Privy Council Appeal No. 57 of 1980

Australia and New Zealand Banking Group Limited – *Appellants*

v.

Beneficial Finance Corporation Limited – – – – *Respondents*

FROM

THE SUPREME COURT OF NEW SOUTH WALES (COMMON LAW DIVISION)

REASONS FOR REPORT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL OF THE 16TH NOVEMBER 1982, DELIVERED THE 13TH DECEMBER 1982

Present at the Hearing:

LORD DIPLOCK
LORD KEITH OF KINKEL
LORD ROSKILL
LORD BRIGHTMAN
SIR HARRY GIBBS

[*Delivered by* LORD DIPLOCK]

This is an appeal from a judgment of Mr. Justice Sheppard sitting in the Common Law Division of the Supreme Court of New South Wales.

It raises three short questions of the construction of a so-called " take-out " letter entered into between the appellants (" the bank ") and the respondents (" Beneficial ") in respect of a loan made on 4th April 1974 by the bank to a company, Tacking Point Downs Pty. Ltd. (" the developer "). Under the take-out letter, the loan was limited to $1·1 million, but this was subsequently increased to 1·6 million dollars by a variation of the take-out letter, made on 2nd March 1976 and by subsequent correspondence. The loan of 4th April 1974 was made as part of arrangements to finance the development by the developer of certain land owned by it at Port Macquarie. The land originally comprised some 107½ acres which by 4th April 1974 were already subject to a first mortgage to the bank as security for future advances; but up to that date, no advances covered by that security had in fact been made. On 4th April 1974 the developer entered into a complex agreement (" the financing agreement ") with Beneficial and a number of other parties, under which Beneficial, in consideration of payment to it by the developer of a quarterly " commitment fee " undertook, *inter alia*, to provide the bank with what was described in the financing agreement as a " take-out guarantee " in the terms of a take-out letter of the same date, a draft of which was annexed to the financing agreement. The description of the take-out letter as a " guarantee " is not strictly accurate in law, *Lep Air Services Ltd. v. Rolloswin Investments Ltd.* [1973] A.C. 331, but in the result nothing turns on this.

The take-out letter was addressed to the bank by Beneficial. The terms of it which are relevant to the questions of construction which their Lordships have to decide read as follows:—

" Dear Sir,

re: Tacking Point Downs Pty. Limited & Ors.—Letter of Undertaking

A. WHEREAS Australia & New Zealand Banking Group Limited (the Bank) has agreed to provide loans, commercial bills and other banking accommodation to Tacking Point Downs Pty. Limited (the Borrower) up to a maximum amount of $1·1 million (the loan).

B. AND WHEREAS the loan is secured (inter alia) by a registered first mortgage over 107½ acres approximately owned by the Borrower at Port Macquarie and a floating debenture charge over the assets and undertakings of the Borrower.

C. AND WHEREAS the Borrower 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 the loan the Bank has requested this letter of undertaking from Beneficial Finance Corporation Limited (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 said 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 in the 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).

2. Beneficial agrees that it shall provide the take-out as outlined herein subject to its liability not exceeding $1·1 million and the only debits which the Bank shall be entitled to charge up against its loan shall be normal banking charges relative thereto and 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 nor shall the bank be entitled to charge up to the Borrower's loan account any interest on the loan."

(The reference in recital C to a " first mortgage " was subsequently corrected to a " second mortgage ", but again nothing turned on this.)

What was submitted by Beneficial to be crucial, and effective to prevent any liability ever having attached to it under clause 1 of the take-out letter, was the fact that on 4th April 1974 the loan was not yet secured by a " floating debenture charge " over the assets and undertaking of the developer. Although a floating debenture charge was in existence before any liability of Beneficial under the take-out letter could arise, the charge was not in fact executed by the developer until 23rd December 1975. It was registered within the statutory 30 days on 19th January 1976.

The learned judge was of opinion that the principle that was applied by the House of Lords in *Greer v. Kettle* [1938] A.C. 156 applied also to the take-out letter. Accordingly in an action commenced by Beneficial on 23rd February 1978, he made a declaration in the following terms:

> " THAT the Plaintiff does not have nor did it ever have any liability to the Defendant arising under the agreements 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."

