31/85

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 AND SONS LIMITED — Appellant

- and -

CHARNA ZYNGIER — First Respondent

- and -

WESTPAC BANKING CORPORATION — Second Respondent

RECORD OF PROCEEDINGS

CLYDE & CO.,
30 Mincing Lane,
London EC3R 7BR

Solicitors for the First Respondent

MAPLES TEESDALE
21 Lincoln's Inn Fields,
London WC2A 3DU

Solicitors for the Appellant

COWARD CHANCE
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the Second Respondent

INDEX OF REFERENCE

No.	Description of Document	Date	Page
	IN THE SUPREME COURT OF VICTORIA		
1.	Amended Statement of Claim	27th May 1982	1
2.	Defence of Second Respondent	13th August 1979	6
3.	Defence and Counterclaim of Appellant	16th September 1982	8
4.	Reply and Defence to Counterclaim of Appellant	28th October 1982	14
5.	Order	30th November 1982	16
6.	Agreed Statement of Facts	28th January 1983	17
7.	Agreed Statement of Issues	28th January 1983	23
8.	Reasons for Judgment of His Honour Mr. Justice O'Bryan	10th March 1983	26
9.	Judgment	10th March 1983	45
	IN THE FULL COURT OF THE SUPREME COURT OF VICTORIA		
10.	Notice of Appeal	7th April 1983	47
11.	Reasons for Judgment	29th February 1984	54
12.	Judgment	29th February 1984	86
13.	Order granting final leave to appeal to Her Majesty in Council	14th June 1984	87

EXHIBITS

Exhibit Mark	Description of Document	Date	Page
	Exhibits to Agreed Statement of Facts		
A.	Instrument of Mortgage	6th February 1976	89

			Page No.
B.	Bill of Exchange	17th August 1976	94
C.	Bill of Exchange	19th August 1976	97
D.	Bill of Exchange	13th October 1976	100
E.	Bill of Exchange	21st October 1976	103
F.	Bill of Exchange	23rd November 1976	106
G.	Letter from the Second Respondent to the First Respondent	16th August 1978	109
H.	Letter from Solicitors for the Second Respondent to the Solicitors for the First Respondent	1st September 1978	111
I.	Caveat	26th September 1978	113

DOCUMENTS TRANSMITTED TO THE JUDICIAL COMMITTEE BUT NOT REPRODUCED

No.	Description of Document	Date
1.	Transcript of Instrument of Mortgage	6th February 1976
2.	Notice of Motion	19th March 1984
3.	Order granting conditional leave to appeal to Her Majesty in Council	20th March 1984
4.	Notice of Motion	12th June 1984
5.	Certificate of Documents	26th July 1984

[I CE]RTIFY THE TYPEWRITING ON THIS [PAGE]
[PURPORT]S TO BE A TRUE [COPY OF THE] Statement of Claim
[OF TH]E ORIGINAL Amended [STATEMENT] OF W[RIT]
[PURPORTS TO] BE A COPY AS FILED IN
[OFF]ICE.
DATED THIS 26th DAY OF July 1984
Deputy PROTHONOTARY OF THE
SUPREME COURT

In the Supreme Court of Victoria

No.1
Amended Statement of Claim
27th May 1982

AMENDED STATEMENT OF CLAIM

(DELIVERED PURSUANT TO ORDER OF THE HONOURABLE MR. JUSTICE O'BRYAN MADE THE 17TH DAY OF MAY, 1982)

1. The Plaintiff is and was at all times material registered as the proprietor of an estate in fee simple in all that piece of land more particularly described in Certificate of Title Volume 8542 Folio 360 (which is hereinafter called "the said land").

2. The firstnamed Defendant ("the Bank") is and was at all times material a company duly incorporated pursuant to the laws of the State of Victoria.

10

3. The secondnamed Defendant ("Scholefield") is and at all material times was incorporated pursuant to the laws of the United Kingdom and registered as a foreign company pursuant to the laws of the State of Victoria.

4. By an instrument of mortgage dated 6th February 1976 and registered at the Office of Titles in dealing G174231 the Plaintiff mortgaged to the Bank all her estate and interest in the said land to secure inter alia the balance for the time being owed by Zinaldi & Company Pty. Ltd. (which is hereinafter called "the Debtor") to the Bank on its account current with the Debtor 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 Debtor or for or in

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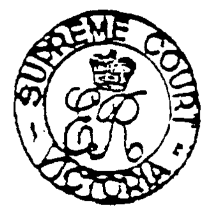


respect of any bills of exchange or promissory notes to which the debtor is or may hereafter be a party and on which the Debtor is or may hereafter be liable.

5. The Plaintiff duly delivered up possession of the said instrument of mortgage and the duplicate of the said Certificate of Title to the Bank.

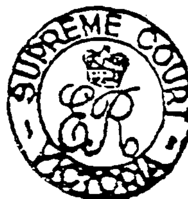
6. It was a term, inter alia, of the said mortgage that the Plaintiff would pay to the Bank on demand the balance for the time being owing by the Debtor to the Bank and secured by the said mortgage. 10

7. It was a further term, inter alia, of the said mortgage that upon the payment or tender by the Plaintiff to the Bank of all monies owing by the Debtor to the Bank, the Bank would execute an instrument of discharge of the said mortgage in registrable form and deliver up possession of the said duplicate Certificate of Title to the Plaintiff.

8. Prior to 6th February 1976 Scholefield drew a series of bills of exchange upon, and had the same accepted by, the Debtor.

9. After the said bills of exchange were accepted by the Debtor as aforesaid, Scholefield endorsed the same in favour of the Bank, by reason whereof the Bank became the holder, and Scholefield the indorser, thereof. 20

10. In due course but prior to 6th February 1976, upon presentment of the said bills of exchange by the Bank, the



Debtor dishonoured the said bills of exchange and the Bank looked to and was paid the amount due thereon by Scholefield.

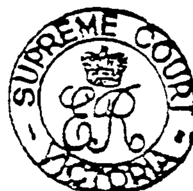
11. On 16th August 1978 the Bank demanded of the Plaintiff payment of all monies secured by the said mortgage being all monies due by the Debtor to the Bank.

12. On 23rd August 1978 the Plaintiff, alternatively the Debtor, tendered to the Bank the sum of $20,877.11 being all the monies that were as at that date due by the Debtor to the Bank and requested the Bank to execute an instrument of discharge of the said mortgage.

13. The Bank and Scholefield wrongfully contend and have at all times material since 23rd August 1978 wrongfully contended, that by reason of the fact that Scholefield had paid to the Bank the amount due under the said bills of exchange, which amount exceeded the said bills of exchange, which amount exceeded the said sum of $20,377.11, and because Scholefield had not been reimbursed thereafter by the debtor, Scholefield was entitled to:-

(a) an assignment of the Bank's right, title and interest in the said land under and by virtue of the said mortgage; and

(b) contribution from the Plaintiff to the extent of the amount so paid by Scholefield to the Bank under the said Bills of exchange.



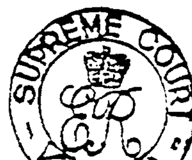
14. On 20th September 1978 Scholefield wrongfully lodged with the Registrar of Titles a Caveat wrongfully claiming an estate or interest in the said land and wrongfully forbidding the registration of any person as transferee or proprietor of or of any instrument affecting such alleged estate or interest, and the said caveat was entered on the Certificate of Title of the said land.

15. By reason of the matters set forth in paragraph 13 hereof, the Bank has wrongfully refused and continues wrongfully to refuse to accept the said sum of $20,877.11 and has wrongfully refused and continues wrongfully to refuse to execute an instrument of discharge of the said mortgage in registrable form or otherwise or to deliver up to the Plaintiff the said duplicate Certificate of Title. 10

16. By reason of the matters aforesaid, the Plaintiff has suffered loss and damage.

AND THE PLAINTIFF CLAIMS:

1. A declaration that Scholefield is not entitled to:-
   (a) an assignment of the Bank's right, title and interest in the said land under and by virtue of the said mortgage or at all; 20
   (b) contribution from the Plaintiff to the extent of the amount so paid by Scholefield to the Bank under the said bills of exchange;
   (c) any estate or interest in the said land capable of supporting the said Caveat or at all.



2. An order that Scholefield withdraw the said Caveat.

3. A declaration that the Bank is obliged to execute an instrument of discharge of the said mortgage and to deliver the same together with the said duplicate Certificate of Title to the Plaintiff.

4. An order that upon tender by the Plaintiff of the said sum of $20,877.11 to the Bank, the Bank execute an instrument of discharge of the said mortgage in registrable form and deliver the same together with the said duplicate

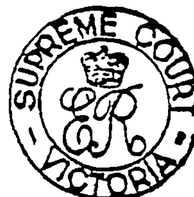
10 Certificate of Title to the Plaintiff.

5. Damages.

6. Costs.

7. Such further or other orders as to this Honourable Court may seem meet.

JOHN KARKAR



I CERTIFY THE TYPEWRITING ON THESE PAGES TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL Defence WHICH PURPORTS TO BE A COPY AS FILED IN OFFICE.
DATED THIS 26th DAY OF July 1984
Deputy PROTHONOTARY OF THE SUPREME COURT

In the Supreme Court of Victoria

No.2
Defence of Second Respondent
13th August 1979

DEFENCE
of Second Respondent

To the endorsement standing in place of the Statement of Claim the Defendant says:-

1. IT admits the allegations contained in paragraph 1 thereof.

2. IT admits the allegations contained in paragraph 2 thereof.

3. SUBJECT to referring to the terms of the said instrument of mortgage, it admits the allegations contained in paragraph 3 thereof. 10

4. IT admits the allegations contained in paragraph 4 thereof.

5. IT admits the allegations contained in paragraph 5 thereof.

6. IT admits the allegations contained in paragraph 6 thereof.

7. IT admits the allegations contained in paragraph 7 thereof.

8. IT admits the allegations contained in paragraph 8 thereof. 20

9. IT admits the allegations contained in paragraph 9 thereof.

10. IT admits the allegation contained in paragraph 10 thereof.

11. IT admits the allegations contained in paragraph 11 thereof.

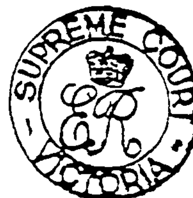
12. SCHOLEFIELD contends and at all material times has contended that by reason of the fact that it paid to the Defendant the amount due under the said bill of exchange or a number of bills of exchange which amount exceeded the said sum of $20,877.11, and, because it was not reimbursed therefore by the debtor, Scholefield is entitled to the benefit of the security constituted by the said mortgage to the extent of the amount so paid by Scholefield to the Defendant. Save as aforesaid, it denies each and every allegation contained in paragraph 12 thereof.

13. IT admits that it has refused and continues to refuse to accept the said sum of $20,877.11 and has refused and continues to refuse to execute an instrument of discharge of the said mortgage in registrable form or otherwise or to deliver up to the Plaintiff the said duplicate certificate of title. Save as aforesaid it denies each and every allegation contained in paragraph 13 thereof.

14. IT denies each and every allegation contained in paragraph 14 thereof.

(sgd) PETER R. HAYES.

DELIVERED the 13th day of August, 1979.



I CERTIFY THE TYPEWRITTEN PAGES TO BE THE ORIGINAL Defence and Counterclaim PURPORTING ... OFFICE.
DATED THIS 26th DAY OF July 84
Deputy PROTHONOTARY OF SUPREME COURT

In the Supreme Court of Victoria

No.3
Defence and Counterclaim of Appellant
16th September 1982

SECOND DEFENDANT'S DEFENCE AND COUNTERCLAIM

DEFENCE

The second defendant, to the Amended Statement of Claim delivered pursuant to the Order of the Honourable Mr. Justice O'Bryan made the 17th day of May 1982, says:-

1. It admits the allegations in paragraph 1 thereof.

2. It admits the allegations in paragraph 2 thereof.

3. It admits the allegations in paragraph 3 thereof.

4. Subject to produce of the instrument of mortgage referred to in paragraph 4 thereof and reference to its full terms and effect, it admits the allegations in paragraph 4 thereof. 10

5. Further to paragraph 4 thereof, by the said instrument of mortgage the plaintiff convenanted with the Bank (inter alia):-

(a) To pay to the Bank on demand all sums which then were or might thereafter become owing from or payable by the Debtor to the Bank for or in respect of any bills of exchange to which the Debtor was or might thereafter be a party and on which the Debtor was or might thereafter be liable (either primarily or only in the event of any other person failing to pay the same) and which were or might thereafter be discounted or paid or which might for the time being be held by the 20

Bank.

(b) In respect of all moneys due by or on account of the Debtor and secured thereby, that as between the plaintiff and the Bank the plaintiff should be a principal debtor for the whole of the moneys thereby secured.

6. It admits the allegations in paragraph 5 thereof.

7. Subject to produce of the instrument of mortgage and reference to its full terms and effect, it admits the allegations in paragraph 6 thereof.

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8. It does not admit the allegations in paragraph 7 thereof.

9. It denies each and every allegation in paragraph 8 thereof.

10. After 6 February 1976, it drew a series of bills of exchange upon the Debtor which the Debtor duly accepted.

PARTICULARS

Number	Date	Sum in Pounds Sterling
74832	17 August 1976	576.97
74988	19 August 1976	2725.92
77589	13 October 1976	6357.95
78022	21 October 1976	5491.85
79412	23 November 1976	5717.77

20

11. Each of the bills alleged in paragraph 10 hereof was for payment to the order of the Bank.

12. It refers to paragraph 9 hereof and denies each and every allegation in paragraph 9 thereof.

In the Supreme
Court of Victoria

No.3
Defence and Counterclaim
of Appellant
16th September 1982
(Contd.)

13. Each of the bills alleged in paragraph 10 hereof was discounted by the second defendant with the Bank after the bill was accepted by the Debtor as aforesaid.

14. It refers to paragraph 9 hereof and denies each and every allegation in paragraph 10 thereof.

15. The Debtor dishonoured each of the bills alleged in paragraph 10 hereof.

16. Upon the dishonour of each of the bills the Bank was entitled to demand payment thereof by the plaintiff pursuant to the instrument of mortgage and, in particular, 10 the covenant thereof alleged in paragraph 5(a) hereof.

