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HOLLAND - CANADA MORTGAGE COMPANY LIMITED (PLAINTIFF).. } APPELLANT,

AND

ROBERT JOHN HUTCHINGS AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

* Feb. 12.
* Mar. 31.

HOLLAND - CANADA MORTGAGE COMPANY LIMITED (PLAINTIFF).. } APPELLANT,

AND

THE ROYAL TRUST COMPANY, JUDICIAL TRUSTEE OF THE ESTATE OF HUGH NEILSON, DECEASED, AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Guarantee—Mortgage bond—Construction of conditions—Extension or renewal of loan—Rate of interest increased without the knowledge of sureties—Whether sureties released—Written acknowledgements by sureties after completion and delivery of the extension and renewal agreements—Whether binding.

On December 15, 1909, the Calgary Y.M.C.A. mortgaged its leasehold of certain lands to the Standard Trusts Company to secure the payment of a loan of $25,000, the terms of payment and interest being set out in the mortgage indenture. As an added security, the respondent Hutchings, the deceased Hugh Neilson and 13 other individuals executed a bond, on the same date, in favour of the mortgagee, for due payment and performance by the Y.M.C.A. It was stipulated in the bond that if the Y.M.C.A. "shall pay * * * to the said The Standard Trusts Company * * * the sum of $25,000 * * * with interest thereon the days and times and in the manner called for in the mortgage or any renewal or extension thereof provided and shall further fully perform all covenants and conditions contained in the said mortgage or any renewal or extension thereof, no matter what dealings the said company may have had with the mortgagors or any one interested in the said lands (the intention being that the above obligation shall remain in full force and virtue as long as any money remains unpaid under the said mortgage or any renewal or extension thereof) then the above bond or obligation to be void, otherwise to remain in full force and virtue." The mortgage moneys were repayable with interest at 7 per cent per annum and the final payment of principal and interest was due and payable on January 2, 1915. The mortgage and moneys secured thereby were assigned and transferred to the appellant company. The Y.M.C.A. defaulted a number of its payments and negotiated with the appellant for an extension of time and eventually

* PRESENT:—Duff C.J. and Rinfret, Crocket, Davis and Kerwin JJ.

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an agreement was reached and reduced to writing on June 29, 1915, whereby time for final payment under the mortgage was extended to April 1, 1918, and the rate of interest was increased from 7 per cent. to 8 per cent.; and a renewal agreement with similar clauses was also negotiated. The sureties were not consulted in the negotiations for the extension and renewal agreements and were not parties to them; but the appellant company prepared a document which was signed by 13 of the 15 bondsmen, among whom were the respondents Hutchings and Neilson, but not until late November or December, 1915. This document purported to acknowledge notice of the assignment of the mortgage and the bond and also notice of the extension agreement. No proceedings upon the mortgage, upon the agreements or upon the bond were taken by the appellant company until March 27, 1934, when an action was brought against the respondent Hutchings and later, on April 9, 1934, a similar action was taken against the legal representatives of the deceased Neilson.

Held, affirming the judgment of the Appellate Division, ([1935] 2 W.W.R. 338), that the respondents Hutchings and Neilson were not liable. The change in the rate of interest was a material variation in the original contract, the performance of which the sureties had guaranteed by their bond, and operated in law in extinguishment of their liability. A renewal or extension with an increased rate of interest was not a renewal or extension within the contemplation of the parties to the bond.

As to the appellant's contention that the words in the bond "*no matter what dealings the said company may have had with the mortgagors* * * " permitted the change of the rate of interest and that the respondents cannot complain of the alteration, reading the instrument as a whole, those words must be confined in their meaning and effect to dealings with matter collateral to the contract and cannot be extended to matters inconsistent with or repugnant to the very contract, the performance of which the sureties have guaranteed: an increase in the rate of interest is not something collateral to but a definite alteration of a material part of the original contract. The parties expressed in that clause their intention that the obligation of the bond shall remain as long as any money remains unpaid under the *said* mortgage or any renewal or extension thereof. The words of that clause cannot be construed to entitle the creditor to make a new contract with the principal debtor and still hold the sureties on the bond given in respect of the original contract.

