46/82

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)

AND:

BENEFICIAL FINANCE CORPORATION LIMITED

Respondent (Plaintiff)

CASE FOR THE RESPONDENT

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RESPONDENT'S CASE

Record

1. The Respondent (Beneficial Finance) was the plaintiff in an action brought by it in the Supreme Court of New South Wales seeking declarations that it was under no liability to the Appellant (the Bank) pursuant to certain agreements set out in documents bearing date the 4th April, 1974 and the 2nd March, 1976. P1

The action was heard by Sheppard J. who gave judgment on 22nd June, 1979. P99 The declaration made on 17th August, 1979 pursuant to that judgment was that "the Plaintiff does not have nor did it ever have any liability to the Defendant, arising under the agreement with the

Defendant, comprised in the letter bearing date 4th April, 1974 and the instrument under seal executed by the Plaintiff in favour of the Defendant on 2nd March, 1976".

The Supreme Court of New South Wales has jurisdiction to make a declaratory order pursuant to Section 75 of the Supreme Court Act, 1970.

The Respondent desires to point out that neither the affidavit of Francis John Kelly nor that of Albert Kevin Robert Watson appearing in the Record at P3 to P71 was read on the hearing of the action. P3 P71

2. The circumstances giving rise to the dispute between Beneficial Finance and the Bank may be briefly summarised as follows:

(a) Tacking Point Downs Pty. Limited is a company incorporated in New South Wales which carried on business as a land developer. P119

(b) Tacking Point Downs Pty. Limited owned, for purposes of development and resale, substantial parcels of land at Port Macquarie (which is a town in New South Wales). P119 to P126

(c) Tacking Point Downs Pty. Limited required finance to develop these lands and had requested loan facilities from the Bank

on the security of registered first mortgages or in one case a second mortgage over the Port Macquarie lands and a floating charge over the assets of Tacking Point Downs Pty. Limited. P119 to P120

(d) The Bank had agreed to provide those facilities on those securities conditionally upon Tacking Point Downs Pty. Limited also providing a guarantee to the Bank in respect of up to A$1,100,000 of the accommodation it was to provide to Tacking Point Downs Pty. Limited. P120

(e) Tacking Point Downs Pty. Limited (and others) requested Beneficial Finance to provide the required guarantee and it agreed to do so. The agreement between Beneficial Finance and Tacking Point Downs Pty. Limited (and others) is included in a Deed made on the 4th April, 1974. P119 to P120

(f) In Clause 1 of that Deed, Beneficial Finance agreed with Tacking Point Downs Pty. Limited that it would provide to the Bank "a take out guarantee" in the form of the draft letter from Beneficial Finance to the Bank annexed to the Deed. P120

Record

(g) That "take out guarantee" was provided to the Bank on the same day. P85

(h) The take out date was initially two (2) years after the date of the guarantee. P86

(i) It was by various agreements extended until 22nd May, 1976. P79

(j) On 2nd March, 1976 Beneficial Finance entered into a further Deed with Tacking Point Downs Pty. Limited (and others) by which Beneficial Finance obliged itself (Clause 1) to provide to the Bank an amended take out guarantee in the form of the draft letter from Beneficial Finance to the Bank annexed to that Deed. P132

(k) The Document referred to in the Deed was in fact furnished to the Bank on the same day. The effect of this document was to vary the guarantee of 4th April, 1974 (as extended) (relevantly to this Appeal) by:- P88 to P92

(i) Extending it until 31st March, 1978. (Clause 1) P89

(ii) Varying the principal liability guaranteed. (Clause 2) P90

(iii) Extending the guarantee to cover "Bank interest on the said principal and all other charges normally made by the Bank up to the date of discharge of its P90 L49 to P91 L2

securities including but not limited to the following, namely all holding charges, rates, land tax, take out fees, endorsement fees and indemnity guarantee fees".