17. Upon the dishonour of each of the bills the Bank demanded payment thereof by the second defendant.

18. It duly paid the Bank the sums required by the Bank to be paid as alleged in paragraph 16 hereof.

19. The Debtor has not reimbursed it in the sums referred to in paragraph 18 hereof or any part thereof.

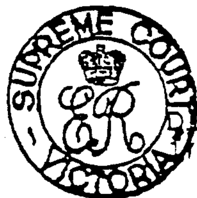
20. It admits the allegations in paragraph 11 thereof.

21. It admits the allegations in paragraph 12 thereof.

22. It refers to paragraph 9 hereof and denies each and every 20 allegation in paragraph 13 thereof.

23. It admits that it contends and that at all times since 23 August 1978 it has contended that by reason of the matters alleged in paragraphs 18 and 19 hereof:

(a) it is and has been entitled as against the



plaintiff to contribution in respect of the payments made by it as alleged in paragraph 18 hereof;

(b) pursuant to section 72 of the Supreme Court Act 1958, or otherwise, it is and has been entitled to require the Bank to assign to it or to a trustee for it the security constituted by the said instrument of mortgage to secure the payment to it by the plaintiff of the sum for contribution to which it is entitled as aforesaid.

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24. Save that it admits that on 26 September 1978 it lodged with the Registrar of Titles a caveat claiming an estate or interest in the said land (and to the full terms of which caveat it will refer at the trial of this action) and that a memorandum of the said caveat was duly entered upon the said Certificate of Title, it denies each and every allegation in paragraph 14 thereof.

25. It refers to paragraphs 22 and 23 hereof and denies each and every allegation in paragraph 15 thereof.

20

26. It denies each and every allegation in paragraph 16 thereof.

COUNTERCLAIM

27. It refers to and repeats the allegations in the Amended Statement of Claim which are admitted in paragraphs 1, 2, 3, 4, 6, 20 and 21 of its Defence.

28. It refers to and repeats the allegations in paragraphs 5 10, 11, 13, 15, 16, 17, 18 and 19 of its Defence.

29. In the premises -

(a) since making the payments alleged in paragraph 18 of the Defence, it has been entitled as against the plaintiff to contribution in that behalf;

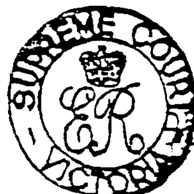
(b) since 23 August 1978 and pursuant to section 72 of the Supreme Court 1958, or otherwise, it has been entitled to require the Bank to assign to it or to a trustee for it the security constituted by the said instrument of mortgage in order to secure the payment to it by the plaintiff of the sum for contribution to which it is entitled as aforesaid. 10

30. The Plaintiff wrongfully denies that it has been or is entitled as alleged in paragraph 29 hereof.

AND THE SECOND DEFENDANT COUNTERCLAIMS:

A. A declaration that it is and has been entitled to contribution by the plaintiff in respect of the payments made by it to the Bank in respect of each of the bills of exchange alleged in paragraph 10 of its Defence. 20

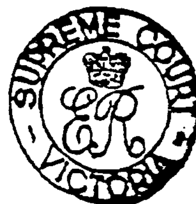
B A declaration that it is and has been entitled to require the Bank to assign to it or to a trustee for it the security constituted by the instrument of mortgage alleged in paragraph 4 of the Amended Statement of Claim in order



to secure the payment to it by the plaintiff of the sum for contribution in which the plaintiff is liable to it.

K.J. MAHONY

DELIVERED the 16th day of September 1982.



I CERTIFY THE TYPEWRITING ON TH
PAGES TO BE A ... CORRECT ... Reply and Defence to Counterclaim
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PURPORTS TO BE ... FILED IN
OFFICE.
DATED THIS 26th DAY OF July 1984
Deputy PROTHONOTARY OF THE
SUPREME COURT

In the Supreme
Court of Victoria

No.4
Reply and Defence to Counterclai
of the Appellant
28th October 1982

REPLY AND DEFENCE TO COUNTERCLAIM OF THE SECONDMANED

DEFENDANT

The Plaintiff as to the secondnamed Defendant's Defence and Counterclaim delivered herein on the 10th day of September 1982 says:-

1. Save as to the admission therein contained, she joins issue with the secondnamed Defendant on its Defence.

DEFENCE TO COUNTERCLAIM

2. She admits the allegations contained in paragraph 27 thereof. 10

3. As to paragraph 28 thereof:-

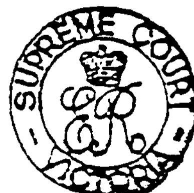
   (a) Subject to the production of the said instrument of mortgage and reference to its full terms, she admits the allegations contained in paragraph 5 thereof;

   (b) She admits the allegations contained in paragraphs 10, 11, 13 and 15 thereof;

   (c) She does not plead to the allegations contained in paragraph 16 thereof as the same contained no allegations of fact but pleads matters of law; 20

   (d) She admits the allegations contained in paragraphs 17, 18 and 19 thereof.

4. She does not plead to the allegations contained in paragraph 29 thereof as the same contains no allegations of fact, but pleads matters of law.

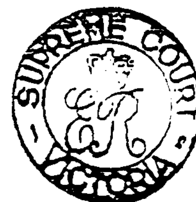


5. As to paragraph 30 thereof, she admits that she denies that the secondnamed Defendant has been or is entitled as alleged in paragraph 29 thereof and denies that such denial is wrongful.

ALAN H. GOLDBERG

JOHN KARKAR

DELIVERED the 28th day of October 1982.



In the Supreme Court of Victoria

No.5

Order Altering name of Second Respondent - 30th November 1982

IN THE SUPREME COURT OF VICTORIA

B E T W E E N :

1979 No.2899

CHANA ZYNGIER — Plaintiff

-and-

THE COMMERCIAL BANK OF AUSTRALIA LIMITED — First Defendant

-and-

SCHOLEFIELD GOODMAN & SONS LTD. — Second Defendant

10

BEFORE THE HONOURABLE MR. JUSTICE O'BRYAN (IN CHAMBERS) TUESDAY THE 30TH DAY OF NOVEMBER, 1982

UPON APPLICATION made on behalf of the firstnamed Defendant and UPON HEARING the solicitor for the plaintiff, the solicitor for the firstnamed Defendant and the solicitor for the secondnamed Defendant I DO ORDER: -

1. That the name of the firstnamed Defendant be altered to WESTPAC BANKING CORPORATION.

2. That this application be otherwise adjourned to the 16th day of December 1983.

20

VICTORIA STAMP DUTY VICTORIA STAMP DUTY

21/3/84

$1 $10

.... O'Bryan J.

JUDGE

This Order was taken out by Messrs. J.M. Smith & Emmerton of 224 Queen Street, Melbourne, Solicitors for the firstnamed Defendant.

I CERTIFY THIS AND THE FOLLOWING ... PAGES ... THE ... Agreed Statement of Facts ... DATED THIS 26th ... July ... 84
Deputy PROTHONOTARY OF THE SUPREME COURT

AGREED STATEMENT OF FACTS

1. On 6th February, 1976 Zinaldi & Co. Pty. Ltd. was indebted to the Westpac Banking Corporation ("the Bank").

2. (a) On 6th February, 1976, the Plaintiff executed an instrument of mortgage in favour of the Bank of all her estate and interest in the land described in Certificate of Title Volume 8542 Folio 360 of which a copy is annexed hereto together with a copy thereof in ordinary typescript and marked for identification with the letter "A".

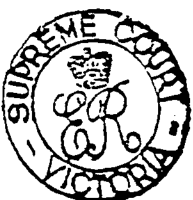
   (b) The Plaintiff delivered up to the Bank the duplicate Certificate of Title of the land;

   (c) The instrument of mortgage was duly registered in the Office of Titles in dealing No. G174231.

3. (a) On 17th August, 1976, the secondnamed Defendant ("Scholefield") drew a bill of exchange on Zinaldi & Co. for $576.97 payable to the order of the Bank;

   (b) The bill was accepted by or on behalf of Zinaldi & Co. on 25th August, 1976;

   (c) Scholefield delivered the bill to the Bank and discounted the bill with the Bank;



   (d) The bill matured for payment on 31st January, 1977 and upon presentment of the bill by the Bank to

Zinaldi & Co. Pty. Ltd., the latter dishonoured the same;

(e) The Bank presented the bill to Scholefield as drawer for payment and Scholefield paid to the Bank the amount due thereon;

(f) Annexed hereto and marked "B" is a copy of the said bill.

4. (a). On 19th August, 1976, Scholefield drew a bill of exchange on Zinaldi & Co. for $2,725.92 payable to the order of the Bank; 10

(b) The bill was accepted by or on behalf of Zinaldi & Co. on 7th September, 1976;

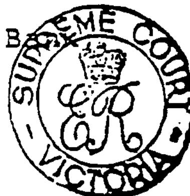
(c) Scholefield delivered the bill to the Bank and discounted the bill with the Bank;

(d) The bill matured for payment on 31st January, 1977 and upon presentment of the bill by the Bank to Zinaldi & Co. Pty. Ltd., the latter dishonoured the same;

(e) The Bank presented the bill to Scholefield as drawer for payment and Scholefield paid to the Bank the amount due thereon; 20

(f) Annexed hereto and marked "C" is a copy of the said bill.

5. (a) On 13th October, 1976 Scholefield drew a bill of exchange on Zinaldi & Co. for $6,357.95 payable to the order of the Bank



(b) The bill was accepted by or on behalf of Zinaldi & Co. on 28th October, 1976;

(c) Scholefield delivered the bill to the Bank and discounted the bill with the Bank;

(d) The bill matured for payment on 11th January, 1977 and upon presentment of the bill by the Bank to Zinaldi & Co. Pty. Ltd. the latter dishonoured the same;

(e) The Bank presented the bill to Scholefield as
10 drawer for payment and Scholefield paid to the Bank the amount due thereon;

(f) Annexed hereto and marked "D" is a copy of the said bill.

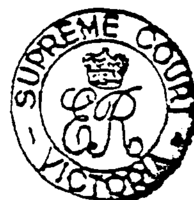
6. (a) On 21st October, 1976, Scholefield drew a bill of exchange on Zinaldi & Co. for $5,491.85 payable to the order of the Bank;

(b) The bill was accepted by or on behalf of Zinaldi & Co. on 23rd November, 1976;

(c) Scholefield delivered the bill to the Bank and
20 discounted the bill with the Bank;

(d) The bill matured for payment on 31st January, 1977 and upon presentment of the bill by the Bank to Zinaldi & Co. Pty. Ltd., the latter dishonoured the same;

(e) The Bank presented the bill to Scholefield as



drawer for payment and Scholefield paid to the Bank the amount due thereon;

(f) Annexed hereto and marked "E" is a copy of the said bill.

7\. (a) On 23rd November, 1976, Scholefield drew a bill of exchange on Zinaldi & Co. for $5,717.77 payable to the order of the Bank;

(b) The bill was accepted by or on behalf of Zinaldi & Co. on 21st December, 1976;

(c) Scholefield delivered the bill to the Bank and discounted the bill with the Bank;

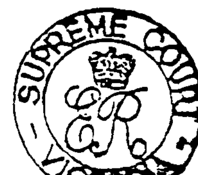
(d) The bill matured for payment on 21st January, 1977 and upon presentment of the bill by the Bank to Zinaldi & Co. Pty. Ltd., the latter dishonoured the same;

(e) The Bank presented the bill to Scholefield as drawer for payment and Scholefield paid to the Bank the amount due thereon;

(f) Annexed hereto and marked "F" is a copy of the said bill.

At all material times, there was no firm or entity known as "Zinaldi & Co.". All the parties hereto intended and treated "Zinaldi & Co." to be and as being Zinaldi & Co. Pty. Ltd.

9\. Zinaldi & Co. Pty. Ltd. has not reimbursed Scholefield



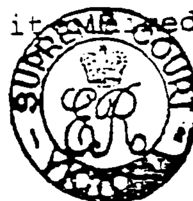
in respect of any of the amounts due on the said bills paid by Scholefield to the Bank as set forth in paragraphs 3, 4, 5, 6 and 7 hereof, or in respect of any part of any of those sums;

10. On 16th August, 1978, the Bank demanded of the Plaintiff payment of all the principal monies and interest secured by the said instrument of mortgage. Annexed hereto and marked "G" is a copy of the Bank's demand dated 16th August, 1978;

10 11. On 23rd August, 1978, the Plaintiff tendered and paid to the bank the sum of $20,877.11 being all the monies that were as at that date due by Zinaldi & Co. Pty. Ltd. to the Bank and which had been demanded by the Bank in its said demand dated 16th August, 1978 and requested the Bank to execute an instrument of discharge of the said mortgage;

12. The Bank refused to discharge the said mortgage because of claims made by Scholefield to be entitled to an equitable interest in the said land. Annexed hereto and
20 marked "H" is the letter from the Bank's solicitors containing the said refusal.

13. (a) On 26th September, 1978 Scholefield lodged with the Registrar of Titles in the Office of Titles in Dealing number H247339, a caveat relating to the said land in which it claimed an equitable



In the Supreme
Court of Victoria

No.6
Agreed Statement of
Facts
28th January 1983
(Contd.)

interest in the said land for the reasons therein set out;

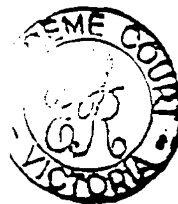
(b) A memorandum of the caveat was duly entered on the Certificate of Title relating to the said land.

Annexed hereto and marked "I" is a copy of the said Caveat.

Signed
....
Solicitors for the Plaintiff

....
Solicitors for the firstnamed Defendant. 10

....
Solicitors for the secondnamed Defendant.



CERTIFY THE TYPEWRITTEN ON THIS PAGE
PAGES TO BE A TRUE AND CORRECT COPY OF
THE ORIGINAL Agreed Statement of Issues WHICH IT
PURPORTS TO BE A COPY AS FILED IN THIS
OFFICE.
DATED THIS 26th DAY OF July 1984
Deputy PROTHONOTARY OF THE
SUPREME COURT

AGREED STATEMENT OF ISSUES

1. Is the firstnamed Defendant ("the bank") obliged to execute an instrument of discharge of the mortgage referred to in paragraph 2 of the Agreed Statement of Facts in registrable form and deliver the same together with the duplicate Certificate of Title Volume 8542 Folio 360 to the Plaintiff having regard to the facts set out in the Agreed Statement of Facts?