As to the written acknowledgments signed by the respondents Hutchings and Neilson, it is settled law that a surety is not discharged by a variation to which he assents afterwards, even though there may be no fresh consideration for the assent, where it is not the creation of a new debt but the revival of an old debt; but, whether the assent is given previous to or subsequent to a variation, the creditor must put the surety in possession of all the facts likely to affect the degree of his responsibility, and if he neglects to do so, it is at his peril; and the evidence in this case does not establish that the sureties ever knew the real facts and circumstances surrounding the making of what are described as the extension and renewal agreements, or that they knew that two of their co-sureties had not assented to the variation in the contract; the original bond was the joint and several obligation of the 15 sureties and each surety had a contractual right of contribution against the others apart altogether from his equitable

right as a surety; that discharge of these co-sureties was something that those who were asked to remain in the bond were entitled to know.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Ives J. (2) and dismissing the appellant company's action.

E. D. Arnold, for the appellant.

H. G. Nolan K.C. for the respondent The Royal Trust Company.

L. H. Mayhood for the respondent Hutchings.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

The judgment of the Court was delivered by

DAVIS J.—This appeal arises out of consolidated actions brought by a mortgagee against certain sureties upon a bond given to secure the payment of the mortgage debt and interest. The appellant, Holland-Canada Mortgage Company Limited, acting at the time through its investment agent, The Standard Trusts Company, made a loan on or about December 15, 1909, to the Calgary Young Men's Christian Association (hereafter for convenience called the Association) of the sum of $25,000 repayable $2,000 on January 2 in each of the years 1911, 1912, 1913 and 1914 and the balance thereof on January 2, 1915, with interest at the rate of 7 per cent. per annum half-yearly on the 2nd days of January and July of each year. To secure repayment of the moneys the Association mortgaged to the said Standard Trusts Company its leasehold lands in the city of Calgary and the Canadian Pacific Railway Company, which was the owner of the lands, joined in the mortgage to perfect the security but expressly exempted itself from the covenant to pay.

Concurrently with the giving of the mortgage fifteen citizens of the city of Calgary executed and delivered to The Standard Trusts Company a bond guaranteeing the repayment by the Association of the moneys borrowed and

(1) [1935] 2 W.W.R. 338. (2) [1935] 1 W.W.R. 133.

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interest thereon. As early as January 2, 1914, the Association became definitely in default under the mortgage. The Standard Trusts Company transferred the mortgage to the appellant on June 3, 1915, and assigned the bond to the appellant on August 20, 1915. Subsequently (the exact date is for the moment unimportant) two agreements were made between the appellant, the Association and the Canadian Pacific Railway Company. One of these agreements, described as an extension agreement, was dated June 29, 1915, and the other agreement, described as a renewal agreement, was dated June 30, 1915, but the evidence shews that it was not until Sept. 22, 1915, that these agreements became finally executed by all parties and completed. The sureties were not consulted in the negotiations for these agreements and were not parties to them. A form of document, described as an acknowledgment, to which I shall later refer was subsequently circulated among the sureties and ultimately thirteen out of the fifteen sureties signed separate documents of like effect.

By the extension agreement it was recited that the Association on January 2, 1915, owed the appellant $19,000 principal and $467.30 interest and that the said sums with interest thereon remained unpaid. The agreement provided that the said $19,000 should be repayable as follows: $500 on the first days of April and October in each of the years 1916 and 1917 and the balance on the first day of April, 1918, with interest thereon from the second day of January, 1915, at the rate of 8 per cent. per annum payable half-yearly on the first days of April and October in each year. It was declared and agreed that all the covenants, clauses, conditions, powers, matters and things contained in the mortgage should apply and relate to the extended dates of payment as fully and in the same manner as if the same had been the dates of payment fixed in and by the said mortgage, excepting that there should be no right of premature repayment except as in the agreement stated and that any statutory right in that behalf should take effect as if the said mortgage had been dated on the date of the agreement. It was further expressly declared and agreed that these presents

shall not create any merger or alter or prejudice the rights and priorities of the company as against any surety, subsequent encumbrancer or other person interested in the said lands or liable in whole or in part for the moneys secured by said mortgage and not a party hereto, or the rights

of any such surety, subsequent encumbrancer or other person, all of which rights are hereby reserved.

