IN THE PRIVY COUNCIL No. 42 of 1984

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

B E T W E E N :

SCHOLEFIELD GOODMAN & SONS LIMITED

Appellant

v.

CHARNA ZYNGIER

First Respondent

- and -

WESTPAC BANKING CORPORATION

Second Respondent

CASE FOR THE APPELLANT

1. This is an appeal from a judgment of the Full Court of the Supreme Court of Victoria (Anderson, Fullagar and Gray JJ.) given on 29th February 1984 dismissing an appeal from a judgment of the Supreme Court of Victoria (O'Bryan J.) given on 10th March 1983. The nature and effect of these judgments will emerge more clearly after a brief statement of the facts. RECORD p.86 p.45

2. In February 1976 a company named Zinaldi & Co. Pty. Ltd. ("Zinaldi") was a customer of a predecessor of the secondnamed Respondent ("the Bank") and was indebted to it. In order to secure that indebtedness the firstnamed Respondent ("Mrs. Zyngier") executed a mortgage over certain Torrens system land in favour of the Bank on 6th February 1976 and, on the same day, deposited the instrument of mortgage together with the duplicate Certificate of Title with the Bank ("the mortgage"). Zinaldi purchased goods from overseas in the course of its business. Bills of exchange were used to finance these purchases. The Appellant ("Scholefield") provided a facility to Zinaldi for this purpose. p.89 pp.94-108

RECORD

pp.94-108

3. Between 17th August and 23rd November 1976 Scholefield drew five bills of exchange on Zinaldi for sums in sterling which totalled £20,870.46. These bills were accepted by Zinaldi. They were made payable to the order of the Bank. The bills were then discounted by the Bank. The funds were used by Zinaldi to meet its overseas purchases The Bank was the holder of each of the bills. As they matured each of them was dishonoured upon presentation by the Bank to Zinaldi for payment. The Bank then made demand upon Scholefield as the drawer. Scholefield paid to the Bank the amounts owing in respect of each of the bills. These events took place prior to 16th August 1978.

4. On that date there was a balance of some $20,000 owing by Zinaldi to the Bank as on

p.110 the taking of a general account. A demand was made on Mrs. Zyngier under the mortgage by the Bank in respect of Zinaldi's indebtedness. On 23rd August 1978 she tendered the sum of $20,877.11 to the Bank and requested the Bank to execute an instrument of discharge of the mortgage. This sum was the amount of Zinaldi's general indebtedness to the Bank on that day.

5. The Bank refused. The ground was that Scholefield had claimed to be entitled to an assignment of the mortgage to secure a claim by it against Mrs. Zyngier for contribution to the amounts it had paid to the Bank on the

pp.113-115 five bills. Scholefield also lodged a caveat with the Registrar of Titles claiming an equitable interest in the land.

6. It was accepted that at the time of each relevant dishonour of the bills by Zinaldi, and at the time of each payment to the Bank by Scholefield in respect of the bills, there were other transactions on foot between Zinaldi and the Bank which were secured by the mortgage. All of these transactions however were at an end and there were no transactions on foot between Zinaldi and the Bank either at the date on which Mrs. Zyngier tendered the moneys to the Bank - i.e. on 23rd August 1978, or when she commenced the present proceedings against the Bank and

pp.1-5 Scholefield in April 1979. Mrs. Zyngier sought declarations that Scholefield was not entitled to an assignment of the Bank's mortgage; or contribution from her in respect of the amounts paid by Scholefield on the bills; or, any estate or interest in the land capable of supporting the caveat. She also sought orders

RECORD

that Scholefield's caveat be withdrawn and that, upon tender of the sum of $20,877.11, the Bank execute a discharge of the mortgage and deliver it up to her together with the duplicate Certificate of Title. By its counter-claim Scholefield claimed a declaration that it was entitled to contribution from Mrs. Zyngier in respect of the payments made by it to the Bank in respect of the bills; and, that it was entitled to require the Bank to assign the mortgage to it in order to secure the payment of the contribution for which Mrs. Zyngier was liable. pp.11-13

7. The action came on for hearing before O'Bryan J. on 2nd February 1983 and judgment was given on 10th March 1983. The declaration and orders sought by Mrs. Zyngier were made. Scholefield's counter-claim was dismissed and it was ordered to pay the costs of Mrs. Zyngier and the Bank. His Honour held that the liability of Scholefield on the bills and the liability of Mrs. Zyngier under the mortgage were not such co-ordinate liabilities as would attract the principles of contribution. His Honour drew attention to the fact that the liability of Scholefield arose under section 60(1)(a) of the Bills of Exchange Act 1909 (Commonwealth) when the bills were dishonoured. On the other hand the liability of Mrs. Zyngier under the mortgage could have arisen when the bills matured but only after demand had been made of the whole of the balance of Zinaldi's account. His Honour said: pp.45-46

pp.41 ll.6-18

> "... in my opinion, the liability imposed on the plaintiff by the mortgage is only indirectly related to bills of exchange. Whereas Scholefield is directly liable on the bills upon dishonour, the Plaintiff is liable to the bank for the balance of an account which might include bills of exchange discounted or paid by the bank. The obligations of the competing parties arose out of separate and distinct subject matter. The bank had no direct recourse to the plaintiff on the bills whereas it had direct recourse to Scholefield. Scholefield, on the other hand had no direct recourse to the plaintiff ... Because I am not persuaded that the

p.42 l.23-p.43 l.11

p.43 ll.19-22

RECORD

> liabilities of the parties are truly of equal status the parties here are not co-sureties for the purposes of the doctrine of contribution."