10 2. Upon the dishonour of the bills of exchange referred to in -

(a) paragraph 3 -

(b) paragraph 4 -

(c) paragraph 5 -

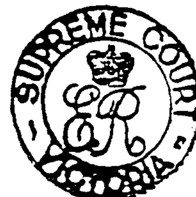
(d) paragraph 6 -

(e) paragraph 7 -

of the Agreed Statement of Facts, was the first defendant ("the bank") entitled to demand of the Plaintiff, pursuant to the instrument of mortgage a copy of which is

20 annexed to the Agreed Statement of Facts, payment of the amount due and payable by Zinaldi & Co. Pty. Ltd. as acceptor of the bill?

3. From the time at which the secondnamed Defendant ("Scholefield") paid to the bank the amount due on the bill of exchange referred to in -



(a) paragraph 3;

(b) paragraph 4;

(c) paragraph 5;

(d) paragraph 6;

(e) paragraph 7,

of the Agreed Statement of Facts, has Scholefield been entitled to contribution from the Plaintiff in respect of the amount paid by it to the bank?

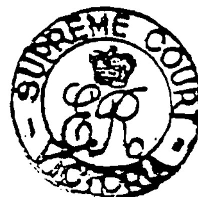
4. Is Scholefield entitled to require the bank and is the bank obliged - 10

(a) not to discharge the mortgage -

(i) in the circumstances set forth in paragraphs 10 and 11 of the Agreed Statement of Facts;

(ii) if and when the bank accepts the tender and payment referred to in paragraph 11 of the Agreed Statement of Facts?

(b) in the circumstances set forth in paragraphs 10 and 11 of the agreed Statement of Facts or if and when the bank accepts the tender and payment 20 referred to in paragraph 11 of the Agreed Statement of Facts or otherwise releases the Plaintiff from liability pursuant to the demand dated 16th August 1978 which is referred to in paragraph of the Agreed Statement of Facts, to



assign to Scholefield or to a trustee for Scholefield by the Plaintiff of any sums to which Scholefield is entitled by way of contribution by the Plaintiff in respect of the amounts paid by Scholefield to the bank in respect of the said bills of exchange?

5. On 26th September 1978, did Scholefield have the interest in the land referred to in paragraph 2 of the Agreed Statement of Facts which was claimed by the caveat a copy of which is referred to in paragraph 13 of the Agreed Statement of Facts?

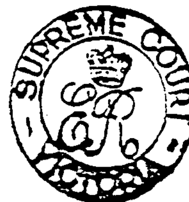
10

6. Is the Plaintiff entitled against the Defendants or either and which of them to any and what sum for damages?

Signed
....
Solicitors for the Plaintiff

....
Solicitors for the firstnamed Defendant.

....
Solicitors for the secondnamed Defendant.



I CERTIFY THE TYPEWRITING ON THE PAGES TO BE A TRUE AND CORRECT COPY OF THE ORIGINAL Reasons for Judgment OF WHICH IT PURPORTS TO BE A COPY FILED IN THIS OFFICE.
DATED THIS 26 DAY OF July 1984
Deputy PROTHONOTARY OF THE SUPREME COURT

In the Supreme Court of Victoria

No.8

Reasons for Judgment of His Honour Mr. Justice O'Bryan
10th March 1983

REASONS FOR JUDGMENT

OF HIS HONOUR MR. JUSTICE O'BRYAN

HIS HONOUR: In this action the parties have filed an agreed statement of facts. References which I make to the facts are derived from the statement. On 6th February 1976 the plaintiff executed an instrument of mortgage in favour of The Commercial Bank of Australia Limited, now Westpac Banking Corporation, (hereinafter referred to as the bank), in respect of the whole of the land described in Certificate of Title Volume 8542 Folio 360 (the land). The mortgage was granted "in consideration of certain advances and accommodation being granted by The Commercial Bank of Australia Limited ... during the pleasure of the bank to the mortgagor ... and/or Zinaldi and Company Pty. Ltd. ..." For convenience, I shall refer to Zinaldi and Company Pty. Ltd. hereafter as 'the debtor' which is the terminology used in the mortgage to describe Zinaldi and Company Pty. Ltd. 10

Five bills of exchange were drawn by Scholefield Goodman & Sons Limited (Scholefield) between 17th August and 23rd November 1976 and accepted by the debtor. The bills were subsequently discounted by the bank as holder and upon being presented to the debtor were dishonoured. The bank as payee then presented the bills to Scholefield, as drawer, for payment. Section 62 of the Bills of 20

Exchange Act 1909 enabled the bank to recover from any party liable on the bills and, in this instance, it chose Scholefield. The bank duly recovered the amount of the bills totalling S.20,870.46 Pounds (approximately) from Scholefield, but Scholefield has been unable to recover from the debtor. Scholefield, having been compelled to pay the bills may recover the amount of the bills from the debtor, as acceptor, under s.62, but, apparently there are no funds available from that source.

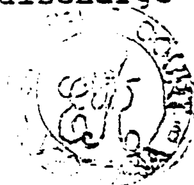
10 On 16th August 1978 the bank demanded of the plaintiff payment of all the principal monies and interest secured by the mortgage. The mortgage encompassed all indebtedness by the debtor and the plaintiff to the bank. The plaintiff thereupon tendered to the bank $20,877.11, the monies then due to the bank by the debtor and/or the plaintiff on the account current of the plaintiff and/or debtor. At the same time the plaintiff requested the bank to execute an instrument of Discharge of the Mortgage. The bank declined to discharge the mortgage on advice given it by its
20 solicitors to the effect that Scholefield claimed to be entitled to an equitable interest in the land.

On 26th September 1978 Scholefield caused a caveat to be lodged with the Registrar of Titles forbidding registration of any instrument affecting the said mortgage and claiming an equitable interest in the land "pursuant

to its entitlement by statute or by equity to be assigned or to have assigned to a trustee for it the right title and interest of (the bank) in such land under and by virtue of the mortgage ... the obligations of (the plaintiff) to the bank under the said mortgage having been satisfied and Scholefield being entitled to contribution from (the plaintiff) in respect of its having discharged certain obligations of (the debtor) to the bank which obligations were the subject of guarantee by (the plaintiff) under the mortgage." 10

In April 1979 the plaintiff began an action against the bank alone. Scholefield was subsequently added as a defendant to the action. In an amended Statement of Claim the plaintiff seeks relief as follows:

1. A declaration that Scholefield is not entitled to:-
   (a) an assignment of the Bank's right, title and interest in the said land under and by virtue of the said mortgage or at all;
   (b) contribution from the Plaintiff to the extent of the amount so paid by Scholefield to the Bank under the said bills of exchange; 20
   (c) any estate or interest in the said land capable of supporting the said Caveat or at all.
2. An order that Scholefield withdraw the said Caveat.
3. A declaration that the Bank is obliged to execute an instrument of discharge of the said mortgage



and to deliver the same together with the said duplicate Certificate of Title to the Plaintiff.

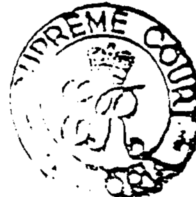
4. An order that upon tender by the Plaintiff of the said sum of $20,877.11 to the Bank, the Bank execute an instrument of discharge of the said mortgage in registrable form and deliver the same together with the said duplicate Certificate of Title to the Plaintiff.

In its defence Scholefield asserts that it has been
10 entitled as against the plaintiff to contribution in respect of the payment made by it to the bank and that pursuant to s.72 of the Supreme Court Act 1958, or otherwise, it is and has been entitled to require the bank to assign to it or to a trustee for it the security constituted by the said instrument of mortgage to secure the payment to it by the plaintiff of the sum for contribution to which it is entitled.

In a counter-claim Scholefield seeks the following declarations:

20 1. That it is and has been entitled to contribution by the plaintiff in respect of the payments made by it to the bank in respect of each of the bills by exchange.

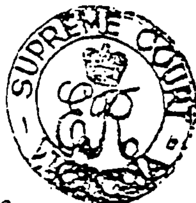
2. That it is and has been entitled to require the bank to assign to it or to a trustee for it the security constituted by the instrument of mortgage



over the land to secure the payment to it by the plaintiff of the sum for contribution in which the plaintiff is liable to it.

When the trial commenced the bank, through its counsel, indicated that it did not wish to present any argument to the court and further indicated that it was willing to abide any order the court might make in relation to the plaintiff's claim or Scholefield's counter-claim and the said mortgage.

In essence, the contest between the plaintiff and Scholefield is whether Scholefield is entitled to contribution from the plaintiff in respect of the amount it paid to the bank. The plaintiff contends that, in the circumstances that she tendered to and paid the bank on 23rd August 1978 all the monies that were at that date due by the debtor to the bank and which had been demanded by the bank, she is entitled to receive from the bank an executed instrument of discharge of the mortgage. Scholefield contends that the equity of the case requires the plaintiff to share in the loss it sustained, that is to say, to contribute to make good the loss because the plaintiff and Scholefield were at all material times co-sureties and under co-ordinate liabilities to make good the failure of the debtor to pay the amount due on the bills. The equitable doctrine of contribution invoked by Scholefield arises, it is contended, from principles expressed by the Court of Chancery in



Duncan Fox & Co. v. North & South Wales Bank (1880) 6 A.C. 1; Greythorn v. Swinburne (1807) 14 Ves Jun 160; 33 E.R. 482; Dering v. Lord Winchelsea (1787) 1 Cox Eq. Cas. 318; 29 E.R. 1184; and subsequent cases.

The submissions made by counsel were concerned with the construction and effect of certain clauses in the instrument of mortgage already referred to. It is, therefore, necessary to set out some of the clauses and covenants in the mortgage. As I do so, I shall omit words which counsel suggested are not relevant to the dispute. I shall substitute for the expression "the mortgagor" the expression "the plaintiff".

10

" In consideration of certain advances and accommodation being granted by the bank to the plaintiff and/or to the debtor and/or of the bank's having agreed not to require immediate payment from the plaintiff and/or of the debtor of certain monies which the plaintiff and/or the debtor is now indebted or liable to the bank ... (the plaintiff) do hereby covenant with the bank as follows:

20

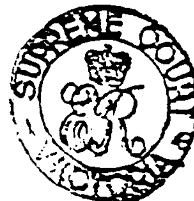
"1. To pay to the bank on demand the balance for the time being owing by the plaintiff to the bank on the account current of the plaintiff with the bank and/or by the debtor on the account current of the debtor with the bank and all and every other the sums

and sum of money (if any) which ... may hereafter become owing from or payable by the debtor ... for or in respect of any Bills of Exchange ... to which ... the debtor is or may hereafter be a party and on which ... the debtor is or may hereafter be liable ... 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 which may for the time being be held by the bank ..."

"10. That in respect of all monies due by or on account of the debtor and hereby secured:- 10

(a) As between the plaintiff and the bank the plaintiff shall be a principal debtor for the whole of the monies hereby secured.

(b) That the liability of the plaintiff 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 money at 20 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 drawers ... of Bills of Exchange ... received by the bank ... bearing the name of the debtor and



held by the bank any time or other indulgence ... and that this mortgage shall be considered to be in addition to any other mortgage guarantee or security which the bank now has on which it may hereafter take for the debts of the debtor ... and that while any money remains secured by this mortgage the plaintiff will not in any way claim the benefit or seek the transfer of any such mortgage or security ... "12. That the plaintiff shall not be entitled to a discharge of this mortgage so long as there is any liability actual or contingent of (the plaintiff) to the bank under any guarantee or other document executed by (the plaintiff)."

10

The payment tendered to the bank by the plaintiff on 23rd August was the amount then owing to the bank by the debtor on the account current of the debtor with the bank. At that stage the bank had recovered from Scholefield the amount of the bills so the debtor's account did not include amounts due on the five bills of exchange. When the bills were dishonoured by the debtor, the bank, as holder and payee, chose direct recourse to Scholefield as drawer. Were it not for Scholefield's equitable claim to benefits under the mortgage by subrogation to the bank's potential rights as mortgagee in respect of the amount of the bills paid by Scholefield, the plaintiff would have

20

been entitled to a discharge of the mortgage on 23rd August. The bank did not assert there was any contingent future liability or any liability actual or contingent of the plaintiff to the bank under any guarantee or other document executed by the plaintiff on that date which would have disentitled the plaintiff to a discharge of the mortgage.

Mr. Merralls, one of Her Majesty's counsel, who appeared with Mr. Karkar for the plaintiff submitted that before Scholefield can establish an entitlement to the benefit of the security constituted by the mortgage it must establish not only a right to contribution from the plaintiff but also a right to be subrogated to the bank's rights to the security provided by the plaintiff. That is so, he submitted, because the plaintiff was not a party to the bills and Scholefield was not a party to the provision of the security to the bank by the plaintiff. Any right to contribution which Scholefield may enforce could only arise if the plaintiff and Scholefield are under co-ordinate liabilities to make good the loss sustained by Scholefield upon the debtor's default, which they are not, Mr. Merralls submitted.

Mr. Merralls referred to the rule of equity that 'equality is equity' and the rules of contribution between co-sureties. <u>Dering v. Earl of Winchelsea</u> (as above) applied

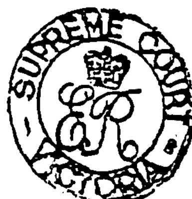
the principle between three co-sureties. Lord Chief Baron Eyre held that contribution should be ordered even though (a) the parties liable were bound jointly, jointly and severally or merely severally to bear the common liability; (b) the liability arose from separate instruments; (c) each surety had assumed his liability in ignorance of any prior sureties in respect of the same obligation; and (d) each surety had assumed his liability in ignorance of any proposals for subsequent guarantees to be obtained
10 from others. (Meagher, Gummow and Lehane, Equity Doctrines and Remedies, para. 1005). In the present case Mr. Merralls submits that, if the plaintiff and Scholefield are co-ordinate obligors, their liability is several, it arises from separate instruments, and each surety assumed his liability in ignorance of the other's existence as a surety past or future. A further principle referred to in argument, ancillary to the rule of Dering, is that "a surety is entitled, in order to obtain contribution, to any security given to the creditor by the co-surety". (Rowlatt
20 on The Law of Principal and Surety, 4th edition, p.159; Ex p. Crisp 1744 1 Atkin 133.)