By the renewal agreement dated one day after the date of the extension agreement, the principal of the mortgage is recited to be $19,500 instead of $19,000. The evidence shews that that sum was arrived at by taking $500 of the arrears of interest and treating it henceforth as principal, making the new principal $19,500, which sum was by the terms of this agreement made payable $500 on the first days of April and October in each of the years 1916 and 1917 and the balance on the first day of April, 1918, with interest from January 2, 1915, at the rate of 8 per cent. per annum payable half-yearly on the first days of April and October in each year. The Association expressly covenanted with the appellant "to pay the said principal money and interest on the days and in the manner above set out." Then followed in this agreement the exact language used in the extension agreement relating the covenants in the mortgage to the extended dates of payment and reserving the rights of the appellant against any surety. The somewhat cumbersome procedure adopted in making two agreements appears to have been first to extend payment of the principal and interest, both in arrears, and then to create a new principal sum and provide new terms for repayment. One of the contentions of counsel for the respondents was that the second agreement with its express covenant to pay, taken in the light of the appellant's letters referring to the "new loan," operated to extinguish the original debt and gave place to a new debt. I shall not stop at the moment to consider that contention.

No proceedings upon the mortgage or upon either of these agreements or upon the bond appear to have been taken by the appellant until March 27, 1934, when the appellant commenced an action against the respondent Hutchings, one of the signatories to the bond given by the fifteen citizens of Calgary in 1909 to secure the payment of the mortgage indebtedness then incurred. On April 9, 1934, the appellant commenced a similar action against the legal representatives of one Neilson, deceased, who had died in 1918, and who, with Hutchings, had been one of the fifteen signatories to the bond. No action has been taken against any of the other signatories to the bond. During the nineteen years intervening between the date

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of the renewal agreement and the commencement of these actions the matter seems to have been allowed to drift along without any one taking any definite action to enforce payment by the Association. The Association obviously had faced a good deal of difficulty in raising money from time to time to pay upon the mortgage and the mortgagee seems to have kept nursing the account from year to year.

By order of the Court the Hutchings action was stayed, on April 23, 1934, until the appellant should commence action on the mortgage against the Association and the Canadian Pacific Railway Company to enforce the security. The appellant then amended its statement of claim in the Hutchings action to include a mortgage action and the Hutchings and the Neilson actions were consolidated. Subsequently on November 19, 1934, the appellant obtained an order nisi against the Association and the Canadian Pacific Railway Company upon the mortgage with a six months' period for redemption. The consolidated actions then proceeded to trial against Hutchings and the Neilson estate upon the bond.

Before discussing the judgments in the courts below it is well to understand the issues involved. Much turns upon the exact language of the bond itself and it is convenient now to set out the bond in full:

> Know all men by these presents, that we, William George Hunt, manager; Robert John Hutchings, manager; Absalom Judson Sayre, manager; Archibald John McArthur, gentleman; George Thomas Callendar Robinson, merchant; Albert William Ward, merchant; George Allan Anderson, physician; John Niblock, superintendent; John Edward Irvine, agent; Charles Allan Stuart, judge; John Henry Hannah, merchant; Alfred Price, superintendent; Thomas Underwood, contractor; Hugh Neilson, merchant; Fred Fishenden Higgs, merchant, all of the city of Calgary, in the province of Alberta, are jointly and severally held and firmly bound unto The Standard Trusts Company, in the penal sum of twenty-five thousand dollars, to be paid to the said Standard Trusts Company, their successors or assigns, for which payment well and truly to be made, we bind ourselves our and each of our heirs, executors and administrators and every one of them firmly by these presents.
>
> Sealed with our seals and dated this 15th day of December, A.D. 1909.
>
> Whereas that the Calgary Young Men's Christian Association have given a mortgage for the sum of twenty-five thousand dollars, dated 15th day of December, 1909, and registered in the Calgary Land Titles Office as no. 2431, to The Standard Trusts Company, on the following property in the city of Calgary in the province of Alberta, and being all that portion of the Canadian Pacific Railway Company's station grounds described as follows: Commencing at the southeast corner of First street East and Ninth avenue, thence easterly along the south limit of Ninth avenue one hundred and fifty feet thence southerly at right angles to the