His Honour did not deal with the possible application of section 72 of the Supreme Court Act 1958 (Victorian) which mirrors the provisions of section 5 of the Mercantile Law Amendment Act 1856 (19 & 20 Vict. c.97)

pp.47-53 8. By notice of appeal dated 7th April 1983 the Appellant appealed to the Full Court. The appeal came on for hearing before Anderson, Fullagar and Gray JJ. on 13th, 14th, 15th and pp.54-85 16th December 1983 and Fullagar J. delivered a judgment (with which Anderson and Gray JJ. p. 86 agreed) on 29th February 1984. The appeal was dismissed. Scholefield was ordered to pay the costs of the appeal. In essence it was again held that the two liabilities were not co-ordinate and this conclusion was largely based upon an interpretation of the terms of the mortgage. Fullagar J. said:

p. 80 l.24-p. 81 l.3

> "... the whole case comes down in the end I think to a difficult question of construction of the mortgage instrument, and I have in the end concluded that under it Mrs. Zyngier is, despite the language of clause 1, not a surety for the debt of Z. Co. (Zinaldi) on the bills of exchange but for a different debt only, namely the whole debt of Z. Co. (Zinaldi) shown as on a general account between the Bank and Z. Co. (Zinaldi). The right of contribution against co-sureties, on the other hand, exists of between sureties for the same debt."

It was also held that section 72 of the Supreme Court Act 1958 (Victorian) did not apply to the facts of the case.

9. The appeal raises important questions. Bills of exchange are commonly used in Australia as a method of financing business transactions; especially, international transactions. See: Walker, The Australian Revival of the Bill of Exchange (1978) 52 Australian Law Journal 244. Typical are the facts of the present case. A Bank is induced to discount a bill accepted by its customer because a reputable financier has become a party - normally as drawer - to the bill. The Bank holds securities provided

by a third person or the customer in respect of its general dealings with the customer. When the bill is dishonoured the Bank looks to and is paid by the financier. The question of whether the financier has a right to have access to the securities held by the Bank has generated a good deal of recent litigation in Australia. See: Commissioner of State Savings Bank of Victoria v. Patrick Intermarine Acceptances Ltd. (In Liq.) (1981) 1 N.S.W.L.R. 175; Dalgety Ltd. v. Commercial Bank of Australia Ltd. (1981) 2 N.S.W.L.R. 211; D. & J. Fowler (Australia) Ltd. v. Bank of New South Wales (1982) 2 N.S.W.L.R. 879; Westpac Banking Corporation v. A.G.C. (Securities) Ltd. (1983) 3 N.S.W.L.R. 348; and, Maxal Nominees Pty. Ltd. v. Dalgety Ltd. (Full Court of Supreme Court of Queensland 10th October 1984 unreported).

10. The submissions that the Appellant will attempt to make good on this appeal are:

(a) The primary liability on the bills was that of Zinaldi as acceptor.

(b) The liability of Scholefield on the bills as drawer to the Bank as holder was a secondary liability in that it was conditional upon non-payment by the acceptor.

(c) Mrs. Zyngier was also under a secondary liability to the Bank in respect of the bills. This liability arose under the terms of the mortgage and was conditional upon non-payment by the acceptor.

(d) The Bank had an unfettered choice as to whether it would look to Mrs. Zyngier or Scholefield for the payments which Zinaldi failed to make to it as holder of the bills. They were each thus subject to a common demand.

(e) The liabilities of Mrs. Zyngier and Scholefield were secondary and co-ordinate and thus attracted the doctrine of contribution; or, additionally or alternatively, the operation of the provisions of section 72 of the Supreme Court Act 1958 (Victoria) produced the same result.

(f) Scholefield was thus entitled to contribution from Mrs. Zyngier in respect of the payments which it had made to the Bank on the bills. Scholefield was also

entitled to have the mortgage assigned to it for its benefit so as to secure the liability to it of Mrs. Zyngier.

(g) The judgment of the Full Court was incorrect and Scholefield is entitled to have the declarations made that were sought in its counter-claim; or alternatively that the Agreed Statement of Issues should be answered:

pp.23-25

1. - No.

2(a), (b), (c), (d) and (e) - Yes.

3(a), (b), (c), (d) and (e) - Yes.

4(a) (i) and (ii) - Yes.

4(b) - Yes.

5. - Yes.

6. - No.

11. The Full Court construed the terms of the Zyngier mortgage in such a way that it was held that it only permitted the Bank to demand payment from Mrs. Zyngier of either the whole of the moneys owed by Zinaldi to the Bank at the time of the demand; or, an amount in gross in part payment of the whole debt but which could not be attributed to any indebtedness or any particular account. It was said by their Honours that this point of construction was "vital" to the case; "fundamental to the result of the litigation"; and, was the point to which "the whole case comes down in the end".

p.56 l.31
p.59 l.13
p.80 ll.24-25

12. Several important conclusions were held to follow from the construction adopted by the Court:

p.79 ll.3-7 (a) (i) "... Mrs. Zyngier could never have been ~~have been~~ called upon by the Bank to pay the amount of the bills, as distinct from some amount 'in gross', unless she was at the same time called upon to pay the amount of the whole general account outstanding including the amount referable to the bills."

p.79 ll.17-20 (ii) "... up to the time of payment by Scholefield the Bank could never have called upon Mrs. Zyngier to pay up on the bills without requiring her to pay in gross the whole general account."

RECORD

(b) ". . . Mrs. Zyngier could never have claimed contribution from Scholefield without in the first place paying off not simply some amount equivalent to what was outstanding on the bills but the whole general account of the Z Co. with the Bank. That is to say, if one assumes that there was no liability as a surety in Mrs. Zyngier as of a higher degree than any liability of Scholefield, still the fact is that Mrs. Zyngier could not obtain contribution until she could prove that she had paid the amount of the debt which was the same amount as the liability of the bills. In my opinion she could never do this without paying the whole of the general balance of account. . . In my opinion, Mrs. Zyngier could never have claimed contribution from Scholefield on any basis, unless and until she had paid off the whole of the general account, for only then could it be said that the amount necessary to discharge the bills must have been included in her payment. (No mere attempt at appropriation by the Bank of a lesser payment to the bills would be effective to discharge the bills without notice at least to the parties liable on the bills and either some agreement with them or some conduct which as against them would have estopped the Bank.)"

p.78 l.19 - p.79 l. 1

p.79 ll.7 - 17

(c) (i) "As at present advised I would go so far as to say that Mrs. Zyngier was a surety for the performance of their duties as surety of all persons liable on the bills; that is to say, she was a surety in a different degree from the suretyship of the drawer Scholefield and, if Mrs. Zyngier had paid the full amount of the ultimate balance owing on general account to the Bank, and that general ultimate balance had included the amount of the relevant bills of exchange, she then would have been entitled not to contribution but to indemnity from the parties otherwise liable on the bill and thus from Scholefield."