(iv) Clause 3 of the agreement of 2nd March, 1976 expressly provided that save as varied by that agreement the terms of the agreement of 4th April, 1974 continue to apply. Those terms included Clause 2 of the 4th April, 1974 agreement under which "the Bank shall not be entitled to make any further advances to the borrower in respect of the loan without Beneficial's prior approval in writing". P91 L4-8 P87 L6-9

(v) Making Beneficial Finance's liability under its guarantee conditional upon the Bank procuring the due payment by the Borrower, or itself paying first certain arrears of commitment fees due to Beneficial Finance from Tacking Point Downs Pty. Limited and secondly all future commitment fees so payable. (Clause 4) P91

Record

(l) The Bank had established an account styled No. 3 account in the name of Tacking Point Downs Pty. Limited to which it debited the "overdraft facilities" referred to in the guarantee of 4th April, 1974 as varied on 2nd March, 1976. (Amended Points of Claim, paragraph 8(c) not denied by the Amended Points of Defence). P82 P96

(m) Thereafter Beneficial Finance did consent in writing to certain further advances, namely those referred to in paragraph 8(d), (e) and (f) of the Amended Points of Claim. P82-3

(n) The consequence was that from and after 10th August, 1977 the further advances to which Beneficial Finance had consented were an increase in the overdraft facilities from the $200,000 referred to in Clause 2(c) of the agreement of 2nd March, 1976 to $549,000, conditional upon the total of such overdraft facilities and the accommodation under the indemnity/guarantee provided to the Port Macquarie Municipal Council not exceeding $600,000 in aggregate. P83 L20-34

(o) In fact the Bank did make advances to Tacking Point Downs Pty. Limited in excess of $549,000 viz. $574,746.91. P117 L26

Record

(p) By its letter of 7th February, 1978 Beneficial Finance asserted to the Bank that it was not liable to "take out" the Bank under the guarantee of 4th April, 1974 as varied on 2nd March, 1976 and gave its reasons for that assertion. P140

(q) The Bank not accepting that assertion Beneficial Finance on 23rd February, 1978 commenced its action for a declaration that it was not liable to the Bank. P1

3. The grounds upon which Beneficial Finance relies and the facts (not already set out) relevant to them are:-

(a) (i) That the only debt or debts due from Tacking Point Downs Pty. Limited to the Bank which it guaranteed were debts secured inter alia by a floating charge over the assets and undertakings of the borrower Tacking Point Downs Pty. Limited and that no such floating charge as recited in paragraph B of the letter of 4th April, 1974 then existed. (Amended Points of Claim paragraph 7). P80

(ii) The allegation that there was not in fact any such floating charge was not denied (Points of Defence paragraph 2) P85 and was expressly admitted on the P98 hearing.

(iii) In fact, such a charge was not given until 23rd December, 1975. P147

This is the ground upon which Beneficial Finance succeeded before Sheppard J. This ground is hereinafter referred to as the floating charge ground.

(b) (i) That it was a condition precedent to the liability of Beneficial Finance under its guarantee, after the variation agreement of 2nd March, 1976, that the Bank should procure the due payment by Tacking Point Downs Pty. Limited or should itself pay the commitment fees due after 2nd March, 1976 from Tacking Point Downs Pty. Limited to Beneficial Finance.

(Amended Points of Claim Paragraph 9) P84

(ii) A commitment fee of A$14,402.82 P144 became due from Tacking Point Downs P145 Pty. Limited to Beneficial Finance on 4th January, 1978.

(iii) It had not been paid by the time of the letter from Beneficial Finance of 7th February, 1978. Ultimately the Bank tendered its own bank cheque for the amount, but the tender was rejected. P145 P146

(iv) The Amended Points of Defence to this claim (Paragraph 4) do not deny the failure to pay but seek to excuse it. P96

(v) No evidence was tendered to support paragraph 4(c) of the Amended Points of Defence.

This ground is hereinafter referred to as the commitment fee ground.

(c) (i) Clause 2 of the guarantee of 4th April, 1974 as varied by Clause 2 of the agreement of 2nd March, 1976 imposed a limit to the advances which the principal creditor could make to the principal debtor without the guarantor's prior approval in writing. P87 L8-11 P90 L40-45

Record

(ii) Paragraph 8 and in particular paragraph 8(h) of the Amended Points of Claim alleges that this limit was exceeded without the prior approval of Beneficial Finance. P80 to P84

(iii) Paragraph 3(d) of the Amended Points of Defence denies that the overdraft limit of No. 3 account was exceeded, but that does not answer the allegation that the limit was $549,000 and that such limit was exceeded. In fact it was. P96 L8-10

On 20th October, 1977 $51,000 was debited to the No. 3 Account increasing the debit balance to $574,746.91. P117 L26

This ground is hereinafter referred to as the excessive advances ground.