Mr. Mahony of counsel for Scholefield seeks to apply principles propounded in the Duncan, Fox case to the present case. They are expressed succinctly and correctly in the following passage in Aga Ahmed Aspahany v. Crisp 1891 L.R. Indian Appeals 24 at 29: "It is a rule of equity that if

the indorser of a bill of exchange pays the holder of it he is entitled to the benefit of the securities given by the acceptor which the holder has in his hands at the time of the payment, and upon which he has no claim except for the bill itself."

Mr. Mahony relies upon the reasoning of Lord Selborne L.C. His Lordship distinguishes between three kinds of cases, the third kind being: "those in which, without any ... contract of suretyship, there is a primary and a secondary liability of two persons for one and the same debt, the debt being, as between the two, that of one of those persons only, and not equally of both, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have been paid." He contends that the present case falls within the third kind of case formulated by Lord Selborne and that Scholefield, being secondarily liable on the bills as drawer, has the remedies of a surety to the securities held by the bank in respect of the debtor's potential primary liability. Mr. Mahony contends that Scholefield should enjoy contribution from the plaintiff, who, whilst not liable on the bills had guaranteed the liability of the debtor to the holder bank.

The distinction which Mr. Merralls seeks to maintain,

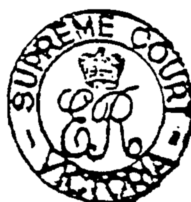


as I understand his argument, relates to the status of Scholefield on the one hand, as drawer of the bills, and the plaintiff on the other as surety for the debtor in his capacity as a customer of the bank. Mr. Merralls contends that Scholefield was not a surety of the debtor as drawer of the bills. Rowlatt (at 213) observed that: "The drawer of an ordinary bill of exchange is not strictly speaking, a surety for the acceptor, who will remain primarily liable, although the position of a person liable
10 on a bill is clearly analogous to that either of principal debtor or surety to the holder". Byles on Bills (12th edition) at 245 observes: "The acceptor is the principal debtor, and all the other parties are sureties for him, liable only on his default". The point of the argument is that, if Scholefield was not a surety of the debtor, it could not be a co-surety of the plaintiff.

Mr. Mahony chose to describe Scholefield as a 'quasi-surety' entitled in equity to a right of contribution because its obligation on the bills was co-ordinate with
20 the obligation of the plaintiff under the mortgage. Kitto, J. spoke of "persons who are under co-ordinate liabilities to make good one loss (e.g. sureties liable to make good a failure to pay the one debt) must share the burden pro rata. Albion Insurance Co. Ltd. v. G.I.O. (N.S.W.) (1969) 121 C.L.R. 342 at 350.

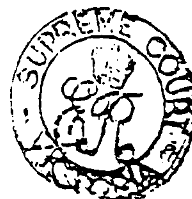
An important question is whether the respective liabilities of Scholefield and the plaintiff were of equal status, i.e. co-ordinate. The expression 'co-ordinate liabilities' is singularly unclear in meaning. In Meagher - Equity Doctrines and Remedies, at para. 1006, the learned authors observe that "there is a dearth of discussion as to the meaning of that phrase. In particular, there are lacking judicial pronouncements as to whether liabilities are not co-ordinate unless they are of the same nature and attract the same remedies for enforcement". 10

Mr. Merralls relies upon the fact that the plaintiff could incur no liability on the bills. She was not a party to the bills and could not be sued otherwise than by the bank under the mortgage. The plaintiff's liability is of a different nature from the liability of Scholefield. Further, on default by the debtor the remedy available to the bank is statutory in nature, S.62 of the Bills of Exchange Act, as against Scholefield, whereas as against the plaintiff it arises out of contract. Under the mortgage, Mr. Merralls argues, the plaintiff's potential liability was in respect 20 of the balance of the debtor's current account. The balance may be constituted by cheques drawn, promissory notes or bills of exchange as contemplated by covenant 1. The remedy provided to the bank under the mortgage, it is contended by Mr. Merralls, differs so much in nature



from the remedy provided by statute to a holder or payee of a bill of exchange against the drawer as to render it inequitable for a court to enforce contribution between them.

The decision in Molson's Bank v. Kovinsky (1924) 4 D.L.R. 330, was referred to by counsel. It was a decision of the Appellate Division of the Ontario Supreme Court. A promissory note had been endorsed by certain persons as accommodation sureties. On the faith of their endorsement the bank made advances to a customer. The bank also held
10 general guarantees from another party in respect of the customer's account. The court held that a surety for a particular portion of the principal debtor's debt and a surety for the ultimate balance due to the principal creditor after exhausting all parties and securities are not co-sureties for the purposes of the rule. Masten, J.A., in holding that the sureties and guarantors were not co-sureties so as to bring into effect the equitable doctrine of contribution between sureties, observed that all the surrounding circumstances and the written documents may be
20 looked at to determine the legal liabilities of several sureties between each other. In Molson's case when the documents were examined, it was found that the guarantee for the ultimate balance of the account was a later obligation in point of time than the liability on the note. That fact also pointed to the view that the guarantor had become a



surety for a surety rather than a co-surety.

It is necessary then to examine the relevant documents. Mr. Mahony contends that by Cl.10(a) of the mortgage the plaintiff is liable to the bank as principal for the whole of the money secured by the mortgage. As the moneys due under the bills by the debtor to the bank were moneys secured by the mortgage (Cl.1) the plaintiff was in every respect a surety for the debtor on the bills. Mr. Mahony submitted that when the bills were dishonoured by the debtor the plaintiff was liable to a demand by the bank because 10 it is expressly provided for in Cl.1. The liability of Scholefield as drawer of the bills was identical with the plaintiff's liability because, in effect, Scholefield was surety for the acceptor, Mr. Mahoney submits.

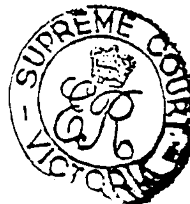
The application of the principles of equity to the agreed facts provides no simple or obvious solution to the present case. The case has to be determined by asking the question whether the plaintiff and Scholefield are legally liable to the bank as obligors in respect of the same obligation. If they are, then the Duncan Fox doctrine applies. 20 A modern statement of the doctrine is as follows:- "A surety who has made payment of more than his due proportion of the common liability is entitled to have assigned to him all the creditor's rights and securities, whether satisfied or not, for the purpose of obtaining contribution including,

apparently, securities received by the creditor from co-sureties, and he may recover contribution by means of those securities". (Halbury 4th Edition Vol. 20 para 234). If co-ordinate liability is not present equity does not call for contribution.

It is clear, I believe, that Scholefield became liable on the bills, not when the bills matured for payment on the several dates in January 1977 specified in the agreed statement of facts but, upon dishonour by the debtor. At that point of time, Scholefield became liable on the bills at the suit of the bank. The obligation arose out of S.60(1)(a) of the Bills of Exchange Act.

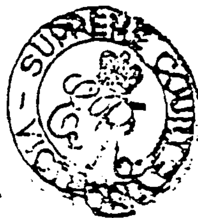
> "The drawer of a bill, by drawing it -
>
> (a) engages that on due presentment it shall be accepted and paid according to its tenor, and that if it is dishonoured, he will compensate the holder ...."

The liability arose out of s.62 after dishonour. It probably matters not whether one categorizes the drawer of a bill of exchange a surety for the acceptor or a person primarily liable on the bill to the holder. The plaintiff's liability, on the other hand does not arise out of the bills or out of the Bills of Exchange Act, as she was not a party to the bills. Her liability could arise when the bills matured and the bank called up the obligations imposed by



the mortgage. The obligation of the mortgage is "to pay to the bank on demand". So, a demand by the bank is a pre-condition of liability when bills matured. Clause 1 of the mortgage expressly makes the plaintiff liable to pay to the bank on demand the balance owing by the debtor on the account current of the debtor. The clause goes on to state in the widest terms possible the many and various ways by which the balance of the account might be increased. One such way is, of course, "Bills of Exchange ... to which ... the debtor ... is ... a party and which ... may be discounted or paid ... by the bank." Clause 1 does not, in my view, impose a primary obligation upon the plaintiff to pay on a bill of exchange to which the debtor was a party, nor did it make the plaintiff a surety on bills. Were it not for the effect of clause 10(a) the suretyship imposed upon the plaintiff by clause 1 would be in respect of the balance owing on the current account of the debtor, after demand by the bank. But clause 10(a) imposes a higher obligation and makes the plaintiff "a principal debtor for the whole of the moneys hereby secured". However, the plaintiff is liable only for the balance of the debtor's account but the balance might include amounts due on bills.

Accordingly, 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 on the bills.

10 In the circumstances, to uphold Mr. Mahony's argument would, I believe, extend the rule in Deering and Duncan Fox beyond the limits contemplated by the judgments. I am not to be taken as saying that the doctrine is rigid and inflexible. In a number of cases, to which reference was made, the doctrine applied. Cf. Cornfoot v. Holdenson 1932 V.L.R. 4; In re Donner Enterprises Ltd. (1974) 1 W.L.R. 1460; Commissioners of State Savings Bank of Victoria v. Patrick Intermarine Acceptances Ltd. (In Liq.) (1981) 1 N.S.W.L.R. 175. Because I am not persuaded that the
20 liabilities of the parties are truly of equal status the parties here are not co-sureties for the purposes of the doctrine of contribution.

It follows that the plaintiff succeeds on the claim and the counter-claim will be dismissed. There will be judgment for the plaintiff in the form of the declaration

In the Supreme
Court of Victoria

No.8
Reasons for Judgment of
His Honour Mr. Justice
O'Bryan
10th March 1983
(Contd.)

sought in paragraphs 1 and 3 of the amended Statement of Claim. I presume that further relief will be unnecessary in view of the attitude expressed by Mr. Hayes for the bank before he departed from the case. Costs will follow the result. The plaintiff's costs, including reserved costs and the costs of Westpac Banking Corporation are to be taxed and paid by the defendant. Liberty to apply is reserved lest some further relief is required by the plaintiff.

I CERTIFY THE TYPEWRITING ON THE
PAGES TO BE A TRUE AND CORRECT COPY OF
THE ORIGINAL Judgment OF WHICH IT
PURPORTS TO BE A COPY FILED IN THIS
OFFICE.
DATED THIS 26th DAY OF July 1984
Deputy PROTHONOTARY OF THE
SUPREME COURT

NO. 4

JUDGMENT

THIS ACTION coming on for hearing before this Court on the 2nd of February 1983 and UPON HEARING Mr. Merralls, one of Her Majesty's Counsel and Mr. Karkar of Counsel for the Plaintiff and Mr. Hayes of Counsel for Westpac Banking Corporation and Mr. Mahony of Counsel for Scholefield, Goodman & Sons Limited AND UPON READING the pleadings herein and the agreed Statements of Facts filed herein AND STANDING FOR JUDGEMENT until this day THIS COURT DOTH ORDER, ADJUDGE AND DECLARE that:-

1. The second named Defendant is not entitled to:-

   (a) An assignment of the right, title and interest of Westpac Banking Corporation in the land more particularly described in Certificate of Title Volume 8543 Folio 360 under and by virtue of instrument of Mortgage number G174231.

   (b) Contribution from the Plaintiff to the extent of the amount so paid by the second named Defendant to the first named Defendant under the bills of exchange referred to in the Statement of Claim.

   (c) Any estate or interest in the said land capable of supporting Caveat H144211.

2. The first named Defendant do execute an instrument of discharge of the said instrument of Mortgage and deliver the same together with the duplicate of the said Certificate of Title to the Plaintiff.

In the Supreme
Court of Victoria

No.8
Judgment
10th March 1983
(Contd.)

3. The Plaintiff's costs including reserved costs and the costs of the first named Defendant be taxed and when taxed paid by the second named Defendant to the Solicitors for the Plaintiff and the first named Defendant respectively.

4. The counter-claim of the second named Defendant be and the same doth stand dismissed.

5. Liberty to apply be reserved to all the parties.

BY THE COURT

Signature
MASTER

10

ENTERED the 31st day of August 1983.

Signature
DEPUTY PROTHONOTARY

VICTORIA STAMP DUTY $3 | VICTORIA STAMP DUTY $3 | VICTORIA STAMP DUTY $50

Seal

I CERTIFY THE TYPEWRIT
PAGES ...
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OFFICE.
DATED THIS 26th DAY OF July 84
[signature]
Deputy PROTHONOTARY OF NO. 5
SUPREME COURT

No.10
Notice of Appeal

In the Full Court
of the Supreme
Court of Victoria

No.10
Notice of Appeal
7th April 1983

NOTICE OF APPEAL

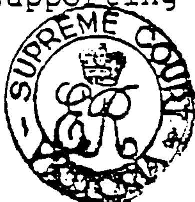
TAKE NOTICE that the Full Court of the Supreme Court of Victoria will be moved by way of appeal on the first available day within the meaning of the Rules of the Supreme Court or so soon thereafter as Counsel can be heard by Counsel on behalf of the abovenamed appellant for an Order that the whole of the decision declarations and orders of the Court given and made on the 10th day of March 1983 by the Honourable
10 Mr. Justice O'Bryan in action no. 2899 of 1979, namely :-

(a) A declaration that the appellant is not entitled to :

(i) an assignment of the right, title and interest of the second respondent in the land described in Certificate of Title Volume 8542 Folio 360 under and by virtue of an instrument of mortgage dated 6 February 1976 executed by the first respondent in favour of the second respondent and registered at the Office of Titles in dealing G174231 or at all;

20 (ii) contribution from the first respondent to the extent of amounts paid to the second respondent by the appellant as the drawer of certain bills of exchange;

(iii) any estate or interest in the said land capable of supporting a caveat lodged by the appellant



with the Registrar of Titles or at all;

(b) a declaration that the second respondent is obliged to execute an instrument of discharge of the said mortgage and to deliver the same to the first respondent together with the duplicate Certificate of Title relating to the said land possession of which the first respondent had duly delivered up to the second respondent with the said instrument of mortgage;

(c) an order that the counterclaim of the appellant be dismissed; 10

(d) an order that the first respondent's costs and the second respondent's costs of and incidental to the action and the counterclaim, including reserved costs, be taxed and paid by the appellant; and

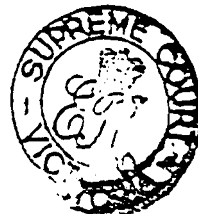
(e) an order that the first respondent have liberty to apply for such further relief as she requires -

be set aside and/or reversed and that in lieu thereof :-

A. It be ordered that the action of the first respondent be dismissed;

B. on the counterclaim of the appellant - 20

(i) it be declared that the appellant is and has been entitled to contribution by the first respondent in respect of the payments made by it to the second respondent in respect of each of the bills of exchange alleged in paragraph 10 of its Defence; and



(ii) it be declared that the appellant is and has been entitled to require the second respondent to assign to it or to a trustee for it the security constituted by the said instrument of mortgage in order to secure the payment to it by the first respondent of the sum for contribution in which the first respondent is liable to it;

C. it be ordered that the appellant's costs and the second respondent's costs of and incidental to the action and
10 the counterclaim, including reserved costs, be taxed and paid by the first respondent;

D. an order be made as to the costs of this Appeal; and

E. such further or other orders be made as to the Full Court shall seem proper -

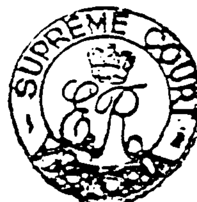
AND FURTHER TAKE NOTICE that the grounds of this Appeal are that :

1. The said decision, declarations and orders were contrary to and wrong in law.

2. The Court in giving the said decision and making the
20 said declarations and the said orders acted on incorrect principles.