p.72 l.40 - p.73 l.9

(ii) "I am of opinion that, upon the proper construction of the mortgage instrument, Mrs. Zyngier became a surety to the Bank for the performance of their obligation by (amongst others) all persons who were liable on the bills of exchange. In other words, to use the words of Masten, J.A. in the Canadian case earlier cited, I think the true construction of the document is such as to make Mrs. Zyngier, as against Scholefield, not a co-surety but a surety for a surety."

p.84 ll.20-27

RECORD

p.80 11.8-23 (d) "Thus there could be no "choice" by the Bank to come against Scholefield for the amount of the bills in the sense of a free exercise of an election by the Bank to come against one surety for the bills rather than another, rather it was absolutely necessary to come against Scholefield or else to bring all its other relevant transactions to an end. If the amount of the relevant bills was $30,000 it could not be said at any stage in my opinion that upon paying $30,000 (in whatsoever terms demanded) Mrs. Zyngier would have a right of contribution against Scholefield; at no time before any payment by her of the whole general balance could it be said that she had in any sense paid the debt for which Scholefield was surety. One of the consequences of this state of affairs is that it cannot be said that there is any mutuality in the rights of one alleged co-surety and the other for contribution."

13. It appears that but for two matters the Full Court would have been prepared to treat the relationship between the drawer of the bills (Scholefield) and the grantor of the security to the Bank (Mrs. Zyngier) as being analogous to that of co-sureties for the due payment by Zinaldi on the bills. These two matters were:

(a) The construction of the mortgage referred to in paragraph 11 and 12 above; and,

(b) The fact that at the time of dishonour there were still other transactions on foot between Zinaldi and the Bank.

See: Record at pp. 73 - 77 as to (a); and, at p. 78 and at p. 84 as to (b).

14. It is our submission that the decision of the Full Court as to both matters was incorrect.

15. For the purpose of dealing with the question of construction it is necessary to refer at some length to several provisions of the Zyngier mortgage.

RECORD
p.90

16. Clause 1 is a covenant by Mrs. Zyngier:

"To pay to the Bank on Demand (as hereinafter defined)

- the balance for the time being owing

  -- by the Mortgagor to the Bank on the account current of the Mortgagor with the Bank and/or

  -- by the Debtor on the account current of the Debtor with the Bank and

- all and every other the sums and sum of money (if any)

  -- which the Bank may (but without any obligation on it to do so) advance or pay or become liable to pay to or on account of the Mortgagor and/or the Debtor either solely or jointly with any other person or

  -- which now are or may hereafter become owing from or payable by the Mortgagor and/or the Debtor for or in respect of any moneys which may be payable by the Mortgagor and/or the Debtor to the Bank either solely or jointly with any other person under any contract on any other account whatsoever whether the time or the respective times for the repayment thereof have arrived or not or

  -- in respect of any Bills of Exchange or Promissory Notes to which the Mortgagor and/or the Debtor is or may hereafter be a party and on which the Mortgagor and/or the Debtor is or may hereafter be liable (solely or jointly with any other person) either primarily or only in the event of any other person failing to duly pay the same which are or may hereafter be discounted or

RECORD

paid or which for the time being be held by the Bank or

-- for or in respect of any loans advances or credits which have been or may hereafter be made or given to any person for the accommodation or at the request of the Mortgagor and/or the Debtor or the repayment of which the Mortgagor and/or the Debtor has guaranteed or may hereafter guarantee to the Bank and also

all legal and other costs charges and expenses which have been or may hereafter be incurred by the Bank in connection with this or any other security or in connection with the said Bills of Exchange and Promissory Notes or otherwise

(all of which are hereinafter included in the terms 'principal moneys')."

17. It is submitted that it is incorrect to construe this covenant so as to confine its operation in such a way that it only permits the Bank to demand payment from the Mortgagor of the whole of the moneys owing by the Debtor as at the date of the demand. To put it another way it is submitted that the covenant contains a series of quite separate and disparate obligations which the Bank can, either independently or in any combination it sees fit, call up by its demand without being compelled to enforce them all. The mere fact that all of these obligations are together defined at the end of the clause as 'principal monies' does not transform the covenant into one that is to be limited to pay the principal monies on demand. That definition is only used for convenience later in the mortgage.
p.90 See for example: clauses 2 and 5.

The interpretation of clause 1 for which the Appellant contends is not only clear from the language of the clause but is confirmed by other provisions of the mortgage.

RECORD

(a) Clause 2 provides, inter alia:

> "That the Mortgagor will so long as any principal moneys remain unpaid (but without prejudice to the right of the Bank to enforce payment of such principal moneys and interest or any part thereof at any time) pay to the Bank interest on the principal moneys for the time being owing ..." (italics supplied). p.90

It is submitted that the words of this clause which we have italicized assume the correctness of our interpretation of clause 1. They recognize the right of the Bank to demand any part of what are together defined as the 'principal moneys' in that clause. Although the Full Court drew attention to these words it was said:

> "Upon the whole I have concluded that the Bank could demand a part of the total liability but, even upon that view, I am of opinion that all it can demand is a sum in gross, for example, $10,000. Thus there could be no 'choice' by the Bank to come against Scholefield for the amount of the bills in the sense of a free exercise of an election by the Bank to come against one surety for the bills rather than another, rather it was absolutely necessary to come against Scholefield or else bring all its other relevant transactions to an end." p.80 ll.5-14

It is submitted that this reasoning is incorrect. The only reason why the Full Court was forced to confine the meaning and effect of the relevant words in clause 2 to a situation of a part payment in gross was because it had incorrectly construed clause 1. In our submission the words support our argument. There is no foundation in the language of clause 2 for the prima facie curious conclusion that the Bank could only demand a part payment in gross.

RECORD

p.90 (b) Clause 5 provides, inter alia:

> "That in case default is made by the Mortgagor in payment on Demand of any of the principal moneys or interest hereby received or in the observance of any of the covenants contained or implied herein and any such default is construed for the space of three days it shall be lawful for the Bank without notice to exercise the power of sale and all other the powers authorities mentioned and given in and by Section 77 of the Transfer of Land Act 1958 ..." (italics supplied).

