

MILFORD v KLINKMUELLER

High Court Apia
6, 21 December 1932
Luxford CJ

SOLICITOR AND CLIENT (Duty of solicitor for vendor in conveyance of real property) - Personal liability of solicitor to client if he parts with title documents without receipt of whole consideration.

Plaintiff executed a Mortgage of his properties in favour of defendant, who was his solicitor at all material times. The Mortgage was given pursuant to an arrangement to secure payment of debts incurred by the plaintiff in transactions involving one Curry and by Curry himself, and pursuant to which arrangement the plaintiff's properties were then conveyed to Curry absolutely subject to the Mortgage to defendant. Plaintiff was liable, or had assumed liability for payment of another Mortgage owing to an Estate of which defendant was Administrator. The balance owing under the Estate Mortgage was included in the principal amount secured by the Mortgage to defendant. The evidence proved plaintiff executed the Mortgage to defendant in the latter's office in the belief that the Estate Mortgage would be paid off out of the proceeds and a release obtained, and also proved his belief was justified, although it was defendant's intention throughout that the Mortgage would simply provide collateral security for the Estate Mortgage and it was not in fact paid off out of the proceeds. Subsequently, Curry was declared bankrupt. Defendant obtained a Judgment against the original mortgagor for the balance owing on the Estate Mortgage, but claimed against the Official Assignee of the Curry Estate for the full amount of his Mortgage.

Held: Plaintiff was entitled to judgment against defendant for the amount owing on the Estate Mortgage on the ground that relief from his obligation thereunder was part of the consideration for conveyance of his properties to Curry, and as his solicitor defendant had the duty to secure payment of the whole consideration for the conveyance before parting with the documents of title. Judgment was given for the plaintiff for the amount owing on the Estate Mortgage, but stayed pending execution by him of an assignment to defendant of his right of action against Curry's Estate in Bankruptcy.

Plaintiff in person.
Defendant in person.

Cur adv vult

LUXFORD CJ. Sometime during the year 1920 the plaintiff (as agent for his cousin Florence Greig) executed a Mortgage over a piece of land in Apia to secure the sum of £100 advanced to him by Mr. W.C. Dean on behalf of his sister Mary Ann Dean. Mr. Dean died, and administration of his estate was granted to the Public Trustee, who acknowledged Mary Ann Dean's claim to the Mortgage. The Public Trustee, instead of transferring the Mortgage to her, permitted her through her agent, the defendant, to collect the moneys due thereunder. Subsequently, Mary Ann Dean died, and letters of administration (with Will annexed) of her estate were granted to the defendant.

The plaintiff agreed to pay the moneys due under the Mortgage for reasons I do not know. Nor do I know whether his agreement was legally enforceable against him. The defendant made demands upon the plaintiff from time to time, which resulted in the plaintiff making payments on account of the accrued interest. This went on until 24th July, 1930 when the defendant made a demand on Florence Greig, who was then living in New Zealand.

The defendant had various other dealings with the plaintiff and Curry, the nature of which was not disclosed in the evidence, but as a result of them, the defendant guaranteed the plaintiff's banking account to enable it to be overdrawn. The defendant was called upon to repay the overdraft when it amounted to £259.12.0. He paid this sum to the bank on 20th December, 1930. In addition to this sum the plaintiff, or Curry, was indebted to the defendant in various amounts making a total of approximately £400.

The defendant made demands upon Curry, and endeavoured without success to obtain security to cover this indebtedness. In the early part of 1931, probably in February or March, Morris Hedstrom Ltd. pressed Curry to pay an account of £341.11.8. I gathered from the evidence that Curry did not admit liability for the whole of this amount, but was particularly anxious that it should be settled. He interviewed the defendant and informed him that Morris Hedstrom Ltd. would assign the debt to any person who would pay £150. He begged the defendant to purchase the debt. The defendant refused to do anything in the matter at first, but after much entreaty by Curry agreed to negotiate with Morris Hedstrom Ltd. with a view to paying a sum smaller than £150, and if successful to advance the money upon the following terms:-

1. Curry to repay the defendant the amount advanced, plus a procuration fee and half the difference between the amount paid and £150.
2. The plaintiff to execute a mortgage of his properties to secure this amount together with all costs and the amount then owing by the plaintiff and Curry, approximately £400.
3. The plaintiff to transfer to Curry all the properties included in the mortgage, immediately after the execution of the mortgage (and of course subject thereto).

