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IN THE PRIVY COUNCIL No. 57 of 1980

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION COMMERCIAL LIST IN PROCEEDINGS NO. 10162 of 1978

BETWEEN:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED — Appellant (Defendant)

- v -

BENEFICIAL FINANCE CORPORATION LIMITED — Respondent (Plaintiff)

CASE FOR THE APPELLANT

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1. This is an appeal pursuant to leave granted by the Supreme Court of New South Wales against the Order of that Court dated 17th August 1979, whereby it was declared that the Respondent ("Beneficial") does not have nor did it ever have any liability to the Appellant ("the Bank") arising under the agreements with Beneficial comprised in the letter bearing date 4th April 1974 and the Instrument under seal executed by Beneficial in favour of the Bank on 2nd March 1976.

Summary of facts and principal issue

2. The agreements referred to in the Declaration came to be made in the following circumstances. The Bank had agreed to provide loan finance to a company called Tacking Point Downs Pty. Ltd. ("TPD") and wished to ensure not only that its lending was secured by the charges mentioned below but also that, when the loan fell to be repaid, TPD would be able to repay it with finance procured from a third party. TPD therefore entered into an agreement with Beneficial on 4th April 1974 ("the TPD Deed") whereby Beneficial agreed, on certain terms and conditions therein set out, that it would enter into an agreement with the Bank. That agreement with the Bank was entered into on the same day, by Beneficial providing 6 - 16

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the Bank with a letter in terms of a draft annexed to
18 - 20 the TPD Deed ("the first Take-Out Agreement").

3. The essence of Beneficial's obligations to the Bank under the first Take-Out Agreement was that in the event of the Bank's loan to TPD not being satisfied within a certain period, Beneficial would make arrangements to discharge TPD's liability to the Bank. The first Take-Out Agreement also contained other provisions, and in particular provisions designed to ensure that Beneficial would, on discharging TPD's liability to the Bank, have the benefit of the securities taken by the Bank in respect of that liability, and that nothing should have been done or omitted by the Bank to diminish or impair the value or effectiveness of those securities.

4. Following the conclusion of these arrangements the Bank duly provided TPD with the loan finance which had been agreed. The arrangements were subsequently
37 - 40 varied, in particular by a Deed dated 2nd March 1976 ("the second Take-Out Agreement"), whereby Beneficial agreed to extend the terms of the first Take-Out Agreement subject to the terms there set out. The chief purpose of the second Take-Out Agreement was to cover proposed lending by the Bank to TPD over and above the amount of lending which had been contemplated by the first Take-Out Agreement.

5. Under the second Take-Out Agreement Beneficial's liability to the Bank arose in the event of TPD not
59 - 60 repaying its borrowings on or before 31st March 1978. By a letter dated 19th December 1977 the Bank informed Beneficial that the Bank proposed to invoke that liability when it arose on 31st March 1978, and was not prepared to extend it. Beneficial's reaction was (by
60 - 62 letter dated the 7th February 1977) to disclaim all liability under the Take-Out Agreements. It did so initially on five separate grounds. Four of these grounds consisted of allegations that the Bank was in breach of express terms or conditions of the second Take-Out Agreement. In so far as those grounds were relied on by Beneficial in the Court below that Court rejected Beneficial's contentions based on them.

6. The fifth ground related to the nature of the securities held by the Bank to secure its lendings to TPD. The first Take-Out Agreement contemplated that the Bank's lendings to TPD were, or would be, secured by mortgages over land owned by TPD and a floating debenture charge over the assets and undertakings of TPD. The second Take-Out Agreement also referred to these securities and also contained provisions entitling Beneficial to call for a transfer of these securities in the event of its discharging its liabilities under the second Take-Out Agreement, and protected Beneficial

from diminution or impairment of the value or effectiveness of these securities. The point taken by Beneficial, and accepted by the Court below, was that the date of the floating debenture charge enjoyed by the Bank over the assets and undertaking of TPD was, as a matter of construction, crucial to the question of Beneficial's liability under the second Take-Out Agreement. If its date was any later than the date of the first Take-Out Agreement, then (it was contended) Beneficial could not in any circumstances be liable.