It is submitted that the italicized words make it perfectly clear that "any" of the "principal monies", as defined in clause 1, can be made the subject of a demand. If the contrary view was correct then this clause should read "... payment on Demand of the principal monies...". The inclusion of the words "of any" make it clear that this is not so. This clause was not referred to by the Full Court.

p.91 (c) Clause 7 provides, inter alia:

> "That this Mortgage shall be a security of any Bill of Exchange and Promissory Note representing any money for the time being hereby secured or which may be taken away by way of renewal of or in substitution for any such Bill of Exchange or Promissory Note and that the demand aforesaid may be made and the powers and authorities herein contained or by the said Act declared to be implied herein may respectively be exercised notwithstanding the currency of any such Bill of Exchange or Promissory Note ..." (italics supplied).

It is submitted that the italicized words again demonstrate that there are various demands which can be made under clause 1. This provision is concerned to ensure that the Mortgage can be used to enforce an indebtedness of the Debtor notwithstanding that a bill of exchange or

RECORD

promissory note which the Bank can enforce may cover the same liability. This clause was not referred to by the Full Court.

(d) The second sentence of the attornment clause - clause 13 - provides, inter alia: p.91

> "And the Mortgagor hereby agrees that if default is made in payment of any of the moneys expressed or intended to be hereby secured or any part thereof respectively on any such demand as aforesaid or in the observance of any of the covenants contained or implied herein it shall be lawful for the Bank at any time thereafter ... to enter upon and take possession of the said land and to determine the tenancy created by the aforesaid attornment ... (italics supplied).

It is submitted that the italicized words again demonstrate that a separate demand can be made under clause 1 in respect of any particular liability to which it extends. Clause 1 is the only clause in the mortgage which provides for the making of any demands. The words "demand as aforesaid" can only relate to clause 1. This provision assumes that such a demand can be made in respect of part and not only the whole of the moneys referred to in clause 1. This clause was not referred to by the Full Court.

(e) Clause 10(b) provides inter alia: p.91

> "That in respect of all monies due by or on account of the Debtor and hereby secured:-
>
> > THAT the liability of the Mortgagor shall not be wholly or partially satisfied by the payment or liquidation at any time hereafter of any sum of money for the time being due upon the general balance of the account of the Debtor with the Bank but shall extend to cover and be a security for all sums of

RECORD

money at any time due to the Bank thereon notwithstanding any such payment or liquidation.

And that it shall be lawful for the Bank to grant to the Debtor/or to any persons liable with him/or to any drawers acceptors makers or endorsers of Bills of Exchange or Promissory Notes or cheques received by the Bank from or on account of the Debtor or bearing the name of the Debtor and held by the Bank/any time or other indulgence and to take any security from and compound with the Debtor or any of such persons and to release any security already held or which may hereafter be obtained by the Bank and to release and discharge the Debtor or any of such persons without discharging or satisfying the liability of the Mortgagor hereunder and that all dividends compositions and payments received from the Debtor or any such persons shall be taken and applied as payments in gross and that this Mortgage shall apply to and secure any ultimate balance that shall remain due to the Bank."

(italics supplied).

It is submitted that the use of the words "the general balance of the account" in the first sentence of this sub-clause indicate that the draftsman was conscious of such a concept and yet did not use them in clause 1. This provides support for our submission that clause 1 is not to be construed as if the only demand that the Bank can make thereunder is for "the general balance of the account". The function of the provisions of the first sentence is to prevent it being contended that the liability of the Mortgagor is to be reduced or satisfied by payments made by or on behalf of the debtor from time to time.

RECORD

The mortgage secures balances due from time to time under any of the limbs of clause 1.

It is further submitted that the words "payment in gross" and "any ultimate balance" at the end of the second sentence of this sub-clause provide additional support for our submission. First the words "payment in gross" show that the draftsman was familiar with the concept too and yet did not use the words in clause 2. This confirms the accuracy of our submissions in paragraph 15 and 17 above. Second the words "any ultimate balance" again confirm the accuracy of our contention in relation to the similar words "the general balance of the account" as used in the first sentence.

The Full Court said:

> "... what is secured by the mortgage is appropriately summarised in a very few words in clause 10 in two ways, first by the words 'money for the time being due upon the general balance of the account of the Debtor with the Bank', and secondly by the words 'any ultimate balance that shall remain due to the Bank'."

p.59 ll.6-11

It is submitted that this is incorrect. Clause 5 operates to provide that the power of sale contained in the mortgage can be exercised in relation to any default in complying with a particular demand or demands made under clause 1. On the other hand what clause 10 makes clear is that, if it so desires, the Bank can obtain payments from others in respect of, inter alia, bills of exchange in order to satisfy the debtor's liabilities. In that situation the mortgage stands as security for any ultimate balance which might remain due to the Bank. To put it shortly the Bank may, not must, use the mortgage to obtain payment of debts due to it by the debtor in respect of bills of exchange.

p.91

RECORD

(f) The general conclusion of the Full Court that the terms of the mortgage only enabled the Bank to demand of Mrs. Zyngier that she pay the total of all outstanding balances owed to the Bank by Zinaldi at the date of the demand is contradicted by other provisions of the mortgage which were not referred to by the Full Court:

p.90 (i) Clause 2 relates to the Mortgagor's liability to pay to the Bank interest and other charges on the 'principal moneys'. These sums are payable "when demanded" and, until demanded, on 31st June and 31st December in each year. It is submitted that specific demand could have been made on Mrs. Zyngier in respect of this obligation and if not p.90 met then, under clause 5, the power of sale could have been employed to obtain payment of the moneys in question.

p.90 (ii) Clause 3 relates, inter alia, to the obligation of the Mortgagor to pay "all rates, taxes, duties, assessments of every description "in respect of "the mortgaged land". If default is made then the Bank is empowered to meet these payments and then to demand repayment from the Mortgagor with interest. Again it is submitted that specific demand could be made in respect of this obligation and the power of sale employed to satisfy it.

