JOHN BURROWS LTD. (*Plaintiff*) .....APPELLANT;

AND

SUBSURFACE SURVEYS LTD. and G. MURDOCH WHITCOMB (*Defendants*) ..... RESPONDENTS.

1968

*Feb. 28, 29
May 13

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Bills and notes—Unconditional promise in writing to pay principal at fixed and determinable future time—Option to make earlier payments from time to time—Whether promissory note—Acceleration clause on default of interest payments—Number of late payments accepted without penalty of default—Whether defence of equitable estoppel applicable—Bills of Exchange Act, R.S.C. 1952, c. 15, s. 176(1).

Under an agreement involving the sale of the plaintiff company to the defendant W, $42,000 of the purchase price was "...to be secured by a promissory note made by the Purchaser and endorsed by an endorser acceptable to the Vendor..." W caused the defendant company to be incorporated and the plaintiff agreed to accept a note signed by that company and endorsed by W. In furtherance of this arrangement, the defendants executed a document whereby the defendant company promised to pay the appellant or order the sum of $42,000 in nine years and ten months from April 1, 1963, together with interest at the rate of 6 per cent per annum on May 1, 1963, and on the first day of each month thereafter until payment, "provided that the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice of intention prior to such payment". In default

*PRESENT: Cartwright C.J. and Judson, Ritchie, Spence and Pigeon JJ.

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of payment of any interest payment for a period of ten days after the same became due the whole amount payable under the note was to become immediately due.

By October 1, 1964, eleven payments had been accepted more than ten days after they were due. On December 7, the November 1 interest payment then being 36 days overdue, the president of the plaintiff addressed a registered letter to both defendants demanding immediate payment of the $42,000 and outstanding interest. W's reaction to this demand was to tender the sum of $420, being the amount of the November 1 and December 1 instalments of interest, but this offer was rejected. On January 14, 1965, an action was commenced whereby the plaintiff claimed against the defendants as maker and endorser of a promissory note the sum of $42,000, by reason of the default made in the interest payments due for the months of October and November, 1964, together with interest to date.

The trial judge, in giving judgment for the plaintiff, found that the instrument in question was a "promissory note" within the meaning of the *Bills of Exchange Act,* R.S.C. 1952, c. 15, and that the plaintiff was not estopped by its conduct from setting up the defendants' failure to make the interest payments in accordance with the note as entitling it to recover the whole amount payable thereon. On appeal, the Court of Appeal by a majority held that the appeal should be allowed in part and the judgment reduced to $420. The plaintiff then appealed to this Court.

Held: The appeal should be allowed and the judgment at trial restored.

The instrument in question was an unconditional promise in writing made by the defendant to pay the plaintiff or order the sum of $42,000 at a fixed and determinable future time, namely, nine years and ten months from April 1, 1963. This was a promise of the kind defined in s. 176(1) of the *Bills of Exchange Act,* R.S.C. 1952, c. 15, and the fact that the maker was accorded the privilege of making payments on account of principal from time to time did not alter the nature of his unconditional promise to pay at the time fixed by the instrument, but merely gave him an option to make earlier payment. Accordingly, the instrument in question was a promissory note, and there could be no doubt that the defendants were in default in their interest payments for more than ten days after the same became due. *Dagger v. Shepherd,* [1946] 1 All E.R. 133, applied; *Williamson et al. v. Rider,* [1962] 2 All E.R. 268; *Crouch v. Credit Foncier of England* (1873), L.R. 8 Q.B. 374, not followed.

The circumstances disclosed by the evidence were not such as to justify the majority of the Court of Appeal in concluding that this was a case to which the defence of equitable estoppel or estoppel by representation applied. This type of equitable defence could not be invoked unless there was some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and this implied there must be evidence from which it could be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations. It was not enough to show that one party had taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes

would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms. *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*, [1955] 2 All E.R. 657, applied; *Hughes v. Metropolitan Railway Co.* (1877), 2 App. Cas. 439; *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] K.B. 130; *Conwest Exploration Co. Ltd. et al. v. Letain*, [1964] S.C.R. 20; *Combe v. Combe*, [1951] 1 All E.R. 767, considered.