These terms were acceptable to Curry, and in view of the substantial reduction he would obtain from Morris Hedstrom's account, were advantageous to him.

Up to this point there is no conflict between the evidence of Curry and the defendant. I now come to the further arrangement which was made between Curry and the defendant to include in the mortgage to be given by the plaintiff, the moneys due and owing under the Mary Ann Dean Mortgage. It is common ground that those moneys were to be included in the new mortgage, but there is a direct conflict of evidence as to the conditions or the purpose of their inclusion. The plaintiff's case is that the defendant agreed to repay the Mary Ann Dean Mortgage, obtain and register a release, and include the moneys paid for that purpose in the new mortgage. The defendant's case is that the inclusion of the amount owing under the Mary Ann Dean Mortgage was for the purpose of collaterally securing it, and to make the plaintiff and Curry legally responsible for its payment.

The plaintiff says that he took no part in the negotiations with the defendant, but left everything to Curry. I think that the plaintiff was present on one occasion when Curry interviewed the defendant, but I am satisfied that his knowledge of what was going on came solely from what he was told by Curry.

Curry in giving evidence of the arrangement with the defendant relating to the inclusion of these moneys said:-

I made it clear to Mr. Klinkmueller that the amount of Mrs. Greig's Mortgage to Dean's Estate, should be included in the accounts. I made it clear that the Mortgage must be paid off.

The defendant gives a different account of the transaction. After referring to the negotiations for the advance of the moneys required to pay Morris Hedstrom's account, he says:-

While these negotiations were going on I suggested that an additional security be given for the amount which was due and owing by Mrs. Greig to Mary Ann Dean's Estate. At that time

I was administrator (with Will annexed) of Miss Dean's Estate. I pointed out to Curry and Milford that they had undertaken to pay off the Mortgage, and it was only fair that they should settle all further moneys payable under and in respect of the Mortgage. This they willingly agreed to do. Mr. Curry asked me to include these moneys in the mortgage which was then to be executed. I repeatedly informed Mr. Curry that the Mortgage would not be paid off by me, but only the other amounts. This mortgage was to be regarded as collateral security to Mary Ann Dean's Estate. Although I did not consider the properties sufficient to carry the additional amount, I agreed for special reasons. The main reason was that Mr. Milford by executing the mortgage would become personally liable under the mortgage and I would have Curry liable also when the property was transferred to him. I acted entirely and only in the interests of Mary Ann Dean's Estate.

During the negotiations the defendant prepared a statement in his handwriting, put in in evidence as Exhibit L, to show approximately how the amount to be secured by the mortgage would be made up. In this statement appears the item:-

Estate Mary Ann Dean	(in re Craig (<u>sic</u>))
Collateral	£121.2.0.

On the second page of the statement, there is a summary of the estimated fees to be charged and among them appears this item:-

New mortgage	(£700 Collateral)	£9. 0. 0.
		1. 1. 0.
		19. 0. 0.

It is quite clear from this and from the defendant's subsequent actions in the proceedings against Florence Greig and in connection with the proof of debt he lodged with the Official Assignee after Curry's adjudication in bankruptcy, to both of which matters I will refer presently, that the defendant intended that the moneys owing under the Mary Ann Dean Mortgage were to be included in the new mortgage from the plaintiff for the purpose of collaterally securing them, but I doubt very much whether Curry understood the position. He was concerned solely to obtain the money required to settle with Morris Hedstrom Ltd. and I do not think that he gave anything else any serious consideration.