(iii) The Bank is given similar rights in respect of repairs to the p.90 mortgaged property by clause 4.

19. The heart of the submission on behalf of the Appellant in relation to this aspect of the appeal is that the Bank could have made demands on Mrs. Zyngier under clause 1 of the mortgage in respect of the bills and, if those demands had not been met, the Bank could have then exercised the power of sale under clause 5 and used the proceeds to obtain satisfaction, in whole or in part, of Mrs. Zyngier's obligations. The Full Court held that no such demands could have been made and no such particular satisfaction could have been obtained. The Appellant submits that in so holding the Full Court did

not correctly interpret the terms of the mortgage.

20. When each of the bills involved in this case were dishonoured by the acceptor, Zinaldi, we submit that the Bank had a choice. It could have made a demand upon Mrs. Zyngier under the mortgage. If that demand was not met then the Bank could have obtained payment out of the proceeds of the sale of the mortgaged property. Alternatively it could have demanded payment from Scholefield as the drawer. The Bank could have resorted to either of them indifferently. The central question then upon this appeal is whether the Bank by choosing to look to, and obtain payment from, Scholefield can throw the whole of the liability upon Scholefield. In our submission it would be inequitable to allow the choice of the creditor to determine the matter. The doctrine of contribution is designed to equitably apportion the loss in such a situation.

21. It is submitted that as between the Bank and Mrs. Zyngier she was a surety in the strict sense for the various debts to the Bank of Zinaldi; including, but certainly not limited to, its debts for failing to meet the bills which it had accepted. This relationship arose independently of the bills themselves and was secured by, and defined in a specific contract; namely, the mortgage of real property. Her liability was a secondary liability in the sense that if Zinaldi did not meet the bills then the Bank could look to her for payment.

22. It is further submitted that as between the Bank and Scholefield the position of Scholefield was closely analogous to that of a surety for the liability of Zinaldi to the Bank on the bills. Scholefield's obligations to the Bank arose out of its position as drawer of the bills and were confined to the bills. See: sections 60(1)(a) and 60(a) of the Bills of Exchange Act 1909 (Commonwealth). Such a relationship is sufficient to attract the equitable principles of contribution and subrogation if otherwise applicable. See: Duncan Fox & Co. v. The North and South Bank (1880) 6 App.Cas. 1 (indorser of bill of exchange in relation to holder); Aga Ahmed Ispahany v. Crisp (1891) L.R. 19 Ind. App. 24 (indorser of promissory note in relation

RECORD

to holder); Commissioners of State Savings Bank of Victoria v. Patrick Intermarine Acceptances Ltd. (In Liq.) (1981) 1 N.S.W.L.R. 175 (indorser of bills of exchange in relation to another indorser); Maxal Nominees Pty. Ltd. v. Dalgety Ltd. (Full Court of Supreme Court of Queensland 10th October 1984 unreported) (drawer of bill of exchange); Re Conley (1938) 2 All E.R. 127 at p.131 E-F per Greene M.R.; In Re Downer Enterprises Ltd. (1974) 1 W.L.R. 1460 at pp.1468C to 1470E per Pennycuick V.C.; and, A.M. Spicer & Son Pty. Ltd. (In Liq.) v. Spicer and Howie (1931) 47 C.L.R. 151 at p. 177 per Starke J. (with whom Evatt J. concurred) and at pp. 184-186 per Dixon J. (with whom Rich J. concurred.

23. The liability of Scholefield in the bills to the Bank as holder was secondary to the primary liability of Zinaldi. In Philpot v. Briant (1828) 4 Bing. 717 at p.720, 130 E.R. 945 Best C.J. said:

> "The acceptor of a bill of exchange is considered as the principal debtor; all the other parties to the bill are sureties that the acceptor shall pay the bill, if duly presented to him on the day it becomes due, and if he then does not take it up, they on receiving notice of its non-payment, will pay it to the holder."

See also: Rowe v. Young (1820) 2 Bligh 416 at p.417, 4 E.R. 381 at p.417 per Bayley J.; Duncan Fox v. The North and South Wales Bank (1880) 6 App.Cas. 1 at p.18. The same conclusion follows from an examination of the provisions of section 60(1)(a) of the Bills of Exchange Act 1909 (Commonwealth). It is there provided:

> "(1) The drawer of a bill be drawing it -
>
> (a) engages that on due presentment it shall be accepted and paid according to its term, and that if it is dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided the requisite proceedings on dishonour are duly taken."

RECORD

24. There are two central and related contentions of the Appellant:

(a) So far as Mrs. Zyngier is concerned Scholefield is entitled to an equal contribution from her in respect of the liabilities on the bills which it has been compelled to meet.

(b) So far as the Bank is concerned Scholefield is entitled to be subrogated to the rights of the Bank to enforce the Zyngier mortgage. This ancillary right of subrogation is in aid of Scholefield's substantive claim to indemnity or contribution.

25. The two doctrines relied upon - subrogation and contribution - are designed to produce flexible and just results in such situations. See: Dering v. Wichelsea (1787) 1 Cox Eq.Cas. 318 at p.321; 29 E.R. 1184 at p.1185; Craythorn v. Swinburne (1807) 18 Ves.Jun. 160, 33 E.R. 482; Stirling v. Forrester (1821) 3 Bligh P.C. 575, 4 E.R. 712; Albion Insurance Co. Ltd. v. G.I.O. (N.S.W.) (1969) 121 C.L.R. 342 at pp. 350-352 per Kitto J.; Mahoney v. McManus (1981) 36 A.L.R. 545 at p.551 per Gibbs C.J. and at pp. 558-9 per Brennan J.; and, Orakpo v. Manson Investments Ltd. (1978) A.C. 95 at p.104 per Lord Diplock, at p.110 per Lord Salmon, at p.112 per Lord Edmund Davis, and at p.119 per Lord Keith of Kinkel.