4. The floating charge ground.

(a) This is upheld in the judgment appealed from. P110 to P114

(b) The Respondent submits that the first five lines of that paragraph of the judgment commencing at line 49 of P111 should be read as stating:

> "Apart from submitting that the case was not distinguishable from Greer v. Kettle because the loan here was by description a loan secured by a floating charge over the assets and undertaking of Tacking Point Downs Pty. Limited the plaintiff submitted that ....."

The balance of the paragraph does in fact summarise submissions put to his Honour Mr. Justice Sheppard by Counsel for the Plaintiff (Beneficial Finance).

(c) The Respondent submits that the judgment below on this ground is correct for the reasons given by Sheppard J. and adds the following additional submissions:-

(i) A contract of suretyship is to be construed strictly in that a surety is not to be made liable for more than he has undertaken. Halsbury 4th Ed. Vol 20 paragraph 20 151 and the cases there cited.

(ii) In this case what is guaranteed is "the liability to the Bank under the said loan". "The loan" is defined in Recital A. It is described by Recital B as being secured by a registered first mortgage over 107½ acres approximately, owned by the Borrower

P86 L33-34

P86 L10-15

at Port Macquarie and a floating debenture charge over the assets and undertaking of the borrower. The 107½ acres approximately is the land described in Part A of the First Schedule to the agreement between Tacking Point Downs Pty. Limited and others and Beneficial Finance. P126 L10-19

(iii) The surety's promise "to pay" or "otherwise make such arrangements as are satisfactory to the Bank" ("the take out") is subject to the proviso that upon Beneficial Finance providing "the take out" the Bank is to assign to it the Bank's interest in the mortgages over the 107½ acres "and the floating debenture charge as aforesaid". P86 L33-34 P86 L34-39

(iv) The guarantee in this case is indistinguishable in principle from that considered in Greer v. Kettle 1938 AC 156 and that part of the speech of Lord Russell of Killowen, beginning on page 164

with the words "In these circumstances it would seem....." to the end of page 165 applies in the Respondent's submission as precisely to this case as it did to that which His Lordship was considering.

(d) It makes no difference in the Respondent's submission that a floating debenture charge over the assets and undertakings of Tacking Point Downs Pty. Limited in favour of the Bank did come into existence 628 days later for the reasons:-

(i) given in the judgment P113

(ii) that it can be seen from a comparison of the title references in Part A to the First Schedule to the agreement between Tacking Point Downs Pty. Limited and Beneficial Finance with the title references in Mortgage No. N461274 that the registered first mortgage over 107½ acres approximately was granted on 31st May, 1973 and that it subsisted on the date of the making of the guarantee. P126 L10-19 P169

(iii) that a floating debenture charge granted on 23rd December, 1975 cannot be said to charge, and is most unlikely in fact to charge, the same assets as would have been charged by such a debenture given prior to 4th April, 1974. Indeed the reference to such a debenture as a floating charge is somewhat misleading. Such a debenture is normally a fixed charge upon certain categories of assets. The Bank's form of floating charge (as at 23rd December, 1975) illustrates that a charge granted on 23rd December, 1975 may not have charged at all many assets which would have been subject to a fixed charge by a debenture given on 4th April, 1974. The charging provision is Clause 16 of the debenture. P152-3

(iv) that if the guarantee did not apply to the Bank's loan when given on 4th April, 1974, nothing short of a subsequent guarantee in respect of the loan as it then was would

confer any rights upon the Bank against Beneficial Finance and no such subsequent guarantee was given.