The defendant discussed with Curry the repayment of the mortgage moneys. Here again there is a conflict of evidence. Both gentlemen agree that £25 was to be repaid monthly on account of the moneys owing to the defendant, but the defendant says that Curry agreed to increase the monthly payments up to £40 for the purpose of applying any amount in excess of £25 towards the moneys owing under the Mary Ann Dean Mortgage, and in any event to pay sufficient in excess of £25 to cover the current interest thereunder. Curry denies this arrangement. I think the defendant has given a true version of the arrangements for repayment as he understood them. Still, it would be difficult for Curry to appreciate the distinction between the Mary Ann Dean Mortgage moneys included in the new mortgage and the moneys owing under the original Mortgage. I am unable therefore to draw the inference from the defendant's version of the arrangement for repayment that Curry understood that the Mary Ann Dean Mortgage was not to be released.

Soon after this the defendant handed the matter over to his partner to complete by preparing and obtaining execution of the necessary documents and the making up of the ordinary statements. There is no evidence of the instructions given by the defendant to his partner, except that the statement in the defendant's handwriting, Exhibit L, to which I have already referred was handed over to him.

Mr. Kronfeld had an interview with Curry on 15th April, 1931 at which a general discussion took place, and a further interview on 27th April at which the plaintiff was also present. There is a direct conflict of evidence concerning the conversations at this interview. The plaintiff

says:-

I called at his, Mr. Klinkmueller's, office with Mr. Curry, but I saw Mr. Kronfeld and not Mr. Klinkmueller. I produce a copy of the Mortgage which I signed, principal sum £659.2.1. I said to Mr. Kronfeld, "Will this money pay off the Mortgage on my cousin's property, Mrs. Greig's?" He said, "Yes, do not worry Mr. Klinkmueller will fix that up as soon as he has time." That was before I signed the Mortgage. Then we went before the Chief Judge and I signed the Mortgage.

Mr. Curry says:-

On 27th April, 1931 Mr. Milford and myself went to Mr. Kronfeld's office. Mr. Kronfeld sent me word that the deeds were ready for signature. When we went in Mr. Milford said, "Before I sign them I want to know if the Mortgage over Florence Greig's property is to be released." Mr. Kronfeld said, "Yes. You can see it is on this statement." He then produced this statement to me. (Statement put in, Exhibit F) I was quite satisfied from the Statement that provision had been made to release the Mortgage. Mr. Milford turned to me and said, "Are you sure it will be released?" I said, "Yes, Mr. Kronfeld says it will be released in a few days." We then appeared before the Chief Judge and Mr. Milford signed the Mortgage.

Mr. Kronfeld says:-

On 27th April, Curry called at my office with Mr. Milford. I had a search of all properties I knew of as belonging to Mr. Milford. Milford then confirmed the arrangements between Curry and himself. I did not have the statements drawn up, nor were the documents typed. I explained the various items shown in Mr. Klinkmueller's list, Exhibit L, and then drafted the statements and documents.

Q. What was said about the Mary Ann Dean Mortgage?

A. I explained to Mr. Milford that the inclusion of the Mary Ann Dean Mortgage was to give the Estate an additional security. Mr. Curry, who was to take over the property, also knew that. In fact it was clearly explained and each item in the draft prepared by Mr. Klinkmueller was explained. I swear that I explained what I have set out in my memorandum of the conference. Mr. Curry saw the figures relating to Morris Hedstrom Ltd. I asked Milford and Curry to return in an hour and a half when I would have the documents ready. I drew and engrossed the Mortgage and the conveyance, and later in the afternoon the documents were signed. I promised to let Curry have the accounts in the course of a few days. I did that . . . I would refer to Milford's statement as to the release of the Mortgage. I deny that statement. I deny positively that I said what Curry alleges.

I will refrain for the moment from commenting on this evidence, but will turn to the documents which were prepared and signed, also to the statements of account and to Mr. Kronfeld's memorandum of what took place at the interview. The Mortgage follows exactly the form prescribed by the third schedule to the Property Law Act, 1908 without the addition of any special covenants, conditions, or declarations. The principal sum of £659.2.1. is repayable upon demand, and interest is payable thereon at the rate of 8% per annum by quarterly payments. Two of the six parcels of land are shown to be subject to a Mortgage to the Bank of New Zealand to secure £350.

