9/1924

STANDARD RUBBER COMPANY V HAGEL.

ORDER: Appeal allowed. Judgment of the Supreme Court of Queensland discharged and judgment in the action entered for defendant appellant. Respondent to pay the costs of the action in the Supreme Court and the costs of this appeal. Such costs in the Supreme Court may exceed £300.

STANDARD RUBBER WORKS PROPRIETARY LIMITED v NAGEL.

Judgment. Knox C.J.

The question for decision in this appeal depends for its solution on the interpretation of a document embodying the terms of settlement of a previous action in which the present appellant (hereinafter referred to as the Company) was plaintiff and the present respondent and one Poeppel were defendants. In that action the Company sought to recover from both defendants the sum of £1699-9-10 the price of goods sold to Nagel & Poeppel at a time when they were carrying on business in partnership. When the action came on for trial Poeppel withdrew his defence and admitted the claim of the company. Thereupon negotiations for settlement took place between the company and Nagel & terms of settlement were drawn up in writing and signed by counsel for both

parties. The document containing the terms of settlement is in the words following, viz :- " (1) By consent judgment for the plaintiff for £1699-9-10 with costs of the action. (2) Execution of the judgment first to be issued against the assets of the partnership sold to and now in the possession of Poeppel. (3) Execution of the judgment against Nagel to be suspended on payment by defendant Nagel of the sum of £600 within 21 days and payment by defendant Nagel ~~for~~ of the balance of the amount of the judgment and costs by monthly payments of £200 the first of such payments to be made on the 1st day of May 1922 and the other payments on the first day of each month thereafter. (4) On ~~default~~ default in performance of this settlement by defendant Nagel judgment to issue forthwith for the full amount and costs against the defendant Nagel. (5) Judgment against the defendant ~~Nag~~ Nagel not to be issued save upon such default as aforesaid and the entry of judgment against the defendant Poeppel to be without prejudice to the right tp enter judgment as aforesaid aginst the defendant Nagel."

l J. before whom the action came for trial refused to give judgment the terms of the document and after some discussion the parties to : settlement agreed that judgment for the full amount claimed should pronounced against both defendants and this was accordingly done, but ntertain no doubt that as between the Company and Nagel both parties re bound by the agreement constituted by the written document. Im- liately after the judgment was pronounced negotiations were set on ot for the purpose of avoiding a forced sale of the assets then in eppel's possession but eventually on the 16th May 1922 these negotia- ons broke down. At that time assets of the former partnership to a nsiderable value were still in the possession of Poeppel. The payment £600 mentioned in the terms of the settlement and one monthly payment

£7 of £200 were made by Nagel and accepted by the Company. When making the last mentioned payment on the 16th May 1922 Nagel's solicitors requested the company's solicitors to "proceed to carry out the terms of settlement and issue execution against Poeppel at an early date", and on the 9th of June again wrote in effect refusing to make any further monthly payments and repudiating any liability on Nagel's part to adhere to the terms of settlement on the ground that the Company by not issuing execution against Poeppel had made default in carrying out those terms. After some further correspondence the company's solicitors on the 18th August 1922 entered judgment for the full amount against Poeppel & Nagel, and on the same day issued execution against Poeppel.

A levy was made under this writ on the 5th September 1922 the amount realised being a very small sum which was paid to the landlord on account of arrears of rent, and Nagel was subsequently compelled to pay the balance of the judgment debt amounting to £899-9-10. Nagel then brought an action against the Company to recover damages for breach of the agreement constituted by the terms of settlement, the cause of action alleged being that the Company in breach of the terms of settlement neglected and refused to issue execution against Poeppel on the judgment or to levy on the assets mentioned in clause 2 of the terms of settlement within a reasonable time after the 7th March 1922, by reason whereof Poeppel was enabled to and did sell and dispose of such assets. The action came on for trial before Shand J. who non-suited the plaintiff. On appeal to the

Full Court of the Supreme Court the non-suit was set aside and a new trial was ordered. The action then came on for trial before the late Chief Justice of Queensland and a jury. In answer to questions the jury found that assuming it was the duty of the Company to cause execution to be levied against the assets of the partnership within a reasonable time after the 16th May 1922 they did not cause execution to be levied within a reasonable time and the plaintiff thereby suffered £650 damages.