26. The right of subrogation extends to a mortgage security given to the Bank by a co-surety. It is not limited to situations where the principal debtor provides the security to the creditor. See: Ex parte Crisp (1844) 1 Atkyns 133 at p.135; 26 E.R. 87 at p.88; Goddard v. Whyte (1860) 2 Giff. 449; 66 E.R. 188; Sherwin v. McWilliams (1921) 17 Tas. L.R. 16 (Crisp J.) and 94 (Full Court), special leave to appeal to High Court refused - 30 C.L.R. 667; Smith v. Wood (1929) 1 Ch.14 at p.21 and at pp.29-30; Commissioners of State Savings Bank of Victoria v. Patrick Intermarine Acceptances Ltd. (In Liq.) (1981) 1 N.S.W.L.R. 175 at pp. 181-2 per Meares J.; Duncan Fox & Co. v. The North and South Wales Bank (1880) 6 App.Cas. 1 at p.10 per Lord Blackburn impliedly rejecting view of Jessel M.R. in Court of Appeal (1879) 11 Ch.D. 88 at p.96; Aga Ahmed Ispahany v. Crisp (1891) 19 L.R. Ind.App. 24; Rowlatt, Principal and Surety (4th ed. 1981)at p. 147; Byles, Bills of Exchange (25th ed. 1983) at p.421; and, Goff and Jones, Restitution (2nd ed. 1978) at pp.415-419.

RECORD

27. So far as the doctrine of contribution is concerned all of the authorities require the existence of some common and connecting link between the nature of the liabilities to which the alleged contributories are subjected. In Smith v. Cook (1911) A.C. 317 at p.326 the Privy Council said in a Victorian appeal: "Before there can be any question of contribution there must be a common obligation upon those who are required to contribute". "Common demand" is a phrase that has also been used. See: Johnston v. Wild (1890) 44 Ch.D.146; Snell, Equity (28th ed. 1982) at p.471; and 16, Halsbury's Laws of England (4th ed.) "Equity" at para. 1252. Goff and Jones prefer to state the requirement in terms that the liability must be "in solidum". See: Restitution, op.cit. Chapter 13 paxim. The Australian textbook writers Meagher, Gummow & Lehane prefer the phrase "co-ordinate liabilities". See: Equity Doctrines and Remedies (2nd ed. 1984) at para. 1006. This was the phrase used by Kitto J. in Albion Insurance Co. Ltd. v. G.I.O. (N.S.W.) (1969) 121 C.L.R. 342 at p.350. The principle is clear enough. What is required as a condition of contribution is that the liabilities in question should be of equal degree because it is the element of equality or communality that makes it just for the doctrine to operate.

28. It is at this point that the decision of the Full Court on the correctness of the construction point becomes critical. In essence the Full Court held that there was no equality in degree; or, no common or co-ordinate link, between the respective liabilities of Mrs. Zyngier and Scholefield sufficient to attract the doctrine of contribution. Fullagar J. said:

p.59 ll.11-16

(a) "This matter of construction of the mortgage instrument is in my opinion fundamental to the result of this litigation, and I have in the end concluded that the mortgagor became by the instrument a final or ultimate surety for liabilities of the debtor, higher in degree than any party to a bill of exchange."

RECORD

(b) "In my opinion, there can be no right of assignment of securities, at all events in a case such as the present, unless it is seen as an aid to enforcement of a right to indemnity or a right to contribution against the mortgagor. Further, as I have concluded that there was no right of contribution or indemnity in Scholefield against the mortgagor at the time when it paid on the bills, the appeal must in my opinion fail. As at present advised I would go so far as to say that Mrs. Zyngier was a surety for the performance of their duties as sureties of all persons liable on the bills; that is to say, she was a surety in a different degree from the suretyship of the drawer Scholefield and, if Mrs. Zyngier had paid the full amount of the ultimate balance owing on general account to the Bank, and that general ultimate balance had included the amount of the relevant bills of exchange, she then would have been entitled not to contribution but to indemnity from the parties otherwise liable on the bill and thus from Scholefield. No right of indemnity in Scholefield against Mrs. Zyngier could possibly be maintained - indeed that boot must be if anywhere on the other foot ..." p.72 l.33-p.73 l.12

(c) "In my opinion the right of contribution (or indemnity), without which no right to assignment of securities can ever accrue, must exist at (or immediately after) the moment of payment by the paying co-surety, or it will never exist at all. And in the present case I am of opinion that, at the time of payment by Scholefield, it had no right of contribution from Mrs. Zyngier. This conclusion ... turns ultimately on the construction of and effect to be given to the instrument of mortgage when read as a whole ..." p.78 l.4-12

(d) "Yet in my opinion Mrs. Zyngier could never have claimed contribution from Scholefield without in the first place paying off not simply some amount equivalent to what was outstanding on the bills but the whole general account of the Z. Co. (Zinaldi) with the Bank. That is p.78 l.19-p.79 l.1

RECORD

> to say, if one assumes that there was no liability as a surety in Mrs. Zyngier as of a higher degree than any liability of Scholefield, still the fact is that Mrs. Zyngier could not obtain contribution until she could prove that she had paid the amount of the debt which was the same amount as the liability of the bills ... she could never do this without paying the whole of the general balance of account."

29. There are two strands in this reasoning. One is that the liabilities are of a different degree. This is based upon a conclusion that the mortgage is to be construed so as to provide that Mrs. Zyngier only guaranteed an ultimate general business of all of Zinaldi's indebtedness to the Bank after the Bank had taken steps to obtain the benefits of all rights it had against third parties (other than her) - i.e. in particular to have pursued Scholefield's liabilities on the bills. The other is the conclusion that at the moment of Scholefield's payment the Bank had no specific rights against Mrs. Zyngier under the mortgage in relation to the bills. It is submitted that both points are incorrect.

30. So far as the first point is concerned there is a short answer. There is nothing at all in the terms of the mortgage which compels the Bank to exhaust any of its remedies against third persons as a condition of demanding an ultimate balance of general account from Mrs. Zyngier. The Bank's rights against her are conditioned only by the defaults specified in the various clauses of the mortgage and no others. To put it differently we submit that Mrs. Zyngier would have had no answer to a claim against her for the amount of the dishonoured bills whether made specifically or included in a claim for an ultimate general balance.

31. The second point is answered in two ways. First we repeat the submission on the point of construction already made. We contend that the Bank could have demanded the precise amount due on account of the dishonoured bills from Mrs. Zyngier under the terms of the mortgage without the need for any more general claim. Payment in accordance with that demand would have satisfied the Bank's debt from Zinaldi in respect of the bills.