7. The floating charge enjoyed by the Bank over the assets and undertaking of TPD was in fact dated 23rd December 1975. Beneficial did not allege that this charge was, at 31st March 1978 or any other material time, any less valuable than a similar charge dated 4th April 1974 would have been. The Court below nevertheless held that, by reason of the date of the debenture alone, Beneficial could escape liability under the second Take-Out Agreement. In the Bank's submission that is not the true effect of the agreement between the parties on any reasonable construction thereof. It is necessary to recite the contents of the relevant documents in some detail in order to place this question of construction in its proper context. 147 - 167

The relevant documents

8. (i) The TPD Deed (dated 4th April 1974). 6 - 16

This Deed (to which the Bank was not a party) was entered into between TPD and Beneficial, with other parties joining in as Guarantors and Sureties respectively. It recited that TPD had requested the Bank to make certain loan facilities available to TPD on the security of (inter alia) a registered first mortagage or mortgages on lands described therein as ("the Port Maquarie lands") and a floating charge over the Borrower's assets, that it was a condition of the Bank's said agreement that TPD would provide a guarantee to the Bank that finance up to the maximum amount of $1,100,000 would be available to TPD to enable it to repay in part or in whole the Bank's loan when that loan fell due for repayment, and that Beneficial had at the request of TPD, the Guarantors and the Surities, agreed to provide what was described as "the take-out guarantee" on the terms and subject to the covenants and conditions thereinafter set forth. The operative parts of the TPD Deed were (so far as material) as follows:

(a) By Clause 1 Beneficial agreed with TPD the Guarantors and the Sureties that Beneficial would provide to the Bank a take-out guarantee in the form of a draft letter from Beneficial to the Bank annexed to

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the Deed.

(b) (By Clause 2 thereof) that Beneficial's obligation to the Bank under the take-out guarantee should be subject inter alia to the terms of the said draft Letter.

(c) By Clause 3 thereof TPD and the Guarantors agreed to pay Beneficial a quarterly commitment fee during the subsistence of the take-out guarantee, the amount of the fee being calculated by reference to the maximum amount owing by TPD to the Bank such quarterly period.

(d) By Clause 4 it was provided that it was a condition of Beneficial's assumption of the obligation contained in Clause 1 that Beneficial should have the benefit of the securities from TPD, the Guarantors and the Sureties described in the Second Schedule to the Deed.

(e) By Clause 5 it was provided that in the event of Beneficial being called upon under Clause 1 to pay out the Bank's loan then upon such payment being made Beneficial should (in addition to TPD's securities as set out in the Second Schedule) be entitled to take the benefit of the Bank's securities in one of two ways there specified.

(f) Clause 7 of the TPD Deed gave Beneficial a 25 per cent share in the net profits of the development of the Port Macquarie Lands in the event of its being called on to discharge TPD's liability to the Bank.

(g) Clause 8 of the Deed provided for Beneficial to extend its take-out guarantee to the Bank in certain events.

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(ii) <u>The first Take-Out Agreement</u>.

It is necessary to set out the material parts of this Agreement verbatim :-

> "A. Whereas the Bank has agreed to provide loans, commercial bills and other banking accommodation to /TPD/ up to a maximum amount of $1.1 m. (the loan).
>
> "B. AND WHEREAS the loan is secured (inter alia) by a registered first mortgage over 107½ acres approximately owned by /TPD/ at Port Macquarie and a floating debenture charge over the assets and undertakings of /TPD/
>
> "C. AND WHEREAS /TPD/ is acquiring an additional

56 acres of land at Port Macquarie which land will be subject to a first mortgage to the Bank

"D. AND WHEREAS as a condition precedent to the granting of a loan the Bank has requested this letter of undertaking from Beneficial

NOW IT IS HEREBY AGREED as follows :

"1. In the event of the Bank's liability in respect of the loan not being satisfied on or before the expiration of two (2) years (the expiration date) from the date hereof Beneficial undertakes upon receipt of ninety (90) days' notice in writing from the Bank to pay or otherwise make such arrangements (the take-out) as are satisfactory to the Bank to discharge the liability to the Bank under the said loan

"PROVIDED HOWEVER that upon Beneficial providing the take-out the Bank transfers and assigns its interest in the Bank's mortgages over the 107½ acres and 56 acres at Port Macquarie and the floating debenture charge as aforesaid to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors AND PROVIDED FURTHER that the Bank shall not during the term of its loan have done or omitted to do any act matter or thing (whether by way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's securities or otherwise) as a result of which act or omission the value or effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 hereof)."

Paragraph 2 of the Agreement limited Beneficial's liability to $1.1 m. Paragraph 3 provided for the partial discharges by the Bank of its securities in respect of sub-divided residential allotments in the residential sub-division of the Port Macquarie lands which TPD was contemplating so as to enable TPD to complete bona fide sales of such allotments.