On this finding the learned C.J. being of opinion that it was the duty of the Company to levy execution on the assets in question within a reasonable time after the 16th May 1922 entered judgment for the plaintiff for £650 and costs and from this judgment the present appeal is

brought. The sole question for decision is whether on the true construction of the terms of settlement this duty was imposed on the Company. In my opinion it was not. Clause 1 provided that there should be judgment for the Company for £1699-9-10 . On that judgment it would have been open to the Company to issue execution and to direct the Sheriff to levy against the goods of either defendant only. This being the position if clause I stood alone clause 2 provides that execution is first to be issued against certain assets in the possession of Poeppel, which seems to me a loose way of saying that execution is first to be issued against Poeppel and the Sheriff is to be directed to levy on these assets. The question really turns on the meaning to be given

to the word "first". Does it mean before execution is issued against any other person liable or levied on any other goods or does it mean ~~this~~ before anything else is done under the agreement? In my opinion the former is the natural meaning of the words and therefore the meaning to be adopted. Where execution can be issued aginst both A. & B and levied on the goods of either I think an undertaking to levy first on the goods of A. imports no more than that execution is to be levied on those goods before it is levied on the goods of B..

It was argued that the description of the assets to be first levied on as being "now in the possession of Poeppel" showed that the obligation was to levy execution before he could dispose of any of the goods in his possession on the 27th March, and therefore immediately. But this

argument takes no account of the fact that some days at least must necessarily elapse before the writ could be issued and the Sheriff be put in possession of the goods and that in the meantime Poeppel, who seems according to the learned Chief Justice to have been a man whom no one trusted, would have ample opportunity to get rid of them. In my opinion the words of clause 2 of the agreement are reasonably clear and impose no such obligation on the company as the respondent alleges. The provisions of clauses 4 & 5 of the agreement were based on the assumption, which proved to be incorrect, that separate judgments would be entered against Poeppel and Nagel, and no assistance in construing clause 2 can be derived from them, or from clause 3 which does no more

than suspend the right of the appellant to issue execution against Nagel so long as he pays the sums therein mentioned.

In my opinion the appeal should be allowed and judgment in th action should be entered for the appellant.

STANDARD RUBBER WORKS PROPRIETARY LIMITED.

V

NAGEL

JUDGMENT ... MR JUSTICE ISAACS.

STANDARD RUBBER WORKS PROPRIETARY LIMITED.

V

NAGEL

JUDGMENT. ... MR JUSTICE ISAACS.

In my opinion the judgment of the late Chief Justice of Queensland was not only a just one but also correct in law.

Turning on the construction of a particular special contract the matter is not of great/general importance, but it means much to the parties concerned.

Two men, Poeppel and Nagel were partners, and the firm purchased goods from the Standard Rubber Company. For these they gave a cheque for about £1,699, which was not paid. An action brought by the company was defended by both partners. While the action was pending the partners agreed to dissolve partnership, on terms of which the only one/s important to mention were that Poeppel was to take the assets and to pay all partnership debts. When the trial of the action came on, Poeppel, in whose possession the assets then were, consented to judgment unconditionally - Nagel however would not consent uncon--ditionally but stipulated for conditions. The parties -Nagel and the company- agreed to the terms and wished them to be noted by the learned Judge presiding. This the Judge declined to do. It was then arranged that the form the settlement should take was a formal

order

order for judgment simpliciter, leaving the two parties as between themselves to be governed by the terms they had already assented to. Nothing could be plainer than this, that the agreement they had al--ready arrived at was not intended to be destroyed or weakened by the form of the judgment but that as between them the curial ~~forms~~ formalities/adopted were only a means of reaching, and honorably effectuating the substance of the bargain they themselves had made.

The agreement which, signed by the Counsel of the two respective parties, was as follows:-

TERMS OF SETTLEMENT.

(1)....By consent judgment for the plaintiff for £1,699/9/10 with costs of the action.

(2)....Execution of the judgment first to be issued against the assets of the partnership sold to and now in/the possession of Foeppel.

(3)....Execution of the judgment against Nagel to be suspended on payment by defendant Nagel of the sum of £600 within 21 days and payment by defendant Nagel of balance of amount of judgment and costs by monthly payments of £200 the first of such payments to be made on 1st/day of May 1922 and the other payments on 1st day of each month thereafter.

(4)....In default in performance of this settlement by defen--dant. Nagel judgment to issue forthwith for the full amount and costs against the defendant Nagel.

(5)....Judgment against the defendant Nagel not to be issued save upon such default as aforesaid and the entry of judgment against the defendant Foeppel to be without prejudice to the right to enter judgment as aforesaid against the defendant Nagel.