3. In particular, and without derogating from the generality of the foregoing grounds :

A. The Court wrongly construed clause 1 of the said instrument of mortgage, as follows :



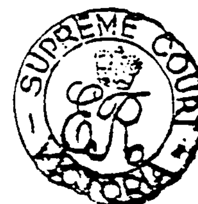
In the Full Court
of the Supreme
Court of Victoria

No.10
Notice of Appeal
7th April 1983
(Contd.)

(i) The Court construed the clause in so far as it related to the liability thereunder of the first respondent for "the Debtor" as limited to liability to pay to the second respondent on demand the balance for the time being owing by the Debtor on the account current of the Debtor with the second respondent.

(ii) The Court construed the clause as not imposing on the first respondent a separate liability to pay to the second respondent on demand any sum which was owing from or payable to the second respondent by the Debtor for or in respect of a bill of exchange to which the Debtor was a party and on which the Debtor was liable and which was discounted or paid or was for the time being held by the second respondent. 10

(iii) In construing the clause, the Court failed to accord their ordinary and natural meaning or any meaning to the words "and" and "other" respectively in the expression, "and all and every other the sums and sum of money (if any) ...". 20



(iv) The Court construed the clause in so far as it related to bills of exchange to which the Debtor was a party and on which the Debtor was liable and which were discounted or paid or were for the time being held by the second respondent as providing no more than an entitlement in the second respondent to include the sum(s) owing from or payable to the second respondent by the Debtor in respect of such bills in the calculation of the account current of the Debtor.

(v) The Court construed the clause as not making the first respondent the Debtor's surety in respect of sums owing from or payable to the second respondent by the Debtor in respect of bills of exchange to which the Debtor was a party and on which the Debtor was liable and which were discounted or paid or were for the time being held by the second respondent.

B. The Court wrongly held that the second respondent had no direct recourse to the first respondent if "the Debtor" as described in the said instrument of mortgage dishonoured as acceptor bills of exchange as described in clause 1 of the said

instrument of mortgage.

C. The Court wrongly held that the liability imposed on the first respondent by the said instrument of mortgage was only indirectly related to bills of exchange.

D. In rejecting the appellant's claim to be entitled to contribution from the first respondent :-

(i) The Court wrongly treated as significant the distinction between the source of the appellant's liability to the second respondent, namely the bills or the Bills of Exchange Act, and the source of the first respondent's liability to the second respondent, namely the said instrument of mortgage. 10

(ii) The Court wrongly held that the liabilities of the appellant and the first respondent for the failure of the acceptor of the said bills of exchange to honour the said bills were not co-ordinate or "of equal status".

(iii) The Court wrongly held that the relationship of the appellant and the first respondent to the acceptor of the said bills of exchange was not such that the appellant should recover contribution from the first respondent. 20

DATED this 7th day of April 1983.

PHILIP E. FOX
Solicitor for the Appellant.

TO: The first respondent,
and to her Solicitors,
Phillips Fox & Masel,
461 Bourke Street,
Melbourne.

AND TO: The second respondent
10 and to its solicitors,
J.M. Smith & Emmerton,
224 Queen Street,
Melbourne.

No.11

Reasons for Judgment

IN THE SUPREME COURT OF VICTORIA

No. 2899 of 1979

In the Full Court of the Supreme Court of Victoria
No.11
Reasons for Judgment
29th February 1984

BEFORE THE FULL COURT

MELBOURNE

BEFORE THE HONOURABLE MR. JUSTICE ANDERSON,

THE HONOURABLE MR. JUSTICE FULLAGAR and

THE HONOURABLE MR. JUSTICE GRAY

B E T W E E N:

SCHOLEFIELD GOODMAN & SONS LIMITED	Appellant (Defendant)
v.	
CHARNA ZYNGIER	Respondent (Plaintiff)
- and -	
THE COMMERCIAL BANK OF AUSTRALIA LIMITED	Respondent (Defendant)

J U D G M E N T

(Delivered 29th February, 1984)

FULLAGAR, J.: This is an appeal as of right from a judgment and orders of the Supreme Court given and made on 10th March, 1983, after the trial of an action. The judgment and orders were in favour of the plaintiff Mrs. Zyngier and against the appellant-defendant Scholefield Goodman & Sons Limited which I shall call Scholefield and which is a company incorporated in the United Kingdom. The other respondent to the appeal, which I shall call the Bank, was also a defendant but it has throughout adopted, as will appear, a neutral attitude to the litigation, agreeing to abide by any order of the Court.

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It is my understanding that the Bank named in the proceedings has changed its name or gone out of existence upon a merger and that the appropriate respondent is Westpac Banking Corporation Limited and, if this is so, appropriate amendments should be made to the proceedings before any order is made on the substantive matters, or else there should be proof to us in proper manner that the appropriate orders regularising the proceedings have already been made.

The Bank was represented by counsel before us but

10 its counsel told us that the Bank wished to take no part in the argument and asked to be excused unless the Court should decide to hear some argument from it. I now think that it would have been wise for the Bank to have put before this Court some submissions as to what is the proper construction and effect of its mortgage instrument and what are the rights inter se of the two parties to it, but as the Bank has chosen not to do this it cannot complain if the Court should give to the mortgage instrument a construction or effect which is contrary to the Bank's present understanding or intention.

20 There are a number of striking differences of a material character between matters alleged and admitted on the pleadings on the one hand and the agreed statement of facts on the other hand, but we were asked to decide this appeal upon the agreed statement of facts, supplemented by various assertions and concessions of counsel, and that is what I think the Court should do. In January 1983 there was apparently filed an agreed statement of issues which counsel before this Court were prepared to treat as substantially irrelevant.

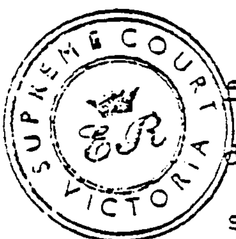
30 The following summarises as briefly as may be my understanding of the salient facts upon which the parties

wish a decision, and they are to be found in the most part in the agreed statement of facts.

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

At the beginning of February 1976 Zinaldi & Co. Pty. Ltd. (which I shall call Z Co. or the principal debtor) was a customer of the Bank and I infer that it had been for some considerable time, and I make this inference partly from the facts set forth in the agreed statement of facts and partly from assertions and admissions by counsel relating to the course of conduct of the parties to this litigation in the course of business of Z Co. On 6th February, 1976, Z Co. was indebted to the Bank in a substantial amount but it does not appear how that indebtedness arose or was constituted. We were told by counsel that Z Co. in a course of conduct as part of its business at and about that time used to purchase goods from overseas from or through the medium of Scholefield, and that one of the ways in which the purchases were paid for was as follows: Scholefield would draw a bill of exchange on Z Co. payable in pounds sterling to the order of the Bank at periods of three months or more after date with the intention in both parties that Z Co. would accept the bill and that the Bank would then discount the bill for Scholefield, the Bank becoming the holder in due course. Then when the bill matured the Bank would present it to Z Co. for payment in Australian dollars. It does not appear whether Z Co. maintained an ordinary cheque account with the Bank but it seems highly probable that it did so at all material times.



On 6th February, 1976, Mrs. Zyngier executed in favour of the Bank a mortgage of her Torrens system land and deposited it and the Certificate of Title with the Bank. It seems to me that the precise construction and effect of the instrument of mortgage is vital to this case but we did not

10 20 30

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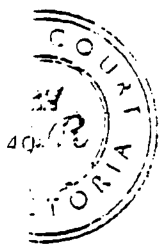
hear any extensive argument as to the meaning of its words or as to the precise rights and liabilities of the two parties to it inter se in various possible events. A photostat copy of the instrument of mortgage appears at pages 26 ff. of the appeal book and the alleged copy starting at page 30 should be completely ignored because it contains numerous errors. In fairness to those concerned it should be said that the photostat mortgage is difficult to reproduce accurately, being very verbose and in very small print.

10 In the instrument of mortgage the mortgagor was described as the mortgagor and the Bank was described as the Bank and Z Co. was described as the debtor. The following is an extract from clause 1 of the mortgage which contains covenants by the mortgagor "and/or the debtor" -

> "To pay to the Bank on Demand the balance for the time being owing ... by the Debtor on the account current of the Debtor with the Bank and all and every other the sums of money ... which the Bank may ... advance or
> 20 pay ... to or on account of the Debtor ... or which now or may hereafter become owing from or payable by the Debtor for or in respect of ... moneys ... payable under any contract or on any other account whatever ... or for or in respect of any Bills of Exchange ... to which the Debtor is or may hereafter be a party and on which the Debtor is or may hereafter be liable ... which are or may thereafter be discounted or paid or
> 30 which may for the time being be held by the Bank ... (all of which are hereinafter included in the terms "principal moneys")."

The following is a summary of what I consider to be the relevant portions of clause 2 of the mortgage -



> "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 at the current rate from time to time charged by the Bank on similar advances ...."

The following is a summary of what I regard as the material portions of clause 10 of the mortgage -

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

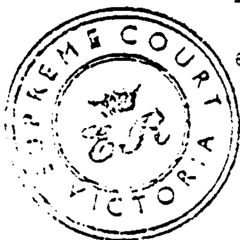
"That in respect of all moneys due by or on account of the Debtor and hereby secured:-

(a) As between the mortgagor and the Bank the Mortgagor shall be a principal debtor for the whole of the moneys hereby secured.

(b) 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 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 any of such persons ... and to release any security already held or which thereafter be obtained by the Bank ... 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 ...

(c) That a copy or statement of the account of the Debtor in the books of the Bank signed by the Manager for the time being of the Bank ... shall be conclusive evidence of the state of accounts between the Bank and the Debtor."

As a consequence of the way in which this appeal was conducted, I have to state my view as to the proper construction and effect of this verbose document without having had the assistance of any submissions by the Bank thereon or any extensive or detailed submissions thereon by the two antagonists before this Court namely Scholefield and Mrs. Zyngier.



In my opinion, in the opening words of clause 1 of the mortgage, the expression "the current account of the Debtor with the Bank" is intended to refer to a current cheque account of the Debtor. The clause then goes on to state all the other various integers which are to be secured by the mortgage. However, 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
10 the Bank", and secondly by the words "any ultimate balance that shall remain due to the Bank". This matter of construction of the mortgage instrument is in my opinion fundamental to the result of the 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.

Between 17th August, 1976, and 23rd November, 1976, Scholefield drew the five relevant bills of exchange on Z Co. for sums in sterling aggregating more than £20,000 payable to
20 the order of the Bank, and each of the bills was accepted by Z Co. The bills matured on various dates and each of them was dishonoured on presentation by the Bank to Z Co. for payment. After dishonour the Bank presented each bill to the drawer Scholefield which paid the amount of the bill to the Bank.

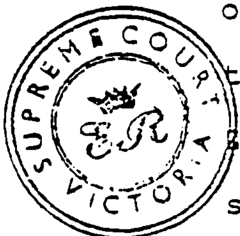
We were given to understand that all these events had taken place prior to 16th August, 1978, on which date there was a balance of about $20,000 Aust. owing by Z Co. to the Bank as on the taking of a general account between
30 it and the Bank, but of course this sum did not include the amount of the aforesaid dishonoured bills because in respect

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 Contd.)

of them the Bank had been paid out by the drawer Scholefield. On 16th August, 1978, the Bank demanded of the plaintiff Mrs. Zyngier payment of all the principal moneys and interest secured by the mortgage. By 23rd August, 1978, all the moneys and interest secured by the mortgage amounted to $20,877.11 and the whole of that amount was made up by moneys owing by Z Co. to the Bank upon transactions completely undisclosed in the facts before the Court - the amount was simply owing as on a general accounting on all transactions between Z Co. and the Bank for which the Bank had not been paid by anybody. It is merely a misleading coincidence that the digits for this amount of Australian dollars and cents are almost exactly the same as the digits for the amount in pounds sterling and pence of all the aforesaid dishonoured bills, and it is a further misleading circumstance that in the agreed statement of facts the amounts owing on the bills are stated, presumably with the correct digits, but in Australian dollars instead of English pounds sterling and pence. In fact, because the digits should be in sterling, the aggregate amount of the said dishonoured bills was much higher than $20,000, but of course the Bank had been paid out in regard to them.

The agreed statement of facts asserts that on 23rd August, 1978, Mrs. Zyngier "tendered and paid to the Bank the sum of $20,877.11 ... and requested the Bank to execute an instrument of discharge of the mortgage." It is not clear on the facts documented whether at this stage there were still transactions in hand and going forward between the Bank and Z Co. to which the mortgage applied. However, the agreed statement goes on to say that "the Bank refused to discharge the said mortgage because of claims by Scholefield to be



BC.

entitled to an equitable interest in the said land." It seems that Scholefield had, before this refusal, claimed to the Bank that Scholefield was entitled to contribution from Mrs. Zyngier in respect of the amount of the five bills paid by it to the Bank, and further claimed that Scholefield was entitled to an assignment of the mortgage either on general equitable principles or pursuant to s.72 of the Supreme Court Act 1958.