Greer v. Kettle was a case in which the House of Lords held that on the true construction of the relevant agreement the only guarantee given by the guarantor was in respect of a debt which was secured by a charge on certain shares, of which charge the guarantor would be entitled to avail himself if he were called upon to pay the principal debtor's debt. When the guarantor was called upon to pay the debt which he had guaranteed, it turned out that the shares which were the subject of the charge, on which the guaranteed debt was described as being secured, did not exist and never had existed, and, indeed, no charge upon them could ever be created.

In their Lordships' view, the judgments in *Greer v. Kettle,* turning as they do on the construction of a quite different agreement, are of no assistance in the instant case, which depends solely upon the true construction of the take-out letter.

It is clear, as is indeed conceded by counsel for Beneficial, that where recital B states " the loan *is* secured . . . . . " this can only have been understood by the parties to mean that the " loan *will be* secured ". Like recitals A and C it speaks to the future. As is apparent from recital D (which shows that the draftsman was aware of what is the legal nature of a " condition precedent "), it was not contemplated by the parties to the take-out letter that any loan, secured or unsecured, would come into existence until after the take-out letter referred to in recital D and set out in the subsequent clauses had been received and the bank had assented to its terms. There is no evidence of any written assent, but the bank did in fact make an advance on 4th April 1974, apparently by endorsing on that date a commercial bill for a million dollars of which the developer was acceptor. So it must be assumed for the purposes of this appeal that a contract between Beneficial and the bank was entered into in the terms of the take-out letter on 4th April 1974 but no earlier.

Counsel for Beneficial was thus driven to contend that the loan which Beneficial had undertaken by clause 1 to pay upon 90 days' notice being given after 4th April 1976 (to the extent that the developer had not discharged the loan itself by that date) could only comply with the description in the recitals of the loan which Beneficial had undertaken to repay upon default by the developer if a floating charge had been executed by the developer on 4th April 1974 and not even one day later.

In their Lordships' view, this construction of the take-out letter as making it a condition precedent that a floating charge should be created by the bank as security for the loan on the very day of the take-out letter, and no later, simply does not make commercial sense. All that mattered to Beneficial, so far as the security for its liability under the take-out letter was concerned, was that the floating charge should be in existence and available to be assigned to it if and when it was called upon to meet that liability, and that if in the event, which did not occur, the developer became insolvent and was wound-up, the charge should have been executed and registered long enough before that date to give Beneficial priority over ordinary creditors. The floating charge had been executed and duly registered before the earliest date at which Beneficial could have

been called upon to repay the loan or any part of it; nor is there any evidence to suggest that even if the take-out letter had not been extended for two more years, as it was on 2nd March 1976, the floating charge of 19th December 1975 would not have been effective to give Beneficial a priority over ordinary creditors in any winding-up of the developer.

Accordingly, in their Lordships' view and contrary to the opinion of the learned judge, the contention that no liability to repay to the bank any part of the loan to the developer ever did attach to Beneficial because of the description of the loan in the take-out letter fails and the bank's appeal upon this point succeeds.

Beneficial, in the alternative to its main submission on which it had succeeded before Sheppard J., sought to uphold the judgment of the Supreme Court upon two further grounds, each of them questions of construction, on which it failed before him.

The first may be called " the commitment fee point ". To deal with this point, it is necessary to look a little more closely at the variation of the original take-out letter made on 2nd March 1976 (" the variation document ") by which the period of the loan was extended to 31st March 1978, the purposes for which the loan could be made were enlarged and the maximum amount of the loan was raised to 1·45 million dollars, a figure that was increased by subsequent correspondence to 1·6 million dollars. The changes in the original take-out letter were made to implement a variation in the financing agreement dated 2nd March 1976 to which the variation document was annexed. Under the financing agreement as so varied some alterations were made in the calculation and dates of payment by the developer to Beneficial of its commitment fees. Under the original financing agreement and take-out letter Beneficial had looked to the developer alone for payment of these; and they had fallen into arrears by $10,000 by 2nd March 1976.

By clause 4 of the variation document, it was provided: —

> " 4. BENEFICIAL'S liability hereunder is conditional upon the Bank procuring the due payment by the Borrower or itself paying firstly the arrears of the commitment fees totalling $10,000·00 owing by the Borrower under the Agreement of 4th April 1974 between (inter alia) Beneficial and the Borrower such payment to be made not later than 4th April 1976 and secondly all future commitment fees payable by the Borrower to Beneficial under the terms of the said Agreement (being at the rate of 3% per annum payable quarterly in advance)."