first mentioned course one hundred feet, thence westerly parallel to and one hundred feet distant from the first mentioned course one hundred and fifty feet to the east limit of First street East, thence northerly along the east limit of First street East one hundred feet to the point of commencement containing 0·34 acre.

Now the condition of the above obligation is such that if the said Calgary Young Men's Christian Association, their successors or assigns shall well and truly pay or cause to be paid to the said The Standard Trusts Company, their successors or assigns the just and full sum of twenty-five thousand dollars of lawful money of Canada with interest thereon the days and times and in the manner called for in said mortgage or any renewal or extension thereof provided and shall further fully perform all covenants, provisoes and conditions contained in the said mortgage or any renewal or extension thereof, no matter what dealings the said company may have had with the mortgagors, or any one interested in the said lands (the intention being that the above obligation shall remain in full force and virtue as long as any money remains unpaid under the said mortgage or any renewal or extension thereof) then the above bond or obligation to be void, otherwise to remain in full force and virtue.

It is significant that the full names and descriptions of each of the fifteen signatories are set out in the opening words of the bond. Obviously each one of those who signed the bond knew exactly how many sureties were joining with him and who they were. It is not unreasonable to infer that each undertook the obligation because the other fourteen joined with him. It was a joint as well as a several obligation.

The bond expressly provided for a renewal or extension of the mortgage. It is unnecessary it seems to me to discuss the rather technical point raised by counsel for the respondents that the use of the singular rather than the plural, i.e., "any renewal or extension thereof," confined the right of renewal or extension to one and only one such transaction. The vital point is that the rate of interest, originally fixed by the mortgage at 7 per cent. per annum, was by the said agreements increased to 8 per cent. per annum. Apart from the questions raised by certain acknowledgments in writing alleged to have been given by the sureties, or some of them, to the appellant at or about the time of the making of the extension and renewal agreements and subject to the question of the effect of the particular language of the bond, the change in the rate of interest was a material variation in the original contract, the performance of which the sureties had guaranteed by their bond, and operated in law in extinguishment of the liability of the sureties. Counsel for the appellant relied upon the *Woodcrafts* case,

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Egbert v. *Northern Crown Bank* (1), for his proposition that a mere change of the rate of interest does not discharge the sureties but in so far as interest charges have been increased they do not bind the sureties. In the *Woodcrafts* case (1), however, Lord Dunedin pointed out that the Bank had imposed a rate of interest that was prohibited by the *Bank Act* and the agreement betwen the Bank and its customer for payment of the increased rate was "statutorily invalid and of no effect." A surety has always been a favoured creditor in the eyes of the law. His obligation is strictly examined and strictly enforced. "It must always be recollected," said Lord Westbury in *Blest* v. *Brown* (2),

> in what manner a surety is bound. You bind him to the letter of his engagement. Beyond the proper interpretation of that engagement you have no hold upon him. He receives no benefit and no consideration. He is bound, therefore, merely according to the proper meaning and effect of the written engagement that he entered into. If that written engagement is altered in a single line, no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, he has a right to say, "The contract is no longer that for which I engaged to be surety: you have put an end to the contract that I guaranteed, and my obligation, therefore, is at an end."

