was of opinion that there was no consideration for the agreement; he expressed doubts as to whether on the true construction of the agreement the appellant had promised to deliver the cheques and cause them to be paid and continued:

> In any event, assuming that the promise had been given by the defendant as alleged, that performance may be effected by the defendant paying the debt in full (Clause 6), but there can be no legal prejudice in such payment as the debt has throughout remained due and owing. Hence the promise of the defendant to deliver the cheques could be avoided without legal prejudice, namely, by paying the debt in full, and therefore the promise is not a valid consideration.
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> Williston on Contracts, revised edition, p. 365, reads:
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> 'That a promise which in terms reserves the option of performance to the promisor is insufficient to support a counter-promise is well settled.'

On the question of construction I agree with Davey J.A. when he says:

> As a matter of construction, the agreement clearly implies that so long as there is no default in its terms the respondent will not sue on the notes, but will forbear from bringing action. A promise to forbear is readily implied from an arrangement such as this.

In my view, when paragraphs 3 and 7 of the agreement are read together they disclose an undertaking by the appellant to give the cheques from time to time in accordance with paragraph 3; this undertaking is the consideration for the respondent's agreement to withhold action and so long as the appellant continued to carry it out the respondent's right to sue was suspended.

With the greatest respect I am unable to agree that the inclusion in the agreement of a privilege of prepayment affects the question. The authorities to which Sheppard J.A. refers are distinguishable on their facts. In the case at bar the appellant did not reserve any option to himself to refrain from delivering the cheques or from providing for their payment by the bank.

There was a further ground upon which Sheppard J.A. would have dismissed the appeal, which is expressed as follows:

> Further, the written agreement, if a valid contract, does not create a defence. The promise by the plaintiff is merely to withhold action; there was no intention to extinguish the debt. Hence, assuming a valid contract and a binding promise to withhold action, that was a mere accord and until such time as there is satisfaction, such an accord does not divest the plaintiff of his right of action.

The learned Justice of Appeal refers to the reasons of Greer L.J. in *British Russian Gazette & Trade Outlook Ltd. v. Associated Newspapers Ltd.*[1], and to *Chitty on Contracts*, 20th ed., at p. 286, and continues:

> It follows that notwithstanding such 'contract', the plaintiff could bring action on the five promissory notes then due although he might make himself liable to damages for not withholding action as agreed. The oral agreement relating to the sixth note affords no defence for the same reasons.

I agree with the view of Sheppard J.A. that the respondent's right of action on the six promissory notes has not been extinguished. It follows that should the appellant have made default under the agreement of July 17, 1958, it would thereupon have been open to the respondent to bring action for the amount remaining unpaid on the notes; but an agreement for good consideration suspending a right of action so long as the debtor continues to perform the obligations which he has undertaken thereunder is binding. To hold that the claimant in such a case may, in breach of the agreement, pursue his right of action leaving the defendant to a cross-action or counter claim would be to countenance the circuity of action and multiplicity of proceedings which it was one of the chief objects of the Judicature Acts to abolish and would be contrary to the terms of subs. 7 of s. 2 of the *Laws Declaratory Act*, R.S.B.C. 1960, c. 213.

The judgments in the *British Russian Gazette* case were not directed to the question whether an agreement for good consideration suspending or postponing a right of action can be pleaded as a bar to an action brought prematurely.

On this point I think it sufficient to refer to one authority. In *Stracy v. The Governor and Company of the Bank of England*[2], the plaintiffs had a valid claim against the bank for having transferred stock standing in their names to another name under a forged power of attorney. The plaintiffs, for good consideration, agreed not to take action until they had made a claim under a commission of bankruptcy isued against the firm in which the forger of the power had been a partner. It was held that until they had fulfilled their engagement to tender a proof under the commission of bankruptcy they could not sue the bank. Tindal C.J.

[1] [1933] 2 K.B. 616 at 655.
[2] (1830), 6 Bing. 754, 8 L.J. O.S.C.P. 234.

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delivering the unanimous judgment of the Court of Common Pleas (other than Bosanquet J., who had been engaged in the cause and took no part in the judgment,) said:

at p. 773:

> We all think our judgment ought to be given for the Defendants, upon another point which has been presented for the consideration of the Court. For it appears to us that the Plaintiffs have, before the commencement of this action, entered into an agreement with the Defendants upon good consideration; under which agreement their right of action is suspended, until they take the proceeding which they had bound themselves by such agreement to adopt.

at p. 774:

> It is urged by the Plaintiffs, that if this is an agreement on their part, it may be the ground of an action by the Bank to recover damages, but that it is no bar to the present action. But the agreement is not set up as a perpetual bar; it is merely insisted on as an objection to the action being brought at the present time. It is urged as an agreement by which the Plaintiffs have for a good consideration restrained themselves from suing, not perpetually, but only until they have first done a particular action.

and at p. 775:

> Under these circumstances, we think the Defendants, in order to avoid circuity of action, may avail themselves of this agreement as a suspension of the Plaintiffs' right to sue in the present action, and that they are not confined to a remedy by a cross action thereon.

Judgment was accordingly given for the defendants.

In my opinion the reasoning of this judgment is applicable to the facts of the case at bar. So long as the appellant continued to perform his obligations under the agreement of July 17, 1958, the respondent's right to sue on the notes was suspended, consequently his action brought on December 7, 1960, was premature and should have been dismissed on that ground.

The reasons which have brought me to the conclusion that the action was premature make it unnecessary to consider either the ground of estoppel on which Davey J.A. proceeded or the arguments addressed to us as to the effect of subs. 33 of s. 2 of the *Laws Declaratory Act*.

I would allow the appeal, set aside the judgment of the Court of Appeal and that of the learned trial judge and direct that judgment be entered dismissing the action with costs throughout.

Appeal allowed.

Solicitor for the defendant, appellant: Joseph McKenna, Victoria.

Solicitor for the plaintiff, respondent: Robert A. Price, Victoria.