
O N A P P E A L
FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

B E T W E E N :

PAULINE BURNES

Appellant
(Defendant)

- and -

TRADE CREDITS LIMITED

Respondent
(Plaintiff)

10

CASE FOR THE RESPONDENT
TRADE CREDITS LIMITED

- | | | <u>Record</u> |
|----|--|--|
| 1. | The Appellant Mrs. Burnes appeals by leave of the Supreme Court of New South Wales Court of Appeal granted on 31st March 1980 against an Order of that Court dated 7th August 1979 by which the Court of Appeal (Street C.J., Samuels and Mahoney JJ.A.) unanimously for the reasons delivered on 15th June 1979 set aside a judgment of the District Court in Sydney (Judge Godfrey Smith) dated 3rd February 1978 in favour of Mrs. Burnes, and gave judgment in favour of the Respondent Trade Credits Ltd. for A\$8,583.31 and for the costs of the trial and of the appeal. | Page 69
Page 68
Pages 51-67
Pages 38-43 |
| 20 | 2. On 12th July 1972 D.G. Hogan Pty. Limited ("Hogan") contracted to sell certain land to Civic Private Hotel Pty. Limited ("Civic"). The unpaid balance of the purchase moneys was A\$100,000. As security Civic mortgaged the land to Hogan by a Memorandum of Mortgage dated 12th October 1972, which provided (inter alia) for payment of the principal on 12th October 1975 and meanwhile for monthly payments of interest at the rate of 9 per cent per annum. | Pages 18-24 |
| 30 | 3. By a Deed of Guarantee dated 12th October 1972 Mrs. Burnes and her husband as guarantors guaranteed to Hogan payment by Civic of the principal sum advanced by | Pages 10-17 |

Record

Hogan to Civic on the terms of the Mortgage with all interest accruing thereon. Reference is made below to some of the relevant provisions of the Mortgage and of the Guarantee.

4. On 18th October 1973 the Mortgage was assigned to Trade Credits by Hogan, who also agreed to assign their rights under the Guarantee to Trade Credits.
5. The principal sum was not paid on 12th October 1975. By a Memorandum varying Mortgage dated 25th November 1975 Civic and Trade Credits agreed to extend the term or currency of the Mortgage to 12th October 1976 at a rate of interest of 16 per cent per annum from 12th October 1975. The evidence of the only witness, a collection officer of Trade Credits, is that this higher rate was within current interest rates in New South Wales at the time.
6. Mrs. Burnes was not asked to give her consent to this variation of the Mortgage, which was a material variation.
7. By a Deed of Assignment dated 25th March 1976 Hogan assigned to Trade Credits its rights in and under the Guarantee.
8. Interest at the rate of 16 per cent per annum totalling A\$8,583.31 (after a credit) became due and payable by Civic pursuant to the Mortgage for the period from 12th October 1975 to 12th May 1976, but has not been paid. On 16th June 1976 Trade Credits claimed this sum from Mrs. Burnes and her husband under the Guarantee. Judgment was entered against Mr. Burnes but he could not be traced.
9. It is common ground that :
- (a) the above sum is due and payable by Civic to Trade Credits and has not been paid;
 - (b) the Mortgage, the Guarantee, and the assignments of each to Trade Credits are valid and effective;
 - (c) entry of judgment against Mrs. Burnes' husband does not affect the claim against Mrs. Burnes.
10. The sole issue on this Appeal is whether :
- Page 26 10
- Page 8, lines 21-24
- Pages 28-30 20
- Pages 1-3 30
- Pages 18, 10, 28
- 40

(i) the terms of the Mortgage and the Guarantee permitted the variation of Civic's obligations (by an extension of time with an increase in the interest rate) without the need to obtain the consent of Mrs. Burnes (as the Court of Appeal held, and Trade Credits contend); or

10 (ii) such variation of Civic's obligations discharged Mrs. Burnes from liability under the Guarantee (as the District Court Judge held, and Mrs. Burnes contends).

11. The contentions of Trade Credits may be summarised as follows :

(1) That variation of Civic's obligations was permitted without the need to obtain Mrs. Burnes' consent appears from the terms of both the Mortgage and of the Guarantee.

Pages 18-24
Pages 10-17

20 (2) The Mortgage and the Guarantee should be construed together, and a meaning should be given to each clause of the Guarantee consistent with the other provisions of the two instruments.

(3) The terms of the Mortgage, which related to a balance of purchase moneys unpaid, treated these moneys as "advanced" to Civic (see the 21st and 25th clauses); and expressly contemplated that the moneys so advanced might be "re-advanced" to Civic after the date of the Mortgage and secured by the same security (see the 25th clause).

Pages 18-24
Page 19
Page 20
Page 20

30 (4) Thus the obligations of Civic, the performance of which Mrs. Burnes guaranteed, might relate to the moneys originally advanced or to moneys subsequently readvanced.

(5) The recitals to the Guarantee also treated the unpaid purchase moneys as having been advanced to Civic.