5. The commitment fee ground.

Judgment: P106 to P110

(a) This provision was inserted into the guarantee by Clause 4 of the variation agreement of 2nd March, 1976 the original provision for the payment by Tacking Point Downs Pty. Limited of commitment fees is Clause 3 of the agreement of 4th April, 1974 between Tacking Point Downs Pty. Limited and others and Beneficial Finance. This was varied by Clause 2 of the agreement of 2nd March, 1976 between those same parties. Thus, Tacking Point Downs Pty. Limited's obligation was to pay the commitment fee

P91 L8-9

P120 L29-35

P132

(i) up to 2nd March, 1976 "at the commencement of each quarterly period",

P120 L45

(ii) from 2nd March, 1976 "per quarter in advance".

P132 L15

(b) The condition inserted into the guarantee was (subject to giving of time in respect of the then arrears) that the Bank would procure the due payment by the Borrower or itself pay "all future commitment fees

payable by the Borrower to Beneficial Finance under the terms of the said Agreement (being at the rate of 3% per annum payable quarterly in advance)". P91 L16-19

(c) A quarter commenced on 4th January, 1978 and as at the 7th February, 1978, the date upon which Beneficial Finance "declined liability" the Bank had not procured the due payment by Tacking Point Downs Pty. Limited of the commitment fee for that quarter, payable before its commencement, or at latest on the first day of the quarter, nor had the Bank itself so paid that fee. French Mariner Compagnie Napolitaine d'Eclairage et de Chauffage par Le Gaz 1921 2AC 512 Ellis v. Rowbotham 1900 1QB 740. P140

(d) The Respondent submits that this clause contains a condition which must be fulfilled precedent to any liability arising in the surety, because:-

(i) The performance by the principal creditor of a promise made by him to the surety is construed as a condition precedent to the surety becoming liable to the principal creditor Eshelby v. Federated

European Bank Ltd. 1932 1KB 423 and generally the cases cited in Halsbury 4th Ed. Vol 20 paragraphs 151, 160 and 259.

(ii) The contract of suretyship is unilateral, as distinct from synallogmatic in the sense in which Diplock, L.J. used those expressions in United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd. 1968 1WLR 74 1968 1 All ER 104. In the present case the obligation of the surety was to pay or arrange ("take out") upon the happening of the following events:-

(a) The Bank making to Tacking Point Downs Pty. Limited the loans and granting the accommodation which it has agreed with that company to make and grant to it.

(b) That company's liability to the Bank not having been "totally discharged and satisfied on or before 31st March, 1978". P89 L44-46

(c) 90 days notice in writing having been given to the Bank by Beneficial P89 L48-49

Finance. It must be beyond argument that each of the above events must have occurred before Beneficial Finance became under any liability to the Bank. The Respondent submits that the following further events must have happened:-

(d) The commitment fees must have been paid. The opening words of Clause 4 state this to be a condition of liability. P91 L9

(e) The Bank shall not have done or omitted any act matter or thing prejudicial to the securities it must assign on "take out". (Agreement of 4th April, 1974 Clause 1 second proviso and agreement of 2nd March, 1976, Clause 1 second proviso.) P86 L41-50 P90 L18-28

(f) The Bank will not have made further advances to Tacking Point Downs Pty. Limited without prior written approval of Beneficial Finance (Agreement 4th April, 1974, Clause 2). P87 L8-11

The Respondent submits that the proper question to be asked is that posed by Diplock L.J. (1968 1 All ER at 110) "What have the parties agreed to do?" The Respondent submits that it is only if the principal creditor has done what it agreed to do that the liability of the surety arises.

In United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd. (Supra) the defendant was not strictly a surety, but its position was closely analogous to that of a surety. It promised to "buy out" rather than "take out" a promise more appropriate to the "principal creditor" holding physical property rather than being owed a debt. The Plaintiff failed because it had not done one of the things which it agreed to do, namely call within a reasonable time upon the defendant to re-purchase.

(iii) The same principle is applied in analogous situations such as option agreements where obligations only arise if the grantee does what he agrees to do, as in Weston v. Collins 1865 34 JL Ch. 353 and Gilbert J. McCaul (Aust) Pty. Ltd. v. Pitt Club

Ltd. 1959 SR (NSW) 122. The question here also is, "have those things happened which the parties agreed should happen before the promisor may be required to do that which he promised to do?".

(e) The Respondent submits that the Court below fell into two errors in rejecting this ground, viz.