(iii) By letter dated 1st May 1974 Beneficial advised the Bank that it had no objection in principle to the Bank taking a registered second mortgage over the additional 56 acres of land subject to a proviso that in the event of the first mortgage subsisting at the time the take-out became operative Beneficial's liability should be limited to $1,000,000 instead of $1,100,000. 20 - 21

(iv) By a Deed dated the 2nd March 1976 made 33 - 37

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between the same parties as the TPD Deed, the TPD Deed was varied and Beneficial at the request of TPD the Guarantors and the Sureties agreed to provide the Bank an amended Take-Out Guarantee so as to cover the increased financial accommodation given by the Bank to TPD. This Deed contained provisions, inter alia, altering the commitment fees payable by TPD to Beneficial.

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(v) The second Take-Out Agreement.

Pursuant to the last-mentioned Deed Beneficial executed the second Take-Out Agreement.

This recited :-

"A. Australia and New Zealand Banking Group Limited (hereinafter called "the Bank") by an Agreement with Beneficial Finance Corporation Limited (hereinafter called "Beneficial") dated 4th April 1974 (hereinafter referred to as "the original take-out letter") agreed to provide certain loans, commercial bills and other banking accommodations to Tacking Point Downs Pty. Ltd. and other related companies (hereinafter called "the Borrower") up to a maximum amount of $1.1. Million

"B By a further Agreement between the same parties dated 1st May 1974 the advance hereinbefore referred to was reduced from $1.1 Million to $1 Million (hereinafter called "the original advance")"

Recital C thereof corrected the reference in Recital C of the first Take-Out Agreement to a first mortgage over the additional 56 acres of land and and Recital D thereof recited Beneficial's agreement under the First Take-Out Agreement to pay out and discharge the Borrower's liability to the Bank in respect of the original advance. The recitals then continued as follows :-

"E. The Bank has provided or agreed to provide additional loans commercial bills and other banking accommodation to the Borrower up to a maximum amount (including the original advance) of $1.45 Million (hereinafter called "the principal") (subject to Beneficial extending the terms of the original take-out letter to cover the said principal)"

Recital F recited the parties' agreement to vary the Agreements dated 4th April 1974 and 1st May 1974 in manner thereinafter set forth and Clause 1 of the second Take-Out Agreement provided as follows :-

"In the event of /TPD's/ liability to the Bank in respect of the Principal not being totally discharged and satisfied on or before 31st March 1978 (hereinafter called "the expiration date") Beneficial will at the expiration of ninety /90/ days' notice in writing given to it by a duly authorised officer of the Bank forthwith pay to the Bank the whole of the Principal then owing together with all bank interest on the Principal and all bank charges of and incidental thereto owing to the Bank by /TPD/ as at the date of payment or otherwise make such arrangements to repay the Bank as are satisfactory to the Bank to fully discharge the liability of /TPD/ to the Bank under the loan at the expiration of the said ninety /90/ days' notice PROVIDED HOWEVER that upon Beneficial complying with the terms of this letter of take-out the Bank will at the expense of /TPD/ transfer and assign its interest in the Bank's securities (as described in the original Take-Out Letter and subject to paragraph 3 of the original Take-Out Letter) to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors AND PROVIDED FURTHER that the Bank shall not have hitherto and shall not pending the expiration date have done or omitted to any act matter or thing (whether in the way of exercising or omitting to exercise any of the powers conferred on the Bank by the Bank's said securities or otherwise) as a result of which act or omission the value or effectiveness of the Bank's securities shall have been in any way diminished or impaired (save in the manner contemplated by paragraph 3 of the original Take-Out Letter)"

Clause 2 contained a limit on Beneficial's liability and identified the relevant obligations of the Bank to provide banking accommodation to TPD. The Deed then provided as follows :-

"3. The liability of Beneficial under paragraph 1 hereof includes and is not in addition to its liability under the original Take-Out Letter, the terms of which shall continue to apply save as herein varied

"4. Beneficial's liability hereunder is conditional upon the Bank procuring the due payment by /TPD/ or itself paying firstly the arrears of the commitment fees totalling $10,000 owing by /TPD/ under /the TPD Deed/ such payment to be made not later than 4th April 1976 and secondly all future commitment

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fees payable /TPD/ to Beneficial under the terms of the /TPD/ Deed