Apart from any express stipulation to the contrary, where the change is in respect of a matter that cannot "plainly be seen without inquiry to be unsubstantial or necessarily beneficial to the surety," to use the language of Rowlatt, The Law of Principal and Surety, 2nd ed. (1926) p. 102, the surety, if he has not consented to remain liable notwithstanding the alteration, will be discharged whether he is in fact prejudiced or not. *Holme* v. *Brunskill* (3). It cannot be said to be self-evident that a change of the rate of interest on a debt of some $19,000 from 7 per cent. to 8 per cent. is unsubstantial or necessarily beneficial to the surety. This is not really disputed by the appellant. What is said is that a particular stipulation in the bond permitted this change and that the respondents cannot complain of the alteration. Our attention is directed by counsel for the appellant to the particular language of the particular bond where in the condition it is expressly stipulated,

> no matter what dealings the said company (i.e., the appellant) may have had with the mortgagors or anyone interested in the said lands.

(1) [1918] A.C. 903.

(2) (1862) 4 De G. F. & J., 367 at 376.

(3) (1877) 3 Q.B.D. 495.

Counsel for the respondents observe that immediately following these words appear in brackets the further words the intention being that the above obligation shall remain in full force and virtue as long as any money remains unpaid under the said mortgage or any renewal or extension thereof.

What then is the meaning and effect to be given to the words "no matter what dealings the company may have had with the mortgagors?" They cannot be disregarded as meaningless. The parties expressed their intention, however, that the obligation of the bond shall remain as long as any money remains unpaid under the *said* mortgage or any renewal or extension thereof. The words in controversy cannot be construed to entitle the creditor to make a new contract with the principal debtor and still hold the sureties on the bond given in respect of the original contract.

A renewal or extension with an increased rate of interest is not a renewal or extension within the contemplation of the parties to the bond. The peculiar language relied upon to hold the sureties notwithstanding a material alteration of the original contract, is not susceptible of the interpretation put upon it by counsel for the appellant. Reading the instrument as a whole, the particular phrase must be confined in its meaning and effect to dealings with matters collateral to the contract, and cannot fairly be extended to matters inconsistent with or repugnant to the very contract, the performance of which the sureties have guaranteed. One can well appreciate collateral dealings between mortgagor and mortgagee that leave the contract itself alone; matters either contemplated by the parties in the original mortgage transaction or incidentally arising throughout the currency of the mortgage. It is sufficient for the purpose of this case to say that an increase in the rate of interest is not something collateral to but a definite alteration of a material part of the original contract.

But the appellant, in any event, relies upon written acknowledgments from Hutchings and Neilson which, it is contended, constitute assent by them to the alteration. It is not proved, however, that either of their acknowledgments was given before Sept. 22, 1915, the date of the completion and delivery of the extension and renewal agreements, and the respondents argue that such an acknowledg-

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ment or assent given without consideration subsequent to a change that operated to discharge the surety cannot revive the debt.

But it has long been settled law that a surety is not discharged by a variation to which he assents afterwards, even though there may be no fresh consideration for the assent, where it is not the creation of a new debt but the revival of an old debt. *Mayhew* v. *Crickett* (1); *Smith* v. *Winter* (2); Rowlatt, 2nd ed., 118. And yet whether the assent be given previous to or subsequent to a variation, the creditor must put the surety in possession of all the facts likely to affect the degree of his responsibility and if he neglects to do so, it is at his peril: *Pidcock* v. *Bishop* (3). Lord Loughborough, in *Rees* v. *Berrington* (4) stated the rule thus:

> It is the clearest and most evident equity not to carry on any transaction without the privity of him (the surety) who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him.

Lord Hanworth, in *Smith* v. *Wood* (5) pointed out that this rule stated by Lord Loughborough was followed in *Holme* v. *Brunskill* (6) and he applied it to the facts of the case before him. Now what were the special facts of the arrangement made between the mortgagor and the mortgagee in September, 1915, in the case before us? Five hundred dollars of arrears of interest were capitalized so as to fix the capital amount at $19,500; the rate of interest was increased from 7 per cent. to 8 per cent. per annum and made retroactive to January 2, 1915; the interest dates were changed from January and July to April and October; the instalments of principal were made payable thereafter $500 half-yearly instead of $2,000 yearly; and the whole debt and interest was to be paid off by April 1, 1918. This transaction, which was described by the mortgagee in its correspondence as " the new loan," cannot be treated as a mere renewal or extension; it involved, if not a new loan, a substantial variation or alteration of the original contract.