APPEAL from a judgment of the Supreme Court of New Brunswick, Appeal Division[1], allowing in part an appeal from a judgment of Barry J. Appeal allowed and judgment at trial restored.

William L. Hoyt, for the plaintiff, appellant.

E. Neil McKelvey, Q.C., and *J. Ian M. Whitcomb*, for the defendants, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Appeal Division of the Supreme Court of New Brunswick (Bridges C.J. dissenting)[1] setting aside the judgment rendered at trial by Barry J. whereby he had awarded the appellant the sum of $42,000 together with interest of $420 as the amount due to it on what he found to be a valid promissory note made in its favour which was signed by the respondent company and endorsed by the respondent Whitcomb.

For some time prior to the events which gave rise to this action, John M. Burrows, the beneficial owner of all the shares in the capital stock of the appellant company, had been on friendly terms with the respondent, Whitcomb, with whom he appears to have been engaged in various business ventures, and on March 22, 1963, he became a party to an agreement whereby the appellant company (which then operated under the name of Subsurface Survey Limited), agreed to sell its assets to Mr. Whitcomb as of the close of business on January 31, 1963, for a total price of $127,274.43. Under the agreement $42,000 of the purchase price was

...to be secured by a promissory note made by the Purchaser and endorsed by an endorser acceptable to the Vendor payable to the Vendor

[1] (1967), 53 M.P.R. 169, 62 D.L.R. (2d) 700.

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within a period of ten years from the date of this Agreement, such promissory note to bear interest at the rate of 6% per annum with such interest being payable monthly and to provide for thirty days' notice by the Purchaser to the Vendor of any payments made on the principal thereof except the final payment payable on the date ten years from this Agreement.

For the purpose of carrying out this transaction, Whitcomb caused the respondent company to be incorporated under the name of Subsurface Surveys Limited and the appellant agreed to accept a note signed by that company and endorsed by Whitcomb. In furtherance of this arrangement, the respondents executed the following document upon which this action is now brought:

Fredericton, N.B.
March 28, 1963.

$42,000.00

FOR VALUE RECEIVED Subsurface Surveys Ltd. promises to pay to John Burrows Ltd. or order at the Royal Bank of Canada the sum of forty-two Thousand Dollars ($42,000.00) in nine (9) years and ten (10) months from April 1st, 1963, together with interest at the rate of six per cent (6%) per annum from April 1st, 1963, payable monthly on the first day of May, 1963, and on the first day of each and every month thereafter until payment, provided that the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice of intention prior to such payment.

In default of payment of any interest payment or instalment for a period of ten (10) days after the same became due the whole amount payable under this note is to become immediately due.

SUBSURFACE SURVEYS LTD.

(Sgd.) "G. Murdoch Whitcomb"
President

(Sgd.) "G. Murdoch Whitcomb"
Endorser

The makers, endorsers, and guarantors hereof waive presentment for payment, notice of nonpayment, protest and notice of protest.

SUBSURFACE SURVEYS LTD.

(Sgd.) "G. Murdoch Whitcomb"
President

(Sgd.) "G. Murdoch Whitcomb"
Endorser.

On March 28 the respondent, Whitcomb, also executed an agreement with the appellant company wherein he is described as "the debtor" and the appellant is described as "the company", whereby he acknowledged that he had

deposited 5,101 common shares of Subsurface Surveys Limited with John Burrows Limited "by way of pledge as security for payment of the said note", by which he clearly intended to refer to the document last hereinbefore recited. This agreement contains the following clause:

> That on default being made by both Subsurface Surveys Ltd. and the Debtor in paying any principal or interest due at any time according to the terms of the said note the Company may forthwith cause the pledged shares to be transferred to the name of the Company on the share register of Subsurface Surveys Ltd. and the pledged shares shall thereupon become the absolute property of the Company.