The Statement of account, after allowing certain credits, shows a final debit against the plaintiff of £518.12.1. This account is dated 1st May, 1931, which is four days subsequent to the signing of the documents. The account makes no mention of the money paid to Morris

Hedstrom Ltd. but I note that Mr. Kronfeld in his memorandum recording the interview of 27th April, 1931, Exhibit M, made the following entry:-

Note: The principal moneys under the Mortgage are made up as follows:

To amount as per statement of Milford	£518.12. 1.
" " to settle claim of Morris Hedstrom Ltd. for J.E. Curry	138. 1. 6.
" costs of release of mortgage No. 95M Carruthers Ltd. to Milford (not charged)	<u>2. 8. 6.</u>
	£659. 2. 1.
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I assume from this that the Statement showing the debit of £518.12.1. was in draft form only on 27th April, 1931, and that a verbal explanation was given of the other two items which bring the total debit to £659.2.1, the amount secured by the Mortgage. These two items should have been included in the engrossed Statement of 1st May, 1931. Included in this Statement is this item:-

Amount to settle Mortgage Estate of the late Mary Ann Dean as per attached account	£121. 2. 0.
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The attached account referred to is as follows:-

Mr. Henry Milford, Apia, Samoa.

In A/c with the Executor in the Estate of the late Mary Ann Dean care of G. Klinkmueller, Esq.,

re Mortgage Florence Greig to M.A. Dean, 1930.

July 24. To balance under Mortgage	£110. 7. 0.
" interest from 24.7.30 to 1.5.31	6.15. 0.
" our fee herein	3. 3. 0.
" Stamp Duty and registration fee on release	<u>17. 0.</u>
	£121. 2. 0.
	=====

E. & O.E. Amount to settle £121.2.0.

Klinkmueller & Kronfeld
30. 4.1931.

This Statement and the Account attached to it ex facie convey only one meaning to a legal practitioner, that is, that the Mary Ann Dean Mortgage would be released.

I have already quoted from the defendant's version of what was arranged with Curry relating to the inclusion in the Mortgage to himself of the amount owing under the Mary Ann Dean Mortgage, and I have stated that I believe that he has given a truthful account of what he intended. Mr. Kronfeld says he was present during some of the interviews between Mr. Klinkmueller and Mr. Curry, and that he understood from them that the Mary Ann Dean Mortgage was not to be released, the idea being (I quote from the note of his evidence), "That the security was to be collateral. Mr. Klinkmueller was to stand as first mortgagee for £550 and Mary Ann Dean's Estate was to stand as second mortgagee for her £121.2.0. collaterally with the Mortgage from Mrs. Greig."

If this was the position which Mr. Kronfeld understood on 27th April, 1931 it is impossible to understand why he prepared the Mortgage without disclosing the two interests and their relative priorities. The proper method would have been to have prepared a second mortgage setting out the nature of the transaction in appropriate recitals. It is equally

impossible to understand why the Statement of account was prepared in language and figures that are applicable only to a repayment and release of the Mary Ann Dean Mortgage.

I prefer to believe that Mr. Kronfeld at the time he completed the matter was under a misapprehension concerning the position of the Mary Ann Dean Mortgage and consequently prepared the Mortgage and the Statement on the assumption that the Mortgage would be released.

More than eighteen months have elapsed since the documents were drawn. Mr. Kronfeld probably did hear the conversation about collateral security during the negotiations, but it is clear from the form of the Mortgage and the Statement showing how the principal sum was made up that he did not have it in mind on 27th April, 1931.

Whatever may have been Curry's understanding of the position, I am satisfied that he told Milford that the Mary Ann Dean Mortgage would be released, and that Milford executed the new Mortgage with that belief.

I wish to add that I accept the defendant's statement that after handing over the matter to his partner he did nothing further in it until a long while subsequently to the execution of the documents. That of course makes no difference to his liability, but I make this finding because there was a suggestion during the hearing that the defendant had been guilty of a fraud upon the plaintiff. There has undoubtedly been a misconception of the principles of conveyancing and of general practice, but there is not the slightest justification for any suggestion of fraud against the defendant.