"5. Beneficial hereby acknowledges that up to the date hereof there has been no breach by the Bank of any terms and conditions of the original Take-Out Letter and that if there has been any such breach or breaches then such breach or breaches have been waived by Beneficial,

"6. The Bank undertakes and agrees that if at any time after the date hereof the Bank becomes aware that /TPD/ has defaulted in the due performance or observation of any covenant obligation or agreement on the part of /TPD/ contained or implied in any one or more of the Banks' securities entitling the Bank to exercise its powers of entry into possession sale foreclosure or otherwise under the Bank's securities then and in any such event the Bank shall forthwith give notice in writing to Beneficial specifying the default which has occurred and at any time thereafter Beneficial may in its absolute and uncontrolled discretion elect to pay to the Bank forthwith (notwithstanding the provisions of paragraph 1 hereof) the Principal and all other moneys owing by /TPD/ to the Bank (as hereinbefore specified) as at the date of payment whereupon the Bank will at the expense of /TPD/ transfer and assign its interest in the Bank's securities to Beneficial in a manner and form satisfactory to Beneficial and its Solicitors".

The Respondent's contentions :

9. In the Court below Beneficial advanced four contentions :

(1) That the Bank was in breach of its obligation under Clause 6 of the second Take-Out Agreement to notify Beneficial of any default made by TPD in the due performance or observance of any covenant obligation or agreement on its part contained or implied in any one or more of the Bank's securities. It was alleged that TPD failed to provide at the intervals provided for in Clause 15 of an equitable mortgage, an audited balance sheet and trading and profit and loss accounts and to pay interest upon moneys secured by certain mortgages of real property;

(2) That the Bank was in breach of paragraph 2 of the first Take-Out Agreement as subsequently varied;

(3) That the Bank failed to comply with Clause 4 of the second Take-Out Agreement; and

(4) That as there was no floating charge of the assets and undertakings of TPD in existence at the date of the first Take-Out Agreement there could be no liability on Beneficial under either that or the subsequent agreement. Reliance was placed on Greer v. Kettle /1938/ A.C. 156, H.L. This was the only contention which succeeded below.

10 The Appellants' Contentions

10. If and so far as Beneficial seeks to support the order of the Court below on the basis of any of the first three contentions summarised in paragraph 9 the Bank submits that the Court below was right and that any such contention should be rejected for the reasons given by Mr. Justice Sheppard.

11. The fourth contention gives rise to the question: what was the liability of TPD to the Bank which Beneficial promised to pay? The Bank submits that the answer to
20 this question depends on the true construction of the first and second Take-Out Agreements in the light of their respective surrounding circumstances.

The First Take-Out Agreement.

12. The liability which Beneficial promised to pay was the "liability to the Bank under the said loan" of TPD as it existed two years and ninety days after the execution of the Agreement. "Loan" was defined in Recital A in terms which made no reference to any security. In the absence of a compelling context the Court should not
30 imply conditions into a defined term.

13. Moreover where a contract contains express provisions on a particular matter the Court should not make any implication dealing with the same matter. The second proviso to Clause 1 deals in terms with the question of security as it exists at the expiration of two years from the execution of the Agreement when the liability of Beneficial crystallised. If at that date the security envisaged by the Agreement existed un-diminished and unimpaired in both value and effect there
40 is no reason to imply into the description of the liability any term or condition that the security should have existed at any particular earlier date.

14. In any event it is clear from Recital D to the Agreement that at the time it was executed by Beneficial the loan had not been grated. Accordingly the words in Recital B "the loan is secured" must be read and

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construed as "the loan is to be secured". Thus even if, contrary to the submissions made in paragraphs 12 and 13, any implication is to be made into the description of the liability which Beneficial promised to pay it cannot be that the Floating Debenture charge existed when Beneficial executed the Agreement.

15. The Floating Debenture charge was executed by TPD on 23rd December 1975. Beneficial did not contend and there was no evidence to support such a contention that the Floating Debenture charge was in anyway diminished or impaired in either value or effect for not having been executed earlier. Accordingly the Bank submits that had it stood alone it is plain that Beneficial would have been liable under the terms of the First Take-Out Agreement.

The Second Take-Out Agreement

16. Clause 3 provided that the terms of the first Take-Out Agreement should continue to apply save as varied by the terms of the Second Take-Out Agreement. The liability of Beneficial in the second Take-Out Agreement was to "pay to the Bank the whole of the principal" owing to the Bank at the expiration of 90 days after 31st March 1978. "Principal" was defined in Recital E as comprising both the original loan and the additional loan. Accordingly the promise contained in paragraph 1 of the Second Take-Out Agreement wholly superseded the promise contained in paragraph 1 of the First Take-Out Agreement.