So long as Burrows remained on friendly terms with the respondent Whitcomb the appellant company does not appear to have insisted on enforcing the letter of this agreement, and continuing indulgences were granted to the respondent with respect to the making of interest payments on the due dates so that by October 1, 1964, eleven payments had been accepted more than ten days after they were due, but on November 23, 1964, there was a falling out between Burrows and Whitcomb and heated words were exchanged between them. On December 7, the November 1 interest payment then being 36 days overdue, Burrows addressed a registered letter to both respondents in the following terms:

> This letter will serve to inform you that, an interest payment due under the terms of the promissory note dated March 28, 1963 made by Subsurface Surveys Ltd. and endorsed by G. Murdoch Whitcomb being in default for more than 10 days, the whole amount payable under the note is now due.
>
> We hereby demand immediate payment of the principal amount of $42,000.00, and outstanding interest.
>
> If payment in full is not made by December 11, 1964 it is our intention to exercise our remedies under the agreement of March 28, 1963 between G. Murdoch Whitcomb and John Burrows Ltd.

The respondent Whitcomb's reaction to this demand was to tender the sum of $420, but things had gone too far and Mr. Burrows rejected the offer and made it plain that the matter would in future be handled by his solicitor. In due course, on January 14, 1965, this action was commenced whereby the appellant claimed against the respondents as maker and endorser of a promissory note, the sum of $42,000 by reason of the default made in the interest payments due for the months of October and November, 1964, together with interest to date.

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The two defences raised by the respondents which form the subject of the appeal are:

(a) That the document referred to in paragraph 2 of the Statement of Claim is not a promissory note because it is not due at a fixed or determinable future time and is not for a sum certain as required by Section 176(1) of the Bills of Exchange Act. . . . (and)

(c) . . .(i) the Plaintiff is estopped from saying that the Defendants defaulted in the payment of such interest because by its conduct . . . it represented to the Defendants that late payment would be accepted without penalty of default which said representation was intended to affect the legal relations between the Plaintiff and the Defendants and which said representation was relied on and acted on by the Defendants.

As has been indicated, the appellant's action was originally framed as an action on a promissory note, but during the course of the trial, and at the suggestion of the learned trial judge, the statement of claim was amended to include alternative claims for the principal amount of $42,000 as the balance due by the respondent company on the purchase price of the business and also as the balance due by both respondents on an account stated between them and the appellant.

The learned trial judge however, in giving judgment for the present appellant, found that the instrument in question was a "promissory note" within the meaning of the *Bills of Exchange Act,* R.S.C. 1952, c. 15, and that the appellant was not estopped by its conduct from setting up the respondents' failure to make the interest payments in accordance with the note as entitling it to recover the whole amount payable thereon.

It was contended on behalf of the respondent that because the instrument in question contained the provision that:

. . . the maker may pay on account of principal from time to time the whole or any portion thereof upon giving thirty (30) days' notice of intention prior to such payment.

it was therefore not a promissory note within the definition contained in s. 176(1) of the *Bills of Exchange Act* which reads as follows:

(1) A promissory note is an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay, on demand or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person, or to bearer.

In acceding to this contention in the opinion which he delivered in the Appeal Division, Mr. Justice Ritchie, with

whom Limerick J.A. agreed in the result, relied in great measure on the case of *Williamson et al. v. Rider*[2], where the majority of the Court of Appeal in England held that a written promise to pay a sum certain "on or before" a given date was not a promissory note within the meaning of s. 83(1) of the *Bills of Exchange Act*, 1882 (which is identical with s. 176(1) of our own Act), because the words created an uncertainty as to the date of payment and introduced a contingency.

The opinion of the majority was most fully expressed in the judgment of Danckwerts L.J., who thought the case to be governed by the decision of Blackburn J. in *Crouch v. Credit Foncier of England*[3], in which it was held that debentures issued under a company's seal, repayable at a certain time but subject to a condition which permitted redemption by drawings by lot, "could not be promissory notes".