Dated this 7th March 1922.

The agreement as will be at once perceived is not a formal contract. It consists of what may be properly described as memoranda, from which the contract if formally drawn up would be framed. It is a bargain between mercantile men, expressed in brief and elliptical terms, and is of a nature to which the language of the Privy Council in the case of The Teutonia(L.R.4.P.C. at.p.182) exactly applies. There Lord Justice Mellish says:- " Although it is true that the " Court ought not to make a contract for the parties which they " have not made themselves, yet a mercantile contract, which is "usually expressed shortly, and leaves much to be understood,ought "to be construed fairly and liberally for the purpose of carrying "out the object of the parties".

When we visualise the relative situations of all parties at the moment, the meticulous dominance the Court was invited to give to the word "first" in clause 2, to the utter disregard of the solid business realities, appears not merely unwarranted but distinctly con-trary to justice.

On the face of the document the goods for which the debt was incurred and then in Poeppel's possession were to be made the first means of paying the debt, That was obviously from any business viewpoint, the one substantial protection to Nagel, who had sold out his interest to Poepel in these goods. It was just to Poeppel who had undertaken to pay the partnership debts. It was astounding to me to hear the learned Counsel for the company advance an argument that takes all substance out of this essential stipulation, and reduces it to a

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mere matter of form. He says that while it was incumbent on the com-
-pany according to its agreement to issue execution first against
Poeppel, that, consistently with the agreement could be done at any
time, even after Poeppel had been allowed to make away with the
assets. All that was necessary, says the company, was that the exe-
-cution against Poeppel should be prior to the execution against
Nagel. According to the argument Priority and not Security was the ob-
-ject of clause 2. A more unbusiness like and purposeless motion I
never heard of. However, that is necessary to save the company in
view of what was done. The goods in Poeppel's possession even on
16 May were worth at ordinary selling price over £2,000. After June
£1,510 had actually been realised for them. But when in September
the company caused the bailiff to levy on such goods of Poeppels
as the bailiff could find, all that could be found realised after
expenses were deducted, the sum of £7/18/8. The articles sold con-
-sisted almost wholly of the office furniture, practically all of
the valuable rubber goods having disappeared: and the proceeds
going at least in the first place into Poeppel's pocket and not
applied to pay the partnership debts. That was the very thing that
clause 2 was designed to prevent - if it is to receive any business
efficacy. But the "execution" issued under those circumstances, and
with that result is said by the company to satisfy the exigency of
the second clause, and to have afforded Nagel all the security
promised him.

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In my opinion, from any standpoint, whether of legal construction, business understanding or ordinary fair play, it is beyond the bounds of reason to regard that as any compliance with the stipulation on 6 March to execute the judgment first "against the assets of the "partnership and now in the possession of Poeppel". Then it is said for the company in argument, though a quite different reason was given for its inaction in its correspondence, that it was unable to issue the execution earlier against Poeppel because it would have been breaking its bargain with Nagel. That is said to arise in this way. Real J, having ordered judgment against both defendants, it had to be a joint judgment: but as the company had agreed with Nagel not to sign judgment against him until his default, they could not do so until he made default, for fear of breaking faith with him, and therefore the company could not sign judgment against Poeppel, and consequently no execution against Poeppel was possible. With singular inconsistency the argument for the company was that Nagel actually made default on 1 May. If that were true, the excuse mentioned goes for nothing, because McCawley C.J. based his judgment on the company's failure after that date, But how does the excuse stand on its own merits? The direction of Real J, as I have said, was given in full knowledge of the actual bargain between the parties. That bargain broke the joint liability of the late part-ners as it then existed by recognising their distinct stipulations for the future. No longer were they Siamese twins in responsibility

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to the company. Poeppel remained unconditionally responsible, and this responsibility was placed in the forefront for the reasons stated. Nagel was liable for the whole amounts but only secondarily. Even judgment was agreed not to be entered against him until he made default. The excuse referred to when it is examined means that it was not Nagel who was to be protected by Poeppel, but Poeppel to be pro--tected by Nagel. For Nagel, according to that was compelled to go on paying regularly on pain of committing a breach of contract, and so lose the protection of the assets, or else suffer default, and be liable to immediate responsibility for the whole amount, judgment and execution, following at once. He was not bound to complete his in--stalments until October. Now if the agreement meant, as the company contends, that no execution could go against Poeppel unless and until Nagel made default, and that Nagel agreed he would not make default but go on paying until October when the whole amount was paid up, of what possible use was clause 2? Clause 2 was the corner stone of the building, and for my part I am unable to make it the only stone to be rejected. The excuse that to issue execution against Poeppel in May would have broken faith with Nagel is doubly absurd when it is remembered how strenuously Nagel urged the company to do it. Some other objections were raised but of a trivial nature. For instance, reliance was placed on the judgment actually ordered and signed as being joint. What does that matter? There was the agreement to proceed by execution against the assets in Poeppel's possession at once. Negotiations deferred the duty to proceed till May, and that is all the company has been required to answer.