My findings of fact up to the time of the execution by the plaintiff of the Mortgage for £659.2.1. can be summarised as follows:-

1. The defendant disclosed to Curry that the amount owing under the Mary Ann Dean Mortgage would be included in the Mortgage for the purpose of collaterally securing it.
2. A doubt exists as to whether Curry understood that position.
3. Curry informed the plaintiff that the Mary Ann Dean Mortgage would be repaid out of the moneys to be advanced by the defendant.
4. Mr. Kronfeld prepared the necessary documents on the assumption that the Mary Ann Dean Mortgage would be released.
5. The Statement showing how the principal sum was made up was prepared on the same assumption.
6. The Mortgage and Statement were prepared by Mr. Kronfeld on an erroneous understanding of the true arrangement.
7. The plaintiff executed the Mortgage believing that the Mary Ann Dean Mortgage would be released. His belief was justified.

Subsequent to the execution of the Mortgage Curry made several payments to the defendant in reduction of the Mortgage, but these did not amount to £25 a month. Indeed only £52.6.0. had been paid up to the 14th October, 1931 and after that date nothing more was paid.

The evidence does not disclose what demands were made by the defendant upon the plaintiff or Curry, but because of their failure to maintain the payments of £25 a month, the defendant commenced proceedings in the name of the Public Trustee against Florence Greig to recover the principal and interest moneys owing under the Mary Ann Dean Mortgage. These proceedings were commenced on the 17th February, 1932. In all, the sum of £125.6.8. was claimed, made up in the following way:-

Principal sum		£100. 0. 0.
Arrears of interest to 28.2.25		16. 0.
Interest to 30.4.1932		<u>57. 6. 8.</u>
		£158. 2. 8.
Less Cash paid 30.11.25	£12.16. 0.	
" " " 28.11.28	<u>20. 0. 0.</u>	32.16. 0.
		£125. 6. 8.

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An Order was made by me in that action giving leave to serve the proceedings on Mrs. Greig in New Zealand subject to the condition that the hearing should be fixed for a date subsequent to 1st June, 1932.

Before the hearing of this case Curry was adjudicated a bankrupt.

On the 25th May, 1932 the defendant filed a proof of debt in Curry's bankrupt Estate claiming to be admitted as a creditor for the sum of £644.5.10. This sum represents the £659.2.1. secured by the Mortgage, plus interest amounting to £57.4.0. but less credits of the sum total of £72.16.3. The defendant valued his security at £525, thus leaving him an unsecured creditor for £119.10.0. This proof of debt standing alone would strongly support the plaintiff's contention that the defendant had agreed to repay the Mary Ann Dean Mortgage; but at that time he had commenced the proceedings against Mrs. Greig. Also, he attached to the proof of debt a statement headed, "Statement re Mortgage A/C.: Mr. G. Klinkmueller." This account bears the same date as the proof of debt. The moneys owing to the defendant personally and those owing to him under the Mary Ann Dean Mortgage are shown separately, with the result that the defendant's personal claim against the Estate is shown as £522.15.10. I am unable to reconcile the figures in the proof of debt with the figures in the statement which accompanied it, although the difference is not large, nor is it clear whether the defendant intended the proof of debt to cover a claim by the Estate of Mary Ann Dean.

The Deputy Official Assignee in his evidence stated that he handed back to the defendant the statement annexed to the proof of debt, and so far as he is concerned the proof of debt is in order. I was very surprised to hear this. However, I do not propose to comment further upon that matter in this Judgment.

I will now turn to the legal aspects of the case. Immediately after the execution of the Mortgage, the plaintiff transferred the mortgaged property to Curry subject to the Mortgage of £659.2.1. Part of the property was also subject to a Mortgage to the Bank of New Zealand for £350. The evidence does not disclose whether this Mortgage represents the Bank's security for the overdraft which the defendant had guaranteed, but as the Stamp Duty on the conveyance was assessed without including the sum of £350 as part of the consideration, I assume that the officer in charge of Stamp Duties was satisfied that there was no money owing under the Bank Mortgage at that time. If that was the position, the conveyance should have been amended accordingly. Otherwise, the document on its face does not bear the proper Duty. That, however, does not affect the present case.