Danckwerts L.J. treated this case as decisive notwithstanding the authority of the judgment of the Court of Appeal in *Dagger v. Shepherd*[4], in which a notice by a landlord to quit "on or before" a fixed date was held to be an effective notice and in which Evershed J. had said:

> The use of the phrase "on or before" some fixed date is today by no means uncommon, particularly in covenants or demands for payment of money, and in such a context it cannot, in our judgment, be open to serious doubt that it means, and would be understood to mean that the covenantor or debtor is under obligation to pay the debt on (but not earlier than) the date fixed but has the option of discharging it at any earlier time selected by him.

We are not bound by the decision of the majority in the *Williamson* case and I prefer the reasoning in the dissenting judgment delivered by Ormerod L.J., in which he pointed out that the *Crouch* case was distinguishable on the ground that the payment there was dependent upon a very real contingency, namely a lottery, whereas in the *Williamson* case, as in the present case, there was no such contingency. Mr. Justice Ormerod cited with approval the judgment of Evershed J. in *Dagger v. Shepherd, supra,* and concluded by saying:

> . . . I have come to the view that, in spite of the words "on or before", there is no uncertainty about the date of payment under this promissory

[2] [1962] 2 All E.R. 268 (C.A.). [3] (1873), L.R. 8 Q.B. 374.
[4] [1946] 1 All E.R. 133.

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note which would render this document other than that which it purports to be. I have come to the conclusion, therefore, that this is a promissory note within the meaning of s. 83(1) of the Bills of Exchange Act, 1882 ...

The instrument here in question is an unconditional promise in writing made by the respondent to pay the appellant or order the sum of $42,000 at a fixed and determinable future time, namely, nine years and ten months from April 1, 1963. This was a promise of the kind defined in s. 176(1) and the fact that the maker was accorded the privilege of making payments on account of principal from time to time did not alter the nature of his unconditional promise to pay at the time fixed by the instrument, but merely gave him an option to make earlier payment.

I am accordingly of opinion that the instrument in question was a promissory note, and there can be no doubt that the respondents were in default in their interest payments for more than ten days after the same became due.

It remains to be considered whether the circumstances disclosed by the evidence were such as to justify the majority of the Court of Appeal in concluding that this was a case to which the defence of equitable estoppel or estoppel by representation applied.

Since the decision of the present Lord Denning in the case of *Central London Property Trust Ltd. v. High Trees House Ltd.*[5], there has been a great deal of discussion, both academic and judicial, on the question of whether that decision extended the doctrine of estoppel beyond the limits which had been theretofore fixed, but in this Court in the case of *Conwest Exploration Co. Ltd. et al. v. Letain*[6], Mr. Justice Judson, speaking for the majority of the Court, expressed the view that Lord Denning's statement had not done anything more than restate the principle expressed by Lord Cairns in *Hughes v. Metropolitan Railway Co.*[7], in the following terms:

> It is the first principle upon which all courts of equity proceed, that if parties, who have entered into definite and distinct terms, involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will

[5] [1947] K.B. 130.

[6] [1964] S.C.R. 20 at 28.

[7] (1877), 2 App. Cas. 439.

be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have thus taken place between the parties.

In the case of *Combe v. Combe*[8], Lord Denning recognized the fact that some people had treated his decision in the *High Trees* case as having extended the principle stated by Lord Cairns and he was careful to restate the matter in the following terms:

> The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced, even though it is not supported in point of law by any consideration, but only by his word.

It seems clear to me that this type of equitable defence cannot be invoked unless there is some evidence that one of the parties entered into a course of negotiation which had the effect of leading the other to suppose that the strict rights under the contract would not be enforced, and I think that this implies that there must be evidence from which it can be inferred that the first party intended that the legal relations created by the contract would be altered as a result of the negotiations.

It is not enough to show that one party has taken advantage of indulgences granted to him by the other for if this were so in relation to commercial transactions, such as promissory notes, it would mean that the holders of such notes would be required to insist on the very letter being enforced in all cases for fear that any indulgences granted and acted upon could be translated into a waiver of their rights to enforce the contract according to its terms.