Page 10

40 (6) The provision in Clause 1 of the Guarantee that it should be "a continuing guarantee" was designed to ensure that the guarantor's obligations would extend to subsequent transactions within the ambit of the Mortgage and the Guarantee, including any by way of readvancement falling within the 25th clause of the Mortgage, or within clause 14 of the Guarantee.

Page 11
Page 20
Page 13

(7) The wording of Clauses 5, 6 and 11 of the Guarantee is also apt to cover such a further dealing by way of readvancement.

(8) Clause 14 of the Guarantee provided for "any further advance or advances" to Civic to be included in the Guarantee unless written notice had been given by the guarantor (no such notice was given). The meaning of "further advance" in clause 14 should be determined by reference to the use of this word "advance" in relation to the unpaid purchase moneys in both the Mortgage and the Guarantee, and to the use of the word "readvance" in relation to those moneys in the 25th Clause of the Mortgage. 10

(9) In this context the variation of Mortgage by the extension of its term for one year at a higher rate of interest was a "further advance" within clause 14 of the Guarantee and a "readvance" within the 25th clause of the Mortgage. If the unpaid purchase moneys had been called in on 12th October 1975, and then lent back to Civic for a further year at a higher rate of interest, that would have been such a "further advance" or "readvance". Dealing with the matter instead by an extension of time at a higher interest rate did not alter the substance of what was effected by the variation of the Mortgage. 20

(10) Trade Credits respectfully adopt the reasoning of Mahoney J.A. at page 62 line 15 to page 65 line 9 of the Record. 30

(11) The word "advance" has been considered in numerous reported cases in various contexts, and has always been given a wide meaning: see for example London Financial Association v. Kelk (1884) 26 Ch. D. 107, 134-7 Bacon V.C. ("advancing" as used in a memorandum of association had a meaning wider than and different from "lending"); Grahame v. Grahame (1886) 19 L.R. Ir. 249 Chatterton V.C. ("advances" in a continuing guarantee included the giving of credit by a bank); In re Smith [1918] 2 Ch. 405 Peterson J. (securities lodged with a bank by X to secure the bank's loan to Y were realised by the bank and the proceeds used to discharge its loan to Y; such proceeds were held to amount to a further advance by X to Y for the purposes of a 40

charge granted by Y to X to secure advances by X to Y); Armco (Australia) Pty. Limited v. Federal Commissioner of Taxation (1947-8) 76 C.L.R. 584 H.C. of A. per Dixon J. at p. 621.

- 10 (12) Clause 18 of the Guarantee permitted Hogan, and Trade Credits as Hogan's assignee, to grant an "indulgence" or "consideration" to Civic or to "compound" with or to "release" Civic. The grant of more time at a higher interest rate was the grant of an "indulgence" to Civic within Clause 18. In Payton v. S.G. Brookes and Sons Pty. Limited [1977] W.A.R. 91, Supreme Court of Western Australia, the clause in the guarantee was similarly worded. The creditor, without the knowledge of the guarantors, agreed with the debtor in consideration of its paying further interest to extend the term of the agreements and to reduce the monthly instalments. Jackson C.J. held that this was the grant of an "indulgence" within the guarantee clause which did not discharge the guarantors from liability. In this connection Trade Credits also respectfully rely on the reasoning of Mahoney J.A. at page 65 line 22 to page 66 line 18 of the Record. Page 15 Pages 65-66
- (13) Alternatively the variation of the Mortgage was a "consideration" granted to Civic or a "compounding" with Civic or a "release" of Civic within the other limbs of clause 18 of the Guarantee. Page 26 Page 15
- 30 (14) There appears to have been a typographical error in clause 18. The words at the end of line 12 and the beginning of line 13 on page 15 of the Record ("at any time any other indulgence") should presumably have read "at any time any time or other indulgence" or "at any time any indulgence" or "any time or other indulgence". The Court of Appeal (per Mahoney J.A. at page 65 lines 17-22 of the Record) found it unnecessary to decide whether the wording of Clause 18 should be corrected. Trade Credits' primary contention is that the meaning of clause 18 is sufficiently clear. But if necessary Trade Credits will contend that clause 18 should be corrected in accordance with the principles outlined in Chitty on Contracts (24th Edition) Volume 1, paras. 718-724, and applied in Adamastos Shipping Co. Ltd. v. Anglo-Saxon Petroleum Co. Ltd. [1959] A.C. 133 L. (E). Page 15 Page 65
- 40

Record

12. In the submission of the Respondent Trade Credits Ltd. the judgment of the Court of Appeal was right and ought to be affirmed, and this appeal ought to be dismissed, with costs, for the following, among other

R E A S O N S

- | | | |
|------------------------|---|----|
| | (1) BECAUSE Mrs. Burnes authorised the making of variations of this kind without the need for her consent; | |
| Pages 18-24
Page 20 | (2) BECAUSE the variation of the Mortgage was within the terms of the Mortgage, particularly the 25th clause; | 10 |
| Pages 13, 15 | (3) BECAUSE the variation was within clauses 14 and 18 of the Guarantee; | |
| Pages 51-67 | (4) BECAUSE the judgment of the Court of Appeal was right. | |

R. C. SOUTHWELL

P. J. MOSS