RECORD

Second as a matter of logic it cannot matter whether the first answer is correct or not. The Bank could have demanded the whole ultimate general balance of account at the point of payment. The debt in respect of the bills would have been included in the demand. It is no bar to contribution that the contributors are liable for different amounts. It is enough that the same debt is covered. This is made clear by the double insurance cases. It matters not that different import and risks are covered by both policies. What is critical is that both policies must cover the risk which has given rise to the claim. See: Albion Insurance Co. Ltd. v. G.I.O. (N.S.W.) (1969) 121 C.L.R. 342 at pp.345-6 and at p.352. In these cases the enquiry is theoretical because ex hypothesi the party in the position of the Bank has not sued the party in the position of Mrs. Zyngier. The Court is thus concerned to ascertain whether as a matter of abstract reasoning the Bank could have come upon Mrs. Zyngier for the debt. The enquiry is as to the existence of a right; not whether it was in fact exercised. See: A.M. Spicer & Son Pty. Ltd. (In Liq.) v. Spicer and Howie (1931) 47 C.L.R. 151 at pp. 184-5 per Dixon J.; and, Duncan Fox & Co. v. The North and South Wales Bank (1880) 6 App.Cas.1 at p.19 per Lord Blackburn.

32. It is submitted that in the present case there is a common burden; or, co-ordinate liability; or, liability in solidum; or, common liability, between Mrs. Zyngier and Scholefield. Either could have been sued at the whim of the Bank and that is the critical enquiry. See: A.M. Spicer & Son Pty. Ltd. (In Liq.) v. Spicer and Howie op.cit. What matters is to identify that it is the creditor who can determine the identity of the party who is to bear the immediate burden of the default of the principal debtor. This is why all the following matters are quite irrelevant:

(a) Whether or not the co-surety was aware of the securities provided to the creditor.

(b) Whether or not the liabilities of the co-sureties arise under different instruments.

(c) Whether or not the liabilities of the co-sureties have different legal sources - i.e. here Mrs. Zyngier is the law of contract and Scholefield is the law of bills of exchange.

RECORD

(d) Whether or not the liabilities of the co-sureties are for different amounts; although, this may affect the amount of contribution.

(e) Whether or not the respective liabilities of the co-sureties embrace different and more extensive heads of liability than the other. All that is relevant is that the indebtedness in question is covered.

33. There are two further particular matters to be addressed.

p.84 11.1-3 (a) It was pointed out by the Full Court that the facts of Duncan Fox showed that at the time the question of Duncan Fox's entitlement to the securities held by the Bank arose all dealings between the principal debtor, Samuel Radford & Sons, and the Bank had come to an end. In the present case at the time the bills were dishonoured there were still other transactions on foot between Zinaldi and the Bank although all transactions had ended by the time the present action was commenced. It was suggested that this demonstrated that at the moment of payment on the bills Scholefield could not have demanded contribution because the Bank could not have been compelled by Scholefield to call up the ultimate general balance of account. See: pages pp.82-84 82-84. In our submission the point is entirely hypothetical and quite irrelevant. It may be conceded, for the purposes of the argument, that in a case where a Bank in fact desires to deal with the security in its own interests and in a manner inconsistent with the interests of a co-surety then no right of subrogation arises. See e.g.: Dalgety Ltd. v. Commercial Bank of Australia Ltd. (1981) 2 N.S.W.L.R. 211; and, Duncan Fox & Co. v. The North and South Wales Bank (1880) 6 App.Cas. 1 at pp. 15, 16 per Lord Selborne. In the present case there was no agreement and no evidence as to these matters. The facts that were agreed and which are determinative of the point are that as at the date of Mrs. Zyngier's tender and as at the date of the Writ there were no transactions on foot between Zinaldi and the Bank. The case is, in any event, consistent with the Bank agreeing to bring its dealings with

Zinaldi to an end if Scholefield had so requested. Further the point is incorrect for another quite different reason. The critical time to judge of the existence of the equity is the time when the claim to it is in fact made and not at some point of time when it may have been made but was not. See: Duncan Fox & Co. v. The North and South Wales Bank op. cit.; and Maxal Nominees v. Dalgety Ltd. op.cit. The facts that were agreed and which are determinative of the point are that as at the date of Mrs. Zyngier's tender and as at the date of the Writ there were no transactions on foot between Zinaldi and the Bank. In our submission the relevant enquiries are:

(i) Having regard to the nature of the two liabilities which are alleged to found the claim for contribution could the Bank, if it had so desired, called up either of them at its election?

(ii) At the time the claim for contribution is made are there any facts, such as continued dealings between the Bank and its customer, which would unfairly restrict the security interests of the Bank if the claim for subrogation is to be recognized?

The requirement that an examination be conducted of what the Bank may or may not have done when a claim, which by hypothesis was never made, is theoretically taken to have been made is a refinement which mistakes the basis in fairness and justice of the doctrine of contribution. Further it is important to distinguish between the two doctrines of contribution and subrogation. The primary equitable right is the right to contribution. That right against Mrs. Zyngier could be enforced by Scholefield against her personally without any reference to the doctrine of subrogation. This latter doctrine is a secondary equitable right which is remedial and operates in aid of the primary right for the purpose of securing it. Thus viewed the only relevant enquiry is whether there is any equitable barrier to the subrogation at the point of time when it is claimed. So then the primary right - contribution - must exist at the point of payment on the bills by Scholefield. But the secondary right - subrogation - need only to exist at the point of claim. The Full Court mistakenly assumed that both

RECORD

doctrines had to apply to the facts at the point of payment on the bills.