17. The Liability which Beneficial promised to pay was defined in Recital E without any reference to any security. The Bank submits that not only is there no compelling context requiring any implication in the definition but that any implication in respect of security being in existence at the time of the execution of the first Take-Out Agreement would be wholly capricious. No distinction is drawn between the original and the additional loan and it would be absurd to imply a term or condition that the additional loan contemplated in May 1976 should be secured by a security in existence in April 1974.

18. The provisos to Clause 1 of the second Take-Out Agreement contemplated that the Bank's securities "as described" in the first Take-Out Agreement were then in existence. The description so contained in Recitals B and C was

(a) a registered first mortgage over 107½ acres owned by TPD at Port Macquarie

(b) a floating debenture charge over the assets and undertakings of TPD and

(c) a first mortgage to the Bank over an additional 56 acres at Port Macquarie

At that time (May 1976) securities of that description (subject to the correction made by Recital C to the second Take-Out Agreement) did exist. Thus if by implication the liability which Beneficial promised to pay was a liability so secured the term or condition so implied was satisfied.

19. The second proviso to Clause 1 of the Second Take-Out Agreement envisaged that "hiterto" by some act or omission of the Bank the value or effect of the Bank's securities might have been diminished or impaired. Thus a past act or omission which did not have that result would not affect the liability of Beneficial. If the first Take-Out Agreement had imposed a condition that the Bank should obtain a particular security by a particular date and the Bank obtained the security after that date but in circumstances where neither the value nor effect was diminished or impaired the liability of Beneficial would be unaffected. The Bank submits that it makes no commercial sense to imply into the description of the liability which Beneficial promised to pay a condition which has no effect on the value and effect of the security but if implied would prevent any liability under such promise arising at all.

20. Failure by one party to satisfy a condition precedent may in ordinary usage be described as a breach by that party of a condition. Thus Clause 5 of the second Take-Out Agreement either confirms that no condition can be implied in the first Take-Out Agreement or if it is to be implied has been waived.

21. In the Court below Beneficial relied on Greer v. Kettle (1938) A.C. 156. The Bank submit that this case, so far as relevant, is authority for the proposition that a man is not answerable for a promise he did not make. The promise that he made must depend on the true construction of the documents, as to which Greer v. Kettle is no authority at all. The documents in this case should be construed just like any other commercial contract, Eshelby v. Federated European Bank Ltd. (1932) 1 K.B.254, 266, but bearing in mind that the statement of Lord Westbury L.C. there quoted does not apply when as here the promisor received $A151,648 (representing 10.5% of the maximum amount to be taken out) as commitment fees and stood to gain 25% of the profits of the development at Port Macquarie in addition to interest if called upon to implement its promise. In all the circumstances the maxim to be applied, in the Bank's

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submission, is "ut res magis valeat quam pereat".

22. In the premises it is submitted that the Order appealed from should be set aside and that in lieu thereof there should be judgment for the Bank on their cross-claim in such amount as may (in default of agreement) be determined by the Supreme Court of New South Wales for the following among other

R E A S O N S

1. Mr. Justice Sheppard was in error in construing the obligation of Beneficial under the Take-Out Agreements as dependent upon the existence of a floating charge over the assets of TPD as at 4th April 1974;

2. His Honour was further in error in treating the subject matter of the Take-Out Agreements as a loan secured by (inter alia) the floating charge in existence at the 4th April 1974.

3. Alternatively, his Honour was in error in treating the subject matter of the Take-Out Agreements as a loan secured by (inter alia) a floating charge;

4. His Honour was in error in ruling that Clause 5 of the second Take-Out Agreement did not have the effect of precluding Beneficial from avoiding liability on the ground that there was no floating charge in existence as at 4th April 1974;

5. His Honour was in error in construing the said Clause 5 so as not to extend to the failure by the Bank to obtain a floating charge before 23rd December 1975.

ANDREW MORRITT

MICHAEL HART

IN THE PRIVY COUNCIL No. 57 of 1980

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- v -

BENEFICIAL FINANCE CORPORATION LIMITED

Respondent (Plaintiff)

CASE FOR THE APPELLANT

ALLEN & OVERY
9 Cheapside,
London, EC2V 6AD

Agents for the Appellant