Dr. Pannam, Q.C. who with Mr. Glick of counsel
10 appeared before this Court for the appellant Scholefield conceded (and Mr. Merralls, Q.C. and Mr. Karkar of counsel for the mortgagor agreed with this) that at the time of each relevant dishonour by Z Co., and at the time of each payment by Scholefield, there were still other transactions on foot between Z Co. and the Bank to which the mortgage related and for which the mortgage secured the Bank, but we were given to understand that these transactions had all ended, and that there were no transactions on foot between them, by the time when this action (No. 2899 of 1979) was commenced by writ of
20 summons in April 1979. These are in my view important facts which ought not to have been left to assertions by counsel.

The appeal book contains an amended statement of claim delivered 27th May, 1982, pursuant to an order of a Judge made on 17th May, 1982, and it contains the original and perhaps only defence of the original defendant being a defence dated 13th August, 1979. The original defendant was the Bank which is referred to in the documents now as the first defendant. The appeal book also contains the subsequent defence and counter-claim on the second (and new)
30 defendant Scholefield dated 16th September, 1982.

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

This Court was asked by all parties to proceed upon the footing that the facts in the agreed statement of facts were admitted on all sides, subject to various corrections made orally by counsel before this Court, and I refer now to the pleadings only to see what relief was claimed therein.

The plaintiff claimed inter alia a declaration that Scholefield was not entitled to contribution and was not entitled to an assignment of the Bank's security constituted by the mortgage, and a declaration that the Bank was bound to discharge the mortgage and deliver up the duplicate Certificate 10 of Title which at the time of the mortgage the plaintiff had deposited with the Bank. The plaintiff also claimed an order that Scholefield's caveat be withdrawn and an order that the Bank, upon tender of the sum of $20,877.11, do execute a discharge of the mortgage and delivered up the Certificate of Title.

By its counter-claim Scholefield claimed a declaration that it is, and has been since paying the Bank on the bills, entitled to contribution from the plaintiff in respect of the payments, and a declaration that it is entitled to require the 20 Bank to transfer to it the security constituted by the mortgage in order to secure the payment to it by the plaintiff "of the sum for contribution in which the plaintiff is liable to it."

Before this Court, as below, the Bank appeared by counsel to say that it wished to put no argument and agreed to abide by any order of the Court. Counsel added that he would like to have the Bank's "costs position reserved". Counsel for the Bank was given leave at the outset by this Court to withdraw on condition that he would appear later if required by the Court to address it, as to costs or otherwise. 30

No witnesses were called at the trial and the learned trial Judge, after hearing argument, gave judgment for a declaration that Scholefield is not entitled to contribution and is not entitled to an assignment of the mortgage and is not entitled to any estate or interest in the mortgaged land capable of supporting a caveat. He ordered that the Bank execute an instrument of discharge of the mortgage and deliver the same, together with the duplicate Certificate of Title, to the plaintiff. Scholefield appeals but the Bank does not
10 appeal and it is joined as a respondent to the appeal.

Upon enquiring from counsel we were informed that, since action brought, the Bank has taken the tendered money from the mortgagor and has paid it by agreement with the mortgagor into a suspense account bearing interest which will be paid to the plaintiff if the judgments and orders in her favour are upheld.

It seems fair to say that the Bank is now virtually in the position of a stakeholder prepared to abide by any order of the Court.

20 It is quite apparent (and counsel before us were agreed) that the arguments before this Court were much wider than those which were put before the learned trial Judge, and that we have been referred to a number of reported decisions to which His Honour was not referred.

Dr. Pannam for the appellant Scholefield contended that Scholefield was entitled on well established principles to contribution from the plaintiff mortgagor Mrs. Zyngier. Scholefield was a quasi-surety for the debt of Z Co. to the Bank on the bill as acceptor, Scholefield being in that class
30 of situation lying "just beyond the border-line of suretyship"

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1964 (Contd.)

which is referred to in Rowlatt on Principal and Surety, 2nd ed. at pp.6-8. Dr. Pannam said in effect, and correctly in my opinion, that Scholefield's position had all the attributes of a surety stricto sensu except the presently irrelevant one that its execution of the bills of exchange as drawer could not be said to be wholly and solely for the purpose of affording security for the debt of Z Co. (Compare the position of an accommodation party to a bill of exchange as explained in Rowlatt op. cit. at p.5 and p.7.)

Dr. Pannam then contended that Mrs. Zyngier was herself a surety for the debt of Z Co. to the Bank as acceptor of the bill, pointing out that by clause 1 of the mortgage instrument she covenants as follows (inter alia) - "to pay to the Bank on demand the balance now or hereafter for the time being owing by the debtor (Z Co.) on its account current with the Bank and all other sums ... which may become owing from or payable by the debtor ... for or in respect of any bills of exchange to which the debtor may be a party and on which it is or may hereafter be liable either primarily or in default of another and which may be discounted by the Bank or held by the Bank." Dr. Pannam contended (again correctly in my opinion) that the right to contribution accrues to any person who is equally liable with a second person for the same debt such as the debt of a third person and where the creditor can come with equal facility, either the first person or the second person for that debt, and chooses to come upon the first person who pays the whole debt. This assumes that the paying person liable is liable in the same degree as the non-paying person liable. The right to contribution is, as he contended, "bottomed on fairness and justice" and is "the result of a general equity on the ground of equality of burden

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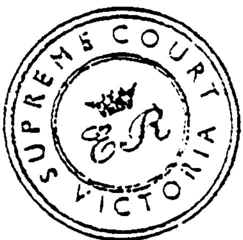

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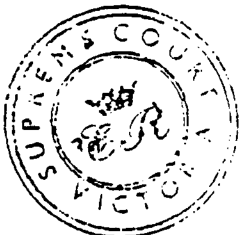
and benefit". We were referred to Dering v. Earl of Winchelsea (1787) 1 Cox 318, 29 E.R. 1184; Craythorne v. Swinburne (1807) 14 Ves. 160, 33 E.R. 482, and especially to Sir Samuel Romilly's argument in reply; Stirling v. Forrester (1821) 3 Bligh 575, 4 E.R. 712; Ward v. National Bank of New Zealand (1883) 8 A.C. 755 at p.765 and Mahony v. McManus (1981) 36 A.L.R. 545 esp. at p.551 per Gibbs, C.J. and at pp.558-9 per Brennan, J. Dr. Pannam claimed that it would in no way affect the claim of Scholefield for contribution even if the mortgagor's
10 liability had been expressed only in such terms as "to pay all moneys owing by Z Co. to the Bank whether on current account or otherwise", saying that still the liability of the quasi-surety Scholefield and of the surety Mrs. Zyngier would be for the same debt. He referred to A.N. Spicer and Son Pty. Ltd. v. Spicer and Howie (1931) 47 C.L.R. 151 esp. at pp.184-6 per Dixon, J. where a contractual obligation by Spicer to pay £10,000 to Howie on the one hand, and a debenture obligation by a company to pay Howie a total of £13,000 on the other hand involved two liabilities to pay the same debt of
20 £10,000 to Howie.

I have been referred to no clearer summary of the rights of a surety than that contained in the second edition of Rowlatt at pp.169-70 and it is perhaps as well to reproduce that passage verbatim. It is as follows -

> "I. As against the creditor, to have his remedies exercised and his securities enforced
>
> (a) Against the principal or sureties in a prior degree with a view to the relief in toto of the surety, and
>
> (b) Against every co-surety with a view to putting upon him his proportion of the burden in relief of every other surety pro tanto.

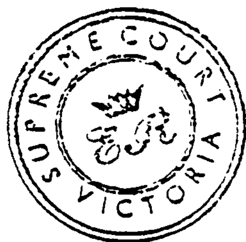


II. As against the principal debtor and sureties in a prior degree, to be indemnified and to have the remedies and securities of the creditor kept alive for that purpose.

III. As against co-sureties, to have rateable contribution towards the deficiency payable to the creditor, to have the remedies and securities of the creditor kept alive for that purpose, and to have a rateable apportionment of payments or securities received by any surety from the debtor. 10

These rights in their origin are all based upon the equity of the surety, subject to the paramount right of the creditor to be paid, to have the powers of the creditor so applied as to produce as far as possible an equitable result as between all persons liable; and the equitable result aimed at is that the person who is primarily liable should bear the burden in total relief of the others, or, if there is a deficiency, that it should fall equally upon those others who are 20 liable secondarily as regards him, and co-ordinately as between themselves. These rights, therefore, none of them necessarily depend upon a contract in that behalf (though in many cases such a contract could readily be implied from the facts) either between the creditor or principal and the surety, or between the sureties themselves. They rest solely upon the consideration that if, as between several persons or properties all equally liable at law to the same demand, it would be equitable 30 that the burden should fall in a certain way, the Court will so far as possible, having regard to the solvency of the different parties, see that, if that burden is placed inequitably by the exercise of the legal right, its incidence should be afterwards readjusted."

Dr. Pannam then contended that, under the general law as indicated in these passages, Scholefield had the right against the creditor Bank to have its remedies exercised and its securities enforced against the co-surety Mrs. Zyngier 40 with a view to putting upon her her proportion of the burden in relief of every other surety pro tanto.



In Duncan, Fox & Co. v. North and South Wales Bank (1880) 6 A.C. 1 the endorser of a bill, having paid the holder Bank after dishonour by the acceptor, found that the acceptor had before the drawing of the bill given an equitable mortgage

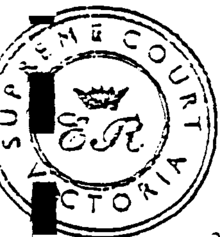
by deposit of deeds to the Bank to secure "the balance for the time being owing to the said Bank by my firm ... for discounts and advances and for all other moneys in or for which the said firm, whether alone or jointly with any other persons ... might from time to time thereafter be or become indebted or liable on their account or which the said Bank might at any time claim against the said firm." It was held by the House of Lords, reversing trenchant judgments in the Court of Appeal, that the endorser was
10 entitled to the benefit of the Bank's security against the acceptor afforded by the deposited title deeds. But Lord Selborne, L.C. said that this equity in the endorser attached "when the bills overdue and dishonoured, and the securities, are found together in the hands of the secured creditor at the time when he requires payment from the endorser; when the creditor has no other transactions then depending with the customer, and no claim upon the securities except for the bills themselves, and when the competition is between the endorser and the acceptor only." Sir Sidney
20 Rowlatt (see 2nd edition of Rowlatt p.205) summarised this apparent limitation by saying that the endorser's entitlement from the moment of receiving notice of dishonour by the acceptor, to the benefit of securities then in the hands of the creditor, is "subject apparently to the liquidation of any other transactions between the creditor and the principal". In passing I would observe that, if equity stopped short of giving subrogation to securities where to do so would necessarily wreck the security of the
30 creditor, one would expect it not to require the creditor

to preserve equality between co-sureties by taking only half from each where to do that would necessitate wrecking the security of the creditor. I shall return to this matter when I return to the question of the rights of Scholefield to contribution.

Dr. Pannam relied of course upon the Duncan, Fox case and the later cases applying it as showing that Scholefield on principle was entitled to the benefit of the mortgaged security from Mrs. Zyngier in the hands of the Bank, but in doing so he had to get over two obstacles, 10 one of which was Lord Selborne's limitation, because Dr. Pannam conceded that, at the times of the notice of dishonour to and the payment by his client there were on foot other transactions (outside the relevant or any bills of exchange) between the Bank and Z Co. in respect of which the Bank was secured by the mortgage. The second "obstacle" was perhaps more apparent than real. At the time of the Duncan, Fox case, if not now, the rationale behind the principle applied was that summarised at the outset of the successful argument of Mr. Kay, Q.C. in 20 that case appearing at p.5 of the report - the endorser upon discharging as surety (or quasi-surety) the primary liability on the bill of the acceptors, "then became entitled to sue the acceptors" - and suing them, to take their property in execution. Part of that property would be the securities left in the hands of the bankers who, if they received payment of the bills from the sureties (the endorsers), could have no right to retain as against them the securities which had been deposited to cover the 30

debt of the acceptors which they (the sureties) had satisfied, and see, at p.13 of the report, the Lord Chancellor's citation from the case of Yonge v. Reynell. Although this was based on the right of a surety to be indemnified out of the property of the principal debtor, Dr. Pannam was able to say that the paying surety in the present case (Scholefield) became entitled to sue the co-surety (Mrs. Zyngier) for contribution - "and, suing her, to take her property in execution. Part of that property would
10 be the securities left in the hands of the bankers", etc., *mutatis mutandis*. I think that this argument is logically correct.

As to the limitation requiring that no other secured transaction be on foot between the Bank and the mortgagor, Dr. Pannam as I understood him contended that the equity nonetheless attached at the time of payment by Scholefield, but that it was an equity which was subject to all the prior rights of the Bank in the security and therefore could not be enforced unless and until the Bank held (as it
20 does now) the securities unencumbered by the Bank's need to enforce them in any way on its own behalf as principal creditor. At the time of action brought by Scholefield, by its counterclaim, the Bank was found in possession of the securities with all transactions between it and the mortgagor closed, and Dr. Pannam contended (as I understand him) that the equity became enforceable at the moment when the Bank, having been throughout in possession of the security, found itself paid out with no relevant transactions pending, this moment having occurred (presumably) long before the date
30 of the counterclaim.



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In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

Alternatively Dr. Pannam said there was no need to worry about any supposed general law impediments upon Scholefield's general law rights, if any, to take the Bank's security and to use it against the mortgagor, because Scholefield was given a statutory right by s.72 of the Supreme Court Act, but he had to face the fact that that section was in force in England at the time of the decision in the Duncan, Fox case as s.5 of the Mercantile Law Amendment Act 1856. Dr. Pannam placed strong reliance, as well he might, upon the recent and carefully reasoned decision of Helsham, C.J. in Eq. in D. and J. Fowler (Australia) Limited v. Bank of New South Wales (1982) 2 N.S.W.L.R. 879 which (subject however to a close comparison of the respective mortgages in that case and this case respectively) appears to be directly in point. The difficulty for this Court arises to some extent out of the fact that we cannot see the full terms of the mortgage in that case, and to a larger extent out of the fact that we have heard arguments by Mr. Merralls for the mortgagor, Mrs. Zyngier, that were apparently not put in the D. and J. Fowler case.