(i) In holding that the surety's obligation was a "bilateral" rather than a "unilateral" contract so that the question asked was not, as it should have been, "did the event happen?" but "did the non-happening of the event justify repudiation for breach?" P108 commencing L33

(ii) In holding that the obligation requiring payment of the commitment fee was an obligation as to time to which Section 13 of the Conveyancing Act 1919 (N.S.W.) applied, that time was therefore not of the essence, and that the delay was not of such significance or so repeated as to justify repudiation by the surety. P109 commencing L33

(f) The first suggested error has been dealt with above. The second, the Respondent submits involves two steps, each erroneous. Section 13 of the Conveyancing Act, 1919 is the equivalent in NSW of Section 35(7) of the Judiciary Act, 1873 and of the Law of Property Act, 1925, Section 41. It provides:

> "Stipulations in contracts, as to time or otherwise, which would not before the commencement of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in such court."

The first erroneous step the Respondent submits is to assert that a contract of guarantee would be construed differently in a court of equity than in a court of law. Halsbury 4th Edition Vol. 20 paragraph 154 and the cases cited.

The second erroneous step the Respondent submits is to assert that in a court of law or of equity, an obligation to make a payment in advance could be satisfied by making it at a time which is not "in advance". Bunge Corporation, New York v. Tradex Export S.A. 1981 1 WLR 711.

A contract by which a finance company guarantees a Bank which is providing finance for land development is, the Respondent submits, properly to be regarded as being of the same nature as a mercantile contract. The Respondent submits that in such a contract time would be regarded as "of the essence" in any Court and that in any event an obligation to make a payment "in advance" of some date, period or event cannot by any equitable doctrine be varied to an obligation which may be satisfied by making the payment after that date, period or event.

(g) If contrary to the above submissions the contract of suretyship on which the Bank relies is to be regarded as a "bilateral" contract, then Clause 4 of the amending agreement of 2nd March, 1976 (particularly when contrasted with Clause 6 of the same document) should be construed as importing a condition strictly so called so that breach of it gave rise to a right of repudiation.

L. Schuler A.G. v. Wickman Machine Tool Sales Ltd. 1974 AC 235

Photo Production Ltd. v. Securicor Transport Ltd. 1980 AC 827.

Record

6. The excessive advances ground - Judgment P105

(a) The operative contractual provision is in Clause 2 of the agreement of 4th April, 1974 "the Bank shall not be entitled to make any further advances to the borrower in respect of the loan without Beneficial's prior approval in writing". P87 L7-11

(b) For the reasons set out in paragraph 2(l), (m), (n) and (o), and 3(c) above, it did make such a further advance.

(c) The learned Judge expressed the view that the breaches (which he assumed though did not decide were established) "are not of provisions which are conditions precedent to the plaintiff's liability". P105 L55-57

(d) The Respondent submits that Sheppard J. erred in so holding because:-

(i) for the reasons advanced in paragraph 5(d) (i) the performance by the principal creditor of a promise made by him to a surety is treated as a condition precedent to the surety's liability.

(ii) for the reasons advanced in paragraph 5(d) (ii) the question which the learned Judge should have posed is "what did the Bank agree

to do?" It plainly agreed not to make such advances and it did not keep that promise,

(iii) "Any departure by a creditor from his contract with the surety without the surety's consent ... which is not obviously and without enquiry quite unsubstantial will discharge the surety from liability whether it injures him or not for it constitutes an alteration in the surety's obligations."

Halsbury's Laws of England, 4th Ed., Vol. 20 paragraph 259 and the cases there cited,

(iv) The making of further advances and the debiting of interest to the loan account were not unsubstantial.

Holme v. Brunskill (1978) 3 Q.B.D. 495;
Smith v. Wood (1929) 1 Ch. 14;
Burnes v. Trade Credits Ltd. (1981) 1 N.S.W.L.R. 93.

(v) Nor is the surety liable for the amount guaranteed but is wholly discharged.

Phillips v. Astling (1809) 2 Taunt 206;

Pickles v. Thornton (1875) 33 L.T. 658;

C.A. Clarge v. Green (1849) 3 Exch. 619;

Barber v. Mackrell (1892) 41 W.R. 341.

Russell Bainton

Counsel for Respondent