As Viscount Simonds said in *Tool Metal Manufacturing Co. Ltd. v. Tungsten Electric Co. Ltd.*[9]:

> . . . the gist of the equity lies in the fact that one party has by his conduct led the other to alter his position. I lay stress on this, because I would not have it supposed, particularly in commercial transactions, that mere acts of indulgence are apt to create rights ...

[8] [1951] 1 All E.R. 767.

[9] [1955]2 All E.R. 657.

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The learned trial judge dealt with the rule of estoppel by representation as applied to the circumstances of the present case in the following brief paragraphs:

> It is my opinion, however, that for such a rule to apply, the plaintiff must have known or should have known that his action or inaction was being acted upon by the defendant and that the defendant thereby changed his legal position. I do not believe that John Burrows ever gave any consideration to the fact that in accepting late payments of interest on the note, he was thereby leading Mr. Whitcomb—as an officer of the defendant corporation—into thinking that strict compliance would not be required at any time.
>
> It is a matter of regret that Mr. Burrows did not see fit to advise Mr. Whitcomb by letter or verbally of his intention to require strict adherence to the terms of the note; but be that as it may, it is my opinion that both defendants were always aware of the terms of P.1 and knew that default in payment of interest exceeding 10 days could result in the plaintiff demanding full payment, as the plaintiff has now done.

Mr. Justice Ritchie, who did not agree with the learned trial judge's interpretation of the evidence, made the following observations in the course of his reasons for judgment:

> By its conduct in accepting payments of interest after they were more than ten days in default and, over a period of sixteen months, not proceeding to enforce payment of the principal amount owing under P-1, the plaintiff gave the defendants a promise, or assurance, which it intended would affect the legal relations between them. Thereby, the plaintiff lulled the defendants into a false sense of security and misled them into the belief its strict right to enforce immediate payment of the principal amount of $42,000 would be held in abeyance or be suspended until they were informed otherwise. It was reasonable for the defendants so to interpret the plaintiff's conduct. As a result, the position of each defendant was prejudiced. In my respectful opinion, the evidence supports that conclusion.

With the greatest respect for the reasoning of the majority of the Court of Appeal, I prefer the interpretation placed on the evidence by the learned trial judge and by Chief Justice Bridges in his dissenting reasons for judgment where he said:

> For estoppel to apply, I think we must be satisfied that the conduct of Burrows amounted to a promise or assurance, intended to affect the legal relations of the parties to the extent that if an interest instalment became in default for ten days the plaintiff would not claim the principal as due unless it had previously notified the defendants of its intention to do so or, if it had not so notified them, that notice would be given them the principal would be claimed if such instalment so in default were not paid. This is, I think, a great deal to infer.

I do not think that the evidence warrants the inference that the appellant entered into any negotiations with the respondents which had the effect of leading them to suppose

that the appellant had agreed to disregard or hold in suspense or abeyance that part of the contract which provided that:

> ...on default being made by both Subsurface Surveys Ltd. and the Debtor in paying any principal or interest due at any time according to the terms of the said note the Company may forthwith cause the pledged shares to be transferred to the name of the Company on the share register of Subsurface Surveys Ltd. and the pledged shares shall thereupon become the absolute property of the Company.

I am on the other hand of opinion that the behaviour of Mr. Burrows is much more consistent with his having granted friendly indulgences to an old associate while retaining his right to insist on the letter of the obligation, which he did when he and Whitcomb became estranged and when the respondents were in default in payment of an interest payment for a period of 36 days.

For all these reasons I would allow the appeal and restore the judgment of the learned trial judge. The appellant is entitled to its costs both here and in the Appeal Division.

Appeal allowed with costs and trial judgment restored.

Solicitors for the plaintiff, appellant: Hoyt, Mockler & Dixon, Fredericton.

Solicitors for the defendants, respondents: McKelvey, Macaulay, Machum & Fairweather, Saint John.