(b) The Full Court relied upon the decision of the Appellate Division of the Ontario Supreme Court in Molson's Bank v. Kovinsky (1924) 4 D.L.R. 330 to support its conclusions.

pp.71-72, 73 & 84 11.19-27

See: at pp. 71-72, 73, and 84. The facts of that case were very different. Although the terms of the security instrument in question are not set out in detail it appears clear that it only operated to secure payment of the ultimate balance due by the customer to the Bank. In that situation it appears to have been held that the surety was only a surety for the due performance by the parties to a promissory note in respect of obligations owed in that capacity to the Bank. Further because of the terms of the mortgage in question it was held by two of the four judges (Masten and Middleton JJ.A.) that the Bank was required to exhaust its remedies against the parties to the promissory note before the "ultimate balance" due to it by its customer could be ascertained. The Chief Justice agreed in the result but gave no reasons. The other Judge, Order J.A., expressly left open the question as to whether a right of contribution would arise if, at the time the ultimate balance was determined and claimed by the Bank, that balance included the amount due on the promissory note. In our submission the case is of little or no assistance in the resolution of the present appeal. It appears to have had a considerable and misleading effect upon the decision of the Full Court. Even at the end of his judgment for the Full Court Fullagar J. said:

p.84 11.19-27

> "Quite apart from all the foregoing considerations, I am of opinion that, upon the proper construction of the mortgage instrument, Mrs. Zyngier became a surety to the Bank for the performance of their obligations by (amongst others) all persons who were liable on the bills of exchange. In other words to use the words of Masten J.A. in the Canadian case earlier cited, I think the true construction of the document

RECORD

is such as to make Mrs. Zyngier as against Scholefield, not a

co-surety but a surety for a surety."

In our submission this is entirely incorrect. There is not a word in the mortgage, or anything in the facts, to justify a conclusion that Mrs. Zyngier was a surety for Scholefield. The position was that she was alternatively liable along with the only other party to the bills; namely, Scholefield. Although it is conceded that if she were a surety for a surety there would be no contribution that is not the case here. See: Re Denton's Estate (1904) 2 Ch. 178 at pp.192-3 and at p.195; and, Standard Brands Ltd. v. Fox (1973) 44 D.L.R. (3rd) 69.

34. There is an alternative route to the result for which the Appellant contends. Section 72 of the Supreme Court Act 1958 (Victoria) provides as follows:

"Every person who

- being surety for the debt or duty of another or

- being liable with another for any debt or duty

pays such debt or performs such duty, shall be entitled to have assigned to him or to a trustee for him

- every judgment specialty or

- other security

which is held by the creditor in respect of such debt or duty, whether such debt or specialty or other security is or is not deemed at law to have been ratified by the payment of the debt or performance of the duty;

and such person shall be entitled to stand in place of the creditor and to use all the remedies and (if need be upon a proper indemnity) to use the name of the creditor in any action or other proceeding at law or in equity in order to obtain from

RECORD

- the principal debtor or

- any co-surety

- co-contractor or

- debtor (as the case may be)

indemnification for the advances made and loss sustained by the person who has paid such debt or performed such duty;

and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceedings by him:

Provided always that no

- co-surety

- co-contractor or

- co-debtor

shall be entitled to recover from any other

- co-surety

- co-contractor or

- co-debtor

by the means aforesaid more than the just proportion to which, as between those parties themselves such last-named person is justly liable."

This provision is in the same terms as and was copied from the U.K. Mercantile Law Amendment Act 1856 (19 & 20 Vic. c.97).

35. It is submitted that Scholefield was either:

(a) a person who was "surety for the debt or duty" of Zinaldi - for this purpose we accept the reasoning of the Full Court at pp. 75-77; or,

pp.75-77

(b) a person who was "liable with another" - i.e. Zinaldi - "for any debt or duty" - see: D. & J. Fowler (Australia) Ltd. v. Bank of New South Wales (1982) 2 N.S.W.L.R. 879 at p.884 per Helsham C.J. in Eq.; and, Maxal Nominees Pty. Ltd. v. Dalgety Ltd., op.cit. at pp.4-5.

RECORD

36. Further it is clear that Scholefield paid the debt or met the liability of Zinaldi to the Bank. The mortgage held by the Bank was a "security" which was "held by the creditor in respect of such debt or duty". The words are not to be limited to securities provided by the principal debtor. See: D. & J. Fowler op. cit. at p.885. It follows then, in our submission, that Scholefield is "entitled to stand in the place" of the Bank "and to use all the remedies and ... to use the name of" the Bank in any legal proceedings against Mrs. Zyngier. This entitlement includes the right to make demand and to enforce the mortgage. See: D. & J. Fowler op. cit. at pp. 886-7.

37. The authorities make it clear that the section should receive a liberal construction. See: Everingham v. Waddell (1881) 7 V.L.R. (L.) 180 at pp. 184-5 per Stawell C.J., and, Batchelor v. Lawrence (1861) 9 C.B. (N.S.) 543, 142 E.R. 214. The Full Court held that the section:

> "... does not extend the statutory right to any person other than a payer who (but for the general law effect of payment) had a right to indemnity or contribution against the giver of the security."

p.77 11.26-29

In our submission, this is incorrect. The section is a code, complete within itself. It is not to be confined in its operation to supposed and unexpressed limitations upon the right of contribution. If a case comes within its terms then effect is to be given to the statute irrespective of what may or may not have been the position in equity. It is our submission that every one of the requirements of the statute were satisfied in the present case. The decision of Eve J. In Re Lamplugh Iron Co. (1927) 1 Ch. 308 is instructive. There a director of a company guaranteed to find rates on property due from a company in the year prior to its liquidation. Under legislation then in force that was a preferential debt in the liquidation. Eve J. held that under s.5 of the Mercantile Law Amendment Act the director was entitled to that priority although the right did not exist at the time he paid the rates. There are other authorities which show that different results can be achieved under this statutory provision to those which would apply in

RECORD

equity as on a claim for contribution. See: e.g. In Re Praken (1894) 3 Ch. 400.

38. On this aspect of the case we rely upon the accuracy of the analysis of the Full Court of the Supreme Court of Queensland in Maxal Nominees Pty. Ltd. v. Dalgety Ltd. op. cit.

39. For the reasons advanced herein the Appellant submits that the judgment of the Full Court of the Supreme Court of Victoria was incorrect; that the Appeal should be allowed with costs; and, that the declaration sought in the counter-claim should be made; or, alternatively that the Agreed Statement of Issues should be answered as appears in paragraph 10(g) above. 10

CLIFFORD PANNAM

LESLIE GLICK