Mr. Merralls did not dispute the general logical coherence and accuracy of Dr. Pannam's arguments as I have, I hope not unfairly, represented them. But he disputed the ultimate foundations upon which the arguments rested. Mr. Merralls contended, first, that Scholefield was not a surety at all, and that therefore it could not be said that Mr. Scholefield and Mrs. Zyngier were co-sureties, and that therefore Scholefield could not avail itself of the rights of co-sureties to contribution under the general law, or the rights of co-sureties under the general law to the

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keeping alive and use of securities, nor the rights of co-sureties under the statute to assignment of securities. This submission of Mr. Merralls was made in two alternative ways, I think on final analysis. In the first place he contended, as I have said, that the rights in question belonged only to a co-surety stricto sensu, that is to say, to a co-debtor who was a surety stricto sensu, and that a mere drawer of a bill of exchange is not such a surety, as the passages cited from Rowlatt establish. In the second place and alternatively, if the first submission failed, still co-suretyship did not exist because the two alleged co-sureties were not surety in respect of the same debt; Scholefield was surety on a bill of exchange for the amount of the bill, whereas Mrs. Zyngier was surety only for a balance of general account in gross between Z Co. and the Bank. As a variation of this alternative argument he contended that if Mrs. Zyngier was a surety for the amount of the bills in any sense, she was such a surety for the due performance on the bills not only of Z Co. but of all other parties to the bill who might be liable, including in the present case Scholefield itself. He referred to the judgment of Masten, J.A. in the Appellate Division of the Supreme Court of Ontario in Molsons Bank v. Kovinsky (1924) 4 D.L.R.330 and especially the following passages at pp.331-2:

> "I also concur in the dismissal of the appeal, but am unable to adopt the view that the appellants were ever entitled to contribution from the guarantors named in the two agreements of guarantee given to the bank on October 29, 1919. ... It is true that the appellants were sureties to the bank, and that the guarantors were also sureties, but I am unable to reach the conclusion that they were co-sureties so as to bring into effect as between the appellants and the guarantors the

> equitable doctrine of contribution between sureties .... In the present case the inference which I draw is that the appellants and the guarantors are not co-sureties liable to contribution inter se. Among other considerations which lead me to that conclusion, I observe that the foundation of the whole doctrine of contribution is the common liability of the sureties of the same debt. The fact that one surety may be liable for one part of the total indebtedness and the others for all will not prevent the application of the principle, the contribution in such case being limited to that portion of the debt as to which there is the common liability, and the right to contribution arises not from contract but from an equity flowing from the relation between the parties. But when one surety is surety for a definite part of the debt (e.g. as here, a certain promissory note), and the other for the ultimate balance due to the banker by the customer, the situation points to the view that the latter is not a co-surety, but a surety for the surety."

Finally Mr. Merralls submitted that, on the authority of the Duncan, Fox case, the party paying on bills, even if entitled to contribution, had no right to assignment or use of the creditor's securities against the "general" surety at any time at all if there were still on foot, at the time of payment, other transactions between the creditor and the "general" surety which were still subject to the security.

In my opinion, there can be no right to 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 of 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 surety of all persons liable

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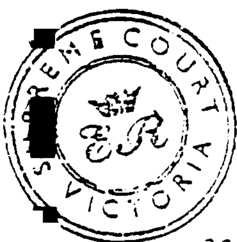
on the bills; that is to say, she was a surety in a different degree from the suretyship of the drawer Scholefield and, if Mrs. Zyngier had paid the full amount of the ultimate balance owing on general account to the Bank, and that general ultimate balance had included the amount of the relevant bills 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.

10 No right of indemnity in Scholefield against Mrs. Zyngier could possibly be maintained - indeed that boot must be if anywhere on the other foot, as Masten, J.A. in Canada suggested. As the learned trial Judge observed in his reasons for judgment, if Scholefield was not at the time of payment entitled to contribution from Mrs. Zyngier then it is not entitled, either under the general law or by statute, to the use of or an assignment of securities held by the Bank from Mrs. Zyngier.

In my opinion Dr. Pannam was correct in his

20 submission that for all relevant purposes here Scholefield should be regarded as a surety for the liability of Z Co. on the bills of exchange, and that for all present purposes it is in the same position as a surety stricto sensu, under the statute as well as under the general law.

As Rowlatt points out, the endorser or drawer liable on a bill of exchange is not in the complete sense a surety for the acceptor, "although (on grounds independent of suretyship) he is discharged by time being given to the acceptor, and is only liable on his default, and although,



30 after the bill has been dishonoured, he is entitled as

LB.

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

against the acceptor to securites covering the bill given by the acceptor and in the hands of the holder, and although, even if not the holder in the bill, he can recover over against the acceptor any sum paid by him in his exoneration. But an accommodation party to a bill of exchange known to be such is ... a surety in every sense, inasmuch as his liability on the bill was only undertaken to afford security for the debt of the party accommodated." See Rowlatt on Principal and Surety 2nd Ed. pp. 6 and 7.

As Rowlatt points out however, although the ordinary drawer of a bill of exchange is not a surety stricto sensu for performance of the acceptor's obligation, nevertheless he belongs to a class of persons (now called by some "quasi sureties") of whom it may be said that there is a primary and secondary liability of two persons for one and the same debt (in the drawer's case, of the acceptor and of himself respectively), "the debt being, as between the two, that of one of those persons only and not equally of both; so that the other if he should be compelled to pay it would be entitled to reimbursement by the person by whom, as between the two, it ought to have been paid. Such persons, when both have become liable to the creditor and it is in his choice upon which to put the burden, do stand in a relation to one another which gives rise to an equity identical with one which exists between principal and surety - namely that securities given by the primary debtor are attributable in the hands of the creditor to the satisfaction of the debt, and do not go back to that debtor or his general creditors."

The position of Scholefield, then, is of a person who is liable on a secondary liability for the debt

of the acceptor who is liable on a primary liability; that is the position between it and the acceptor Z Co., although the creditor Bank can come against either of them, and Scholefield's relationship with the acceptor is one "which gives rise to an equity identical with one which exists between principal and surety". It is in my view immaterial that a statute such as the Bills of Exchange Act may provide (e.g. by s.62) for some of the remedies which equity or the law merchant would otherwise give. To this class of "quasi sureties", to which Scholefield belonged, belong also "the transferor of shares who is liable by statute under certain circumstances to pay calls if the tansferee does not, the owner of goods which by the law of distress may be made liable for the rent of the premises upon which they are, a lessee liable under the covenants of a lease assigned, a mortgagor liable for the mortgage money after a sale of the equity of redemption" - Rowlatt op. cit. at p.8 says that none of these can be classed as sureties, "though in each case the liability is a secondary one and in each case the person secondarily liable has upon payment the right to be reimbursed by the person primarily liable, founded upon the same principle as the right of a surety to sue the principal for the money paid by him."

It would seem to me to be a very curious intention in the legislature, in a beneficient enabling statute which courts of high authority have said should be liberally construed to advance the remedies intended, to shut out of the section persons who for all relevant purposes have all the rights of a surety stricto sensu and are as much in need of a remedy as true sureties. The position of Scholefield

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

as against the creditor and the debtor seems to me to disclose every relevant reason for treating it as a "person being surety for the debt of another" within the section, and there has not been put to me in argument any reason for excluding mere drawers or endorsers of bills on the one hand and allowing in accommodation parties on bills on the other hand. In my opinion the words of the section, "being surety for the debt or duty of another", should be construed as including persons in the class of "quasi sureties" dealt with by Rowlatt 2nd Ed. at pp.6 and 7. Certainly I consider that a "quasi surety" who has paid after dishonour on a bill is from that moment on to be treated in every relevant way as a surety both under the statute and under the general law principles. With respect, I prefer this view to that primarily adopted by Helsham, C.J. in Eq. in D. and J. Fowler (Australia) Limited v. Bank of New South Wales (supra) at p.884, but I observe that His Honour expressly reserved the question whether a person in Scholefield's position was a surety within the section.

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Batchellor v. Lawrence (1861) 9 C.B. (N.S.) 543 and 142 E.R. 214 was a case where a person who was jointly liable with other persons paid the debt in circumstance where, before the statute, the fact of payment would have been a bar to recovery from the others of contribution and a bar to enforcement in that behalf of the creditors' securities. The others, being defendants to the proceedings by the payer, took the view that the statutory words, "and such payment or performance so made by such surety shall not be pleadable in bar", appear to relieve only a surety who pays and not a co-debtor or co-contractor who

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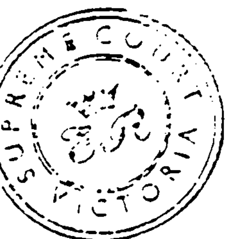

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pays - in other words, the quoted clause does not add after "surety" such words as "or co-contractor or co-debtor" - and the contention was that payment therefore was a bar as against a paying co-contractor or co-debtor, though not as against a "surety". The court disposed of this argument by saying that this"very beneficial enactment" should be liberally construed to advance the intended remedy, and that the word "surety" in the clause in question was quite apt to include a co-debtor who had paid
10 the whole debt or more than his just proportion. It is true that the judges did not need to consider the ambit of the words "being surety" in the earlier part of the section, but the whole court saw no difficulty in giving to "surety" in the latter part of the section a very extended ambit indeed. It seems to me to be a smaller step, and every bit as well merited in order to extend the intended remedies to all those formerly under the same disadvantages, to construe the earlier words "person being surety for the debt of another" as covering a person who is a "quasi surety" of the class
20 referred to in Rowlatt (supra) and who under the general law had against the principal creditor the same right of indemnity. and against a surety in equal degree the same right of contribution, as did a surety stricto sensu.

I think that s.72 contains only one relevant limitation that was not conceded by Dr. Pannam. I consider that it does not extend the statutory rights to any person other than a payer who (but for the general law effect of payment) had a right of indemnity or constribution against the giver of the security. See per Erle, C.J. in
30 Batchellor's case 9 C.B. (N.S.) at the beginning of p.55 -

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

"It seems to me that the very object of the statute was to give the co-surety or co-debtor a prompt or efficacious remedy for obtaining such contribution."

In my opinion the right to 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 10 of mine turns ultimately on the construction of and effect to be given to the instrument of mortgage when read as a whole, and I repeat that this was a matter upon which we received not a great deal of argument.

I do not find it easy to express the conceptions which I think dictate the result at which I have arrived, but the matter might perhaps be tested or expressed in one or two different ways. In the first place, the right to contribution is "bottomed in equity", and equity requires mutuality. Yet in my opinion Mrs. Zyngier could never have claimed contribution from Scholefield without in the first 20 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

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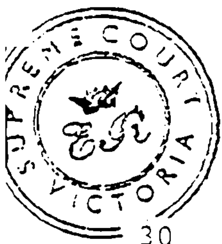
whole of the general balance of account. In my opinion, as a matter of construction of the instrument of mortgage, Mrs. Zyngier could never have been called upon by the Bank to pay the amount of the bills, as distinct from some amount "in gross", unless she was at the same time called upon to pay the amount of the whole general account outstanding including the amount referable to the bills. In my opinion, Mrs. Zyngier could never have claimed contribution from Scholefield on any basis, unless and until she had paid off
10 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.) And 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
20 to pay in gross the whole general account. It is, I think, a real and difficult question of construction of the mortgage instrument whether under it the Bank is entitled to demand anything other than the whole ultimate balance of account, and I find it very difficult to resolve that question, and it is a question upon which we heard no argument at all. Were it not for the words in brackets in clause 2 of the mortgage "(but without prejudice to the right of the Bank to enforce payment of such principal monies and interest <u>or any part thereof</u> at any time)" - I would be clearly
30 of opinion that there was no right whatever in the Bank

to demand anything other than a payment by the mortgagor of the whole "ultimate balance" due to the Bank, i.e. as on a general accounting of all matters between the mortgagor and the Bank and the debtor and the Bank. 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 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.

As I have said before, 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. on the bills of exchange but for a different debt only, namely the whole debt of Z Co. shown as on a general

account between the Bank and Z Co. The right of contribution against co-sureties, on the other hand, exists only between sureties for the same debt.

In Dering v. Earl of Winchelsea (supra) Lord Eldon said - "The creditor who can call upon all shall not be at liberty to fix one with the payment of the debt; and upon the principle requiring him to do justice, if he will not, the court will do it for him". In my opinion the Bank was not a creditor who could call upon Mrs. Zyngier to pay the debt for which Scholefield was surety, but was a creditor who could only call upon her to pay the whole, or a portion in gross, of a general balance of account between Z Co. and the Bank. If whilst other debits and credits existed the Bank had validly called upon Mrs. Zyngier to pay a portion in gross, albeit precisely equal to the amount then due by Z Co. upon the relevant bills, she could not in my opinion have maintained any claim to contribution against Scholefield. If the creditor had to demand and the mortgagor had to pay, the whole general balance between debtor customer and creditor Bank in order to discharge the bills and in order to lay a foundation for a claim to contribution, then these circumstances alone demonstrate, in my opinion, that the two alleged sureties were not liable for the same debt, and that the creditor was not (within the meaning of the contribution doctrine proposed) at liberty to call upon either for payment, and that the liability of the two alleged sureties was not co-ordinate. When Lord Eldon said that "natural justice requires that the surety shall not have the whole thrown upon him by the choice of the creditor not to resort to remedies in his power" he was not, I venture to think, contemplating that the creditor



In the Full Court of the Supreme Court of Victoria

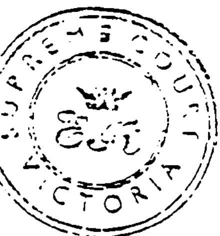
No.11 Reasons for Judgment 29th February 1984 (Contd.)

would bo offending natural justice by declining to close off the whole complex of debits and credits in a continuing relationship with the debtor customer by calling up the entire balance owing on a general account.

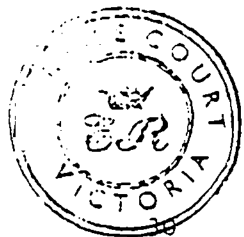
It is probably only repetitive, but it may assist to clarify those considerations which appeal to me, by taking points of distinction from the Duncan, Fox case (supra).