The circumstances surrounding the conveyance by the plaintiff to Curry would ordinarily raise a doubt whether the plaintiff made an absolute conveyance of his beneficial interest in the properties therein described, or whether he conveyed them conditionally upon Curry covenanting to reconvey to him their equities of redemption; but as Curry's evidence on this point stands uncontradicted, I must hold for the purpose of this case that there was an absolute conveyance.

The plaintiff therefore conveyed his properties to Curry for a total consideration, leaving out the Bank Mortgage, of £660.2.1, which was paid to him by Curry taking over the Mortgage of £659.2.1. and paying the sum of £1 in cash. The plaintiff would have been quite satisfied if he and Florence Greig had thereby been relieved of their obligation to repay the Mary Ann Dean Mortgage, but owing to the several misunderstandings which should not have occurred, they still remain liable.

The Mortgage executed by the plaintiff does not disclose that any portion of the principal is collateral to the moneys secured by the Mary Ann Dean Mortgage. In appropriate proceedings and upon being satisfied that a mortgage was intended to operate in part as a collateral security the Court would rectify the deed in order to give effect to the true intention of the parties. In the present case I would be unable to find sufficient grounds to justify an order for rectification. It follows from this that the true amount secured by the defendant's Mortgage is £538.0.1, unless the defendant applies the sum of £121.2.0. to repay the Mary Ann Dean Mortgage.

The question now arises, "To what relief is the plaintiff entitled?" His properties have been conveyed to Curry, but the purchase money to

which he was entitled was short paid by £121.2.0. This money may be recoverable from Curry's Estate, but even if that Estate is legally liable, I understand that only a small dividend could be paid.

The relationship of solicitor and client existed at all material times between the defendant and the plaintiff, and in particular when his firm acted in the conveyance of the plaintiff's properties to Curry. On such a transaction the solicitors of the vendor personally are responsible to their client if they part with the documents of title without receiving the whole of the consideration. In effect, that is the position in the present case.

Even if the principal sum of £659.2.1. had collaterally secured the Mary Ann Dean Mortgage the defendant's liability would have been very much the same. In that event, the liability of Florence Greig would have continued. Also, her property would have remained charged with the payment of the principal and interest moneys.

Indeed the defendant, acting on the assumption that the new Mortgage collaterally secured the other Mortgage moneys, has taken proceedings for their recovery from Florence Greig. Judgment has been obtained against her, and she has made arrangements to pay the Judgment debt, with the result that the principal sum of £659.2.1. secured by the defendant's Mortgage may be reduced to £538.0.1. It would have been the duty of the defendant's firm to have secured to the plaintiff the payment of the sum of money by which the defendant's Mortgage may have been reduced, before handing over the documents of title. In consequence of this omission the plaintiff would be left to prove as an unsecured creditor in Curry's Estate.

In my opinion, the defendant's liability to the plaintiff arises solely out of the relationship of solicitor and client, and the relief to which the plaintiff is entitled is a monetary judgment for the loss he has sustained.

I called the parties before me yesterday to deliver an interim Judgment, in which, after setting out the view I took of the defendant's liability, I suggested that if he repaid and procured a release of the Mary Ann Dean Mortgage and paid the filing and hearing fees a formal judgment need not be recorded. The defendant, however, elected that the Court should enter judgment. I therefore give Judgment for the plaintiff for £120.2.0. with costs according to scale. The Judgment will be stayed until the plaintiff shall have executed to and in favour of the defendant an assignment of his right of action against the Estate of Curry, in respect of the purchase money short paid when the plaintiff conveyed his properties to Curry. The Deed of Assignment shall be prepared by the defendant and forwarded to the plaintiff for execution within fourteen days from this date.