The plain honest and effective meaning of the agreement to my mind

is nothing more or less than this:-

(1)...The company to be entitled to order judgment against both defendants.

(2)...The particular assets to be realised at once by execution against Poeppel, this connoting judgment to be entered against him forthwith.

(3)...Execution of the judgment ordered against Nagel, to be suspended while he complied with the in-stalment plan.

(4)..Judgment not to be entered against Nagel unless he failed in respect of the instalments, in which case the protection of (3) and (4) to cease.

(5)...Nagel, in case of default, to raise no objection that a separate judgment had been entered against Poeppel.

The company has had all the benefit of the bargain, and they have deprived Nagel of any of its stipulated protection.

In my opinion the company was justly amerced by McCawley C.J. and this appeal should be dismissed with costs,

G. Rich J.

STANDARD RUBBER WORKS PROPRIETRAY LIMITED v. NAGEL.

JUDGMENT. RICH J.

STANDARD RUBBER WORKS PROPRIETARY LIMITED v. NAGEL.

JUDGMENT. RICH J.

This appeal is from a judgment of the late Chief Justice of Queensland in which His Honour held that the appellant was bound to issue execution against one Poeppel and to levy on certain partnership assets within a reasonable time after the date of the entry of judgment in a previous action. In that action the parties arrived at a settlement the terms of which are not very aptly worded.

The answer to the present controversy depends upon the construction of this document. I am unable to agree with the construction placed upon it by the late Chief Justice. In my opinion clause 2 of the settlement provided that execution should be levied on the partnership assets before levying on Nagel's separate goods.

The document is not to be construed as imposing an absolute and over-riding obligation on the company to proceed against the partnership goods before taking any other steps under the terms of settlement.

So far as execution against the partnership assets is concerned the document is silent as to the time when such execution is to issue.

In my opinion the document in question affords no support to the cause of action alleged and the appeal should be allowed

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To be handed down

STANDARD RUBBER WORKS PROPRIETARY LTD. V. NAGEL.

Judgment. Higgins J.

I do not think that anything would be gained if I were to deal with any of the numerous questions discussed but one; and that is, the question of the meaning of clause 2 of the "terms of the settlement". If that question be decided against the respondent (the plaintiff in the action) the action must fail; and anything that I could say on other subjects would be merely obiter. The action is of a very unusual nature, based on the terms of settlement of an action against the partnership of Nagel and Poeppel. It has not been contended by the appellant (the defendant) that there would be no cause of action even if the plaintiff's interpretation of the terms of settlement were accepted; and, in the absence of argument on the subject, I propose to assume that there would be a good cause of action. My opinion is that there was nothing in the terms of settlement to oblige the appellant, as judgment creditor, to levy execution "against the assets of the partnership sold to and now in the possession of Poeppel", or to levy execution at all unless he chose; and that the word "first" in clause 2 means merely that before levying of any execution against Nagel there must be execution against the assets of the partnership. These expressions are not technical, but they are used in the terms of settlement, and the meaning is plain. While I recognize the thoroughness with which the late Chief Justice McCawley dealt with the case, I am unable to concur with him in the following passage (amongst others) in his reasons for judgment (p.177) -

> " what effect is to be given to the word 'first' [in clause 2 of the terms of settlement]? I think it means that the plaintiff should levy execution against these goods, that is to say, before

Nagel was bound to do anything; and the first thing Nagel was bound to do was to pay £600 21 days after judgment".

It must strike any one at all familiar with the ways of sheriffs and executions as extraordinary that the two learned counsel who drew up and signed the terms of settlement should expect execution to be completed within 21 days. But there is nothing whatever in the terms of settlement to make the obligation of Nagel to pay £600 in 21 days and £300 monthly thereafter (clause 3) dependent upon the levying of execution against the partnership goods. Nagel was to go on paying until the judgment was satisfied. If and when there should be execution and sale of all these goods, Nagel would presumably get the advantage of anything realized from the sale, and credit for his own payments, in the settlement of accounts with Poeppel. With the accounts between the partners, the judgment creditors had no concern. I regard clause 2 not as binding the judgment creditors to levy execution against any person or any goods, but as binding them not to worry Nagel with execution against his private assets until execution should be exhausted against the goods that belonged or had belonged to the partnership. For it was a partnership debt.