This clause imposes upon the bank two distinct obligations: (1) to procure the due payment by the borrower or itself to pay the arrears of $10,000 not later than the specified date of 4th April 1976 and (2) to procure the due payment by the borrower, or itself to pay, all future commitment fees under the financing agreement as varied.

The first obligation of the bank was punctually fulfilled by 4th April 1976; but the developer did not pay punctually on 4th January 1978 the commitment fee due upon that date; nor did the bank do so. The bank did subsequently tender to Beneficial a cheque for the correct amount of the commitment fee due by the developer on that date; but this tender was not made until after Beneficial had commenced this action on 23rd February 1978. Beneficial rejected the tender.

Under clause 4 of the variation document it may well be that upon its true construction time was of the essence of the first obligation to pay arrears of commitment fees, since a specified latest date was fixed for its performance, but as respects the payment of future commitment fees as they fell due, in their Lordships' view, it cannot have been intended that

time should be of the essence, either as respects the developer's own liability under the financial agreement as varied on 2nd March 1976 or the bank's obligation under the second part of clause 4 of the variation document. *Prima facie,* time is not of the essence of a covenant for payment of money contained in an agreement which also deals with other matters, although there are well-known exceptions in some maritime contracts. In the instant case Beneficial has been unable to suggest any commercial reason why delay in punctual payment could not be adequately compensated for by damages equal to interest lost by such delay. Sheppard J. was therefore right to reject the argument that Beneficial was entitled to elect to treat the brief delay in tendering the instalment of the commitment fee due on 4th January 1978 as a wrongful repudiation by the bank of the original take-out letter as varied. The use of the word " conditional " at the beginning of clause 4, as Lord Reid pointed out in *Wickman Machine Tool Sales Ltd. v. L. Schuler A.G.* [1974] A.C. 235, 251, is of itself inconclusive; " condition " is used in contracts in a variety of senses and does not necessarily mean only a term of a contract any breach of which, however minor, by one party entitles the other party to treat it as a wrongful repudiation of the contract and to elect to accept it as putting an end to all primary obligations of both parties under the contract that have not yet been performed.

So, in their Lordships' view, the commitment fee point as a means of upholding the judgment of the Supreme Court fails.

The second ground on which Beneficial sought to uphold the learned judge's decision, despite his rejection of it in his reasons for his judgment, was based upon an alleged breach by the bank of a provision in clause 2 of the original take-out letter:

> " the Bank shall not be entitled to make any further advances to the [developer] in respect of the loan without Beneficial's prior approval in writing ".

As already mentioned the $1·1 million maximum was from time to time extended with Beneficial's prior approval in writing until it had reached by August 1977 the sum of $1·6 million.

Their Lordships will assume, as did the learned judge without deciding the matter, that the bank did make advances to the developer in excess of $1·6 million before Beneficial on 23rd February 1978 issued its summons claiming that it was discharged from all liability under the take-out letter as varied. But, in their Lordships' view, this would be no breach of clause 2 of the take-out letter, either in its original form or as subsequently varied. The bank's obligation under clause 2 is not a general obligation to make no further advances to the developer without Beneficial's prior approval in writing. It is confined to an obligation not to make any further advances " in respect of the loan " beyond those provided for in the take-out letter as varied; and " the loan " is defined in recitals A and B of the original take-out letter as the loan secured by the securities referred to in recitals B and C. The only consequence of the bank's making to the developer advances in excess of the maximum provided for by the take-out letter as varied by the variation document and subsequent correspondence would be that in respect of such advances the bank would be an unsecured creditor. It would not be entitled to call upon Beneficial to repay them under clause 1 of the original take-out letter.

For these three reasons, the bank's appeal against the declaration made by the Supreme Court succeeds.

Its cross-appeal against Beneficial for payment due under clause 1 of the take-out letter as varied was dismissed by the learned judge. Accordingly he did not find it necessary to determine what amount was

due to the bank from Beneficial. In the light of their Lordships' decision on the appeal, the bank's cross-claim will now require to be determined. Their Lordships have accordingly humbly advised Her Majesty (1) that the appeal be allowed and the declaration made by Mr. Justice Sheppard be set aside, and (2) that the cross-claim be remitted to the Supreme Court for determination in accordance with their Lordships' judgment. The respondents must pay the appellants' costs here and below to be taxed or agreed.

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In the Privy Council

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED

v.

BENEFICIAL FINANCE CORPORATION LIMITED

DELIVERED BY
LORD DIPLOCK

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