While I cannot accept the contention of counsel for the respondents that there was the creation of a new debt and the extinguishment of the old debt, there were such

(1) (1818) 2 Swanst. 185.
(2) (1838) 4 M. & W. 454.
(3) (1825) 3 B. & C., 605 at 610.
(4) (1795) 2 Ves. Jun. 540, at 543.
(5) [1929] 1 Ch. 14, at 23.
(6) (1877) 3 Q.B.D. 495.

material changes in the original contract as to call for full disclosure to the sureties and assent to such changes if the sureties were to be rendered liable for the contract as varied. It is not suggested, much less proved, in evidence that the sureties ever knew the real facts and circumstances surrounding the making of what are described as the extension and renewal agreements. Two of the fifteen sureties never gave any acknowledgment and the authority of the agent who purported to sign for Hutchings is denied by Hutchings. But in any event the acknowledgment is merely this, that

> I have received notice that said Holland-Canada Mortgage Company Limited has entered into an agreement with the said Young Men's Christian Association whereby the time for repayment for the said mortgage has been extended for a term of five years at the rate of interest of 8 per cent per annum, and I agree that said bond so executed by me shall be and remain binding on me notwithstanding said extension or said increase of rate of interest.

It is not established by the evidence that either Hutchings or Neilson knew of the real transaction between the mortgagor and the mortgagee and assented to it, nor is it attempted to be shewn that Hutchings or Neilson knew that two of their co-sureties, Niblock and Irvine, had not assented to the variation in the contract. The original bond was the joint and several obligation of the fifteen sureties and each surety had a contractual right of contribution against the others apart altogether from his equitable right as a surety. The discharge of these two co-sureties was something that those who were asked to remain on the bond were entitled to know.

But it is said that both the extension and renewal agreements reserved the rights of the sureties by express language in the instruments. It is quite a different matter, however, to reserve the rights against the surety in an agreement merely extending the time for payment and to reserve the rights against the surety in an agreement materially altering the old contract. This was clearly pointed out by Street J. in *Bristol and West of England Land Mortgage and Investment Company* v. *Taylor* (1) where he said at p. 296 that

> the words reserving the creditor's rights against the surety, however effectual they may be in so far as the extension of time is concerned, are mere "idle words" in so far as any effect upon the stipulation for an increased rate of interest is concerned.

(1) (1893) 24 O.R. 286.

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We were asked by counsel for the appellant to decline to follow that case upon the ground that it was not rightly decided. That was a decision of the Queen's Bench Division in Ontario over forty years ago. We entirely agree with the views expressed in that case by Street J. and the decision may well be regarded as settled law.

A great deal of correspondence between the parties to the original transaction was put in at the trial and the appellant endeavoured to shew from some of it that Hutchings and Neilson had, quite independently of the form of acknowledgment, by later correspondence acknowledged their liability on the bond. I have read carefully the correspondence put in at the trial and having regard to all the facts and circumstances surrounding the transactions as hereinbefore related I do not find any such admission of liability as to entitle the appellant to judgment against either Hutchings or the estate of Neilson. This was the conclusion reached by the learned trial judge and was affirmed by the unanimous judgment of the Appellate Division of the Supreme Court of Alberta.

It is unnecessary therefore to consider the questions raised during the argument on the defence that the actions were barred by the running of time. It is obvious that the appellant would encounter a good deal of difficulty in this respect having regard to the facts that the bond was given on October 15, 1909, default on the mortgage occurred as early as January, 1914, and suit was not entered till March, 1934. Had we considered the appropriate statutory provisions of Alberta governing the limitation of time for the commencement of these actions, the appellant might well have been found to have been barred but we have thought it better to consider and discuss the appeal upon the broad ground of liability without reference to any statutory bar of the actions.

The appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Fitch & Arnold.*

Solicitors for the respondent Hutchings: *Short, Ross, Shaw & Mayhood.*

Solicitors for the respondent The Royal Trust Company, trustee: *Bennett, Hannah & Sanford.*