The learned Chief Justice, indeed, has dealt with this view of cl. 2 thus:

> "If the clause meant no more than that execution should not be levied against Nagel until execution was levied against Poeppel, Nagel could get no benefit from the clause unless he made default. He would in effect have to make default in the agreement in order to get the benefit of it - a most extraordinary situation."

Now, with deep respect for the late Chief Justice, I am unable to accept the position as so stated. Is delay in the enforcement of the judgment debt against Nagel personally no benefit to Nagel? Is not the substitu-

tion of time payments for one immediate payment no benefit to him? I note also that the Chief Justice, in coming to his conclusion as to the meaning of the terms of settlement seems to treat the circumstances of the case as adding to the expressions used in the contract. There is a difference between (a) putting oneself in the circumstances of the parties at the time of a contract, so as to find the proper application of the contract, and (b) deducing from the circumstances what contract the parties would probably have made. The former course is legitimate; the latter is not. Finding 4 of the jury at the trial is as follows -

"That the parties to this action thereupon agreed that judgment should be entered in the said action against the plaintiff and Poeppel for £1699/9/10 with costs on the terms and conditions mentioned in the agreement of settlement (Ex 2) so far as the same could be applied".

The concluding words "so far as the same could be applied" were due to the position taken by Real J. [at the trial of the original action Standard Rubber &c ltd. v. Nagel] that there must be judgment against both defendants - against Nagel as well as against Poeppel. But finding 4, which neither party impugns, practically reduces the obligations created to the terms of settlement on their true interpretation; and in these terms of settlement I can find, neither expressed nor implied, any obligation on the part of the appellant to issue execution at all.

In my opinion, the appeal should be allowed.

STANDARD RUBBER WORKS PROPRIETARY LTD. V. NAGEL

JUDGMENT STARKE J.

Nagel, the plaintiff, alleged in his pleadings that the defendant, the Standard Rubber Works Pty Ltd, agreed and undertook that it would immediately, or at the earliest reasonable time after 7th March 1922, issue execution upon a certain judgment, and levy against and cause to be seized, the assets of a partnership between Nagel and one Poeppel styled "The Non-Puncturable Tube and Rubber Company", sold to, and then in the possession of Poeppel. The proof of this allegation rests upon the construction of certain Terms of Settlement, dated 7th March 1922, of an action in which the Standard Rubber Works Pty Ltd was the plaintiff and Nagel and Poeppel were defendants. By this Settlement, it was agreed that judgment should be given for the Standard Rubber Works Pty Ltd against both Nagel and Poeppel for the sum of £1,699-9-10d. And Clause 2 provided as follows: "Execution of the judgment first to be issued against the assets of the partnership sold to and now in the possession of Poeppel". This clause does no more than require the assets of the partnership to be exhausted before execution is levied upon assets belonging to Nagel himself. It fixes no time within which the execution upon the partnership assets should be levied. Nor is it necessary simply the agreement set forth in the pleadings to give business effect and efficacy to this term of the Settlement. Clause 3 of the Settlement provides for certain payments by Nagel, but it throws no light on Clause 2. By Clauses 4 and 5, the parties stipulated that no judgment should be given against Nagel unless he made default in the payments mentioned in Clause 3. But the learned Judge who heard the action in which the Settlement was made stated that he must in law give judgment against both defendants. The parties finally accepted this view, and judgment was given accordingly. But the parties refrained for some time from formally entering this judgment on the records of the Court. These Clauses, 4 and 5, can only be understood in the light of this action on the part of the learned Judge and of the parties at the trial. They are inappropriate to the judgment which was actually given, but it is clear enough that they operate to prohibit any execution

against Nagel's own assets unless he made default in the payments under Clause 3. The Clauses have no bearing upon the provisions of Clause 2.

Lastly, I would observe that this is not an action against the Standard Rubber Works Pty Ltd for levying execution upon Nagel's own assets before the assets of the partnership were exhausted, or before he made default in the payments stipulated for in Clause 3, but an action based upon neglect to levy upon the partnership assets forthwith, or within a reasonable time after 7th March 1922.

The appeal ought to be allowed, with the usual consequences.

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