In Duncan, Fox each of the two contestants was liable to the creditor on the bill of exchange. The security was to secure whatever might be owing from the mortgagor to the Bank. Therefore, on notice of dishonour to the endorser-appellant, the mortgage was held by the Bank to cover the bills of exchange, qua bills of exchange, and, on payment by the endorser, the endorser was entitled to the bills so as to sue on them against the mortgagor whose liability on them was secured by the mortgage. And at the time of this happening "the situation was so cleared up" between the Bank and the mortgagor that the Bank had, besides the right to come on the endorser for their bill of exchange liability, a right to come on the mortgagor for the bill of exchange liability.

In Duncan, Fox at p.19 Lord Blackburn speaks of the creditor having the right to come upon more than one person for the payment of the debt, and this must be the same debt, and in the present case the Bank had no right to come upon the mortgagor for the bill of exchange liability of Z Co. to the Bank, but only for the whole general balance of account or else for some unallocated portion in gross. In Duncan, Fox at p.22, Lord Watson (speaking of the time of the notice of dishonour) said that indubitably the bankers had power, in terms of the mortgage, to apply the balance of



their securities in extinction of the indebtedness of the mortgagor, but in my view that is not so in the present case. If the Bank in the present case, with a general balance over and above the bills outstanding, had said to the mortgagor, "Pay me the amount of these five bills of exchange aggregating $30,000" - and she had paid $30,000 - that would not have discharged the bills, whether or not the Bank had then purported to "appropriate" the payment to the bills in its own accounts - in order for the bills to be discharged it would have to make some agree- 10 ment (whether ultimately dependent on estoppel or not) not only with the mortgagor but with those whose rights depended upon the bills and their endorsements and upon the history of the bills. At p.19 Lord Blackburn spoke of the rule that, "If several persons are indebted and one makes the payment, the creditor is bound in conscience...to give the party paying the debt <u>all his remedies</u> against the other debtors", but the only remedy of the Bank against the mortgagor in the present case was to call up the general balance of the account, and calling up <u>that</u>, in whole or 20 in part in gross, was something which its conscience did <u>not</u> bind it to do, for that would be too harsh an obligation upon the Bank - it is again observed that calling up a mere part (equal in fact to the bill liability) of the general balance in gross would not discharge either the drawer Scholefield or the Z Co. or the mortgagor upon any liability in respect of the bills of exchange without some further agreement expressed or implied.



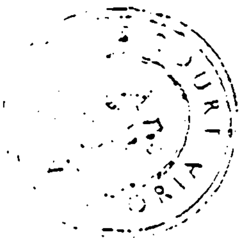
It is to be observed also that Lord Watson at p.21 30 regarded it as a "special circumstance, of vital importance

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

to the decision of the case", that "at the time when the bills in question matured, the bankers had brought their dealings with the acceptors to a close". That was important in the Duncan, Fox case because the executors of equity, in deciding whether to permit the surety to take hold of and use against the debtor the securities held by the creditor, needed first to be assured that such action by the surety did not unfairly prejudice the creditor himself whose relevant rights were of course paramount. In my opinion the same general considerations apply to 10 the question whether and when equity extends the right to contribution. To hold in the present case that a mere payment by the drawer at any time, that is to say whilst all the Bank's transactions with Mrs. Zyngier and with Z Co. were going forward, entitled the drawer forthwith to contribution from Mrs. Zyngier, would in my view be an unwarranted and harsh interference with the Bank's legal and equitable rights.

Quite apart from all the foregoing considerations, I am of opinion that, upon the proper construction of the 20 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.



For these reasons I consider that the appellant Scholefield was not entitled to contribution from Mrs. Zyngier at the time of payment by Scholefield on the 30

In the Full Court of the Supreme Court of Victoria

No.11 Reasons for Judgment 29th February 1984 (Contd.)

bills, and that Scholefield is not now entitled to have assigned to it, or to use for its purposes, the security of the mortgage from Mrs. Zyngier to the Bank.

I would dismiss the appeal and order that the costs of the respondent be taxed and paid by the appellant. I would direct that this order be not passed or entered until one of the members of this Full Court sitting in Chambers has by order certified as to the joinder of the proper respondent to the appeal other than Charna Zyngier,

10 on application to such Judge by one of the parties, and that each Judge be hereby authorized to dispose of such application and the cost thereof.

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CERTIFICATE

I certify that this and the thirty-one preceding pages are a true copy of the Reasons for Judgment of ~~the~~ Fullagar J in the Full Court

(ANDERSON, FULLAGAR, GRAY, JJ. ....)

Signed: ....[signature]........

20

Associate

29/2/84

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IN THE SUPREME COURT
OF VICTORIA
BEFORE THE FULL COURT
ON APPEAL FROM THE SUPREME COURT
OF VICTORIA

No.12
JUDGMENT

No. 2599 of 1979

In the Full Court of the
Supreme Court of Victoria
No.12
Judgment - 29th February 1984

B E T W E E N:

SCHOLEFIELD GOODMAN AND SONS LIMITED

Appellant
(Secondnamed Defendant)

- and -

CHARNA ZYNGIER

Firstnamed Respondent
(Plaintiff)

- and -

WESTPAC BANKING CORPORATION

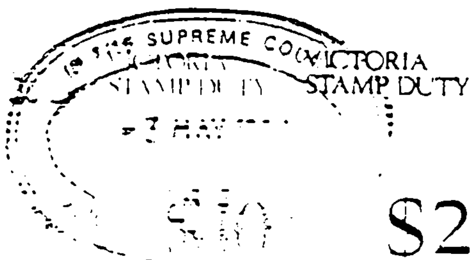
Secondnamed Respondent
(Firstnamed Defendant) 10

JUDGMENT OF THE FULL COURT ON APPEAL
COMPRISING THEIR HONOURS MR. JUSTICE ANDERSON,
MR. JUSTICE FULLAGAR AND MR. JUSTICE GRAY
WEDNESDAY THE 29TH DAY OF FEBRUARY 1984

THIS APPEAL coming on to be heard on the 13th, 14th, 15th and 16th days of December 1983 and UPON READING the Appeal Book herein and UPON HEARING Mr. Pannam one of Her Majesty's Counsel and Mr. Glick for the Appellant (Defendant) and Mr. Merralls one of Her Majesty's Counsel and Mr. Derham for the Firstnamed Respondent (Plaintiff) and Mr. North of Counsel for the Secondnamed Respondent (Firstnamed 20 Defendant) THIS COURT ORDERED that this matter should stand for judgment and this matter standing for judgment this day accordingly, THIS COURT FURTHER ORDERS as follows:

1. That the Appeal herein be dismissed.

2. That the costs of both Respondents be taxed and when taxed, paid by the Appellant.



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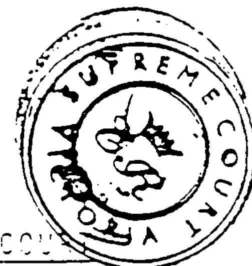


BY THE COURT 30

In the Full Court of the
Supreme Court of Victoria
No.13
Order Granting Final Leave to
Appeal to Her Majesty in Council
14th June 1984

IN THE SUPREME COURT
OF VICTORIA
BEFORE THE FULL COURT
ON APPEAL FROM THE SUPREME COURT
OF VICTORIA

No. 2899 of 1979

BETWEEN:

SCHOLEFIELD GOODMAN AND SONS LIMITED

Applicant
(Appellant)
(Secondnamed Defendant)

- and -

CHARNA ZYNGIER

Respondent
(Firstnamed Respondent)

- and -

WESTPAC BANKING CORPORATION

Respondent
(Secondnamed Respondent
(Firstnamed Defendant)

ORDER OF THE FULL COURT OF THE SUPREME COURT OF VICTORIA COMPRISING THEIR HONOURS MR. JUSTICE ANDERSON, MR. JUSTICE FULLAGAR AND MR. JUSTICE BEACH MADE THURSDAY THE 14TH DAY OF JUNE 1984

UPON HEARING Dr. Pannam one of Her Majesty's Counsel and Mr. Glick for the Applicant and Miss. Korman, Solicitor for the Firstnamed Respondent and Mr. North of Counsel for the Secondnamed Respondent AND UPON READING the Notice of Motion herein dated the 12th day of June 1984 and the Affidavit of Helen Jeanette Lewin sworn the 5th day of June 1984 and filed herein and the Exhibit thereto, THIS COURT DOTH ORDER:

1. That final leave be granted to the Applicant to appeal from the Judgment of the Full Court in this action pronounced and made on the 29th day of February 1984 to Her Majesty her heirs and successors in her or their Privy Council.

2. That the costs of this application and the Orders herein be

In the Full Court
of the Supreme
Court of Victoria

No.13
Order Grating Final
Leave to Appeal to
Her Majesty in Council
14th June 1984
(Contd.)

costs of the appeal.

3. That all parties have liberty to apply.

VICTORIA STAMP DUTY $20 VICTORIA STAMP DUTY $20 VICTORIA STAMP DUTY $20 VICTORIA STAMP DUTY $2

BY THE COURT

EXHIBITS

"A"
Instrument
of Mortgage
6th February
1976

I CERTIFY THE TYPEWRITING ON TH[illegible]
PAGES TO BE A TRUE AND C[illegible]
THE ORIGINAL Exhibit "A" [illegible]
PURPORTS TO BE A COPY AS [illegible]
OFFICE.
DATED THIS 26th DAY OF July 1984

[signature]

Deputy PROTHONOTARY OF THE
SUPREME COURT

EXHIBIT "A"

INSTRUMENT OF MORTGAGE

G174231

EXHIBITS

"A" - Instrument of Mortgage - 6th February 1976 (Contd.)

THE COMMERCIAL BANK OF AUSTRALIA LIMITED

VICTORIA

MORTGAGE

6 FEB 1976

MORTGAGE (DIRECT & INDIRECT) Freehold & Leasehold Singular & Plural (Victoria)

NOTE—To be taken in duplicate—all alterations and interlineations to be initialled. alterations where ... of the printed ... to be made.

(a) I Chana [illegible] Shopkeeper of 805 Glenhuntly Road Caulfield South

(hereinafter called "the Mortgagor")(b) being registered or entitled to be registered as the proprietor of an estate (c) in fee simple

in the land hereinafter described subject to the encumbrances notified hereunder in consideration of certain advances and accommodation being granted by THE COMMERCIAL BANK OF AUSTRALIA LIMITED whose registered office is at Nos. 335 to 339 Collins Street in the City of Melbourne (hereinafter called "the Bank" which expression includes its transferees) during the pleasure of the bank to the Mortgagor or in the case of more than one party being included in the definition "The Mortgagor" to any one or more thereof and/or to (d) [illegible] PTY. LTD. ~~whose registered office is situated at~~ 315 La Trobe Street Melbourne (hereinafter called the Debtor) and/or of the Bank's having agreed not to require immediate payment from the Mortgagor and/or the Debtor of certain moneys for which the Mortgagor and/or the Debtor is now indebted or liable to the Bank and/or for other consideration moving from the Bank to the Mortgagor and/or the Debtor do hereby covenant with the Bank as follows(e)

(a) Insert I or WE with name in full, address and occupation of each person who is to sign the Mortgage (or, if a Company, insert its name and situation of its registered office).

(b) If the Mortgagor(s) is (are) executor(s) or administrator(s) insert here "the legal Personal Representative(s) of ... late of ... deceased."

(c) Insert "in fee simple" or "of leasehold," or if both freehold and leasehold insert "in fee simple in the land hereinafter described and of leasehold in the land hereinafter described."

(d) If direct, leave blank: if indirect, insert name in full, address and occupation of each person to whom the advance is made; if to a Company, insert its name and registered office; if to a firm, insert the firm's name, address and business.

(e) If (b) filled in, insert here "with interest only to moneys now or hereafter to become owing by the Mortgagor as such Representative(s)."

1.—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 or on any other account whatsoever whether the time or the respective times for the repayment thereof have arrived or not or for 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 paid or which may 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").

2.—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 at the current rate from time to time charged by the Bank on similar advances such interest to be computed as from the day or respective days on which the principal moneys are respectively lent advanced paid become owing or become chargeable to the Mortgagor *and/or the Debtor* and will also pay all other lawful and customary charges in relation thereto all such interest to be considered as accruing from day to day and to be payable and paid when demanded but until demanded to be payable on the thirtieth day of June and the thirty-first day of December in every year or on such other half-yearly days in each year as from time to time are the half-yearly days fixed by the Bank for the balancing of the books of the Bank in the State of Victoria and together with all such lawful and customary charges as aforesaid to be turned into principal at every half-yearly rest on the balancing of the books of the Bank and thenceforth to become principal moneys and bear interest accordingly at the rate aforesaid.

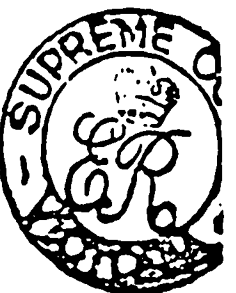
3.—THAT while any money remains secured by this mortgage the Mortgagor will duly and punctually pay all rates, taxes, duties, assessments of every description now charged or which may hereafter be charged upon the said land and if the said land or any part thereof is held under lease will duly and punctually pay the rent reserved by such lease and observe and perform all the covenants and conditions therein contained which on the part of the Mortgagor ought to be paid, observed and performed and will do all such acts and things as by law are required to be done on the part of the Lessee and that if the Mortgagor makes default in payment of the said rates, taxes, duties, assessments and rent or of any other moneys by the said lease or by any covenant therein contained or by law required or necessary to be paid by the Mortgagor it shall be lawful for but not obligatory upon the Bank at any time to make any such payment and the Mortgagor will at any time thereafter on demand repay to the Bank any money so paid by it with interest thereon at the rate aforesaid and calculated from the date of payment and every sum of money so paid by the Bank with interest thereon as aforesaid shall until full repayment thereof be a charge upon and recoverable from the said land and shall form part of the principal moneys hereby secured and the Bank may if it sees fit change the same to the current account of the Mortgagor or the Debtor.

4.—THAT the Mortgagor will at all times during the continuance of this security well and sufficiently maintain uphold support and keep the buildings fences and gates or other improvements for the time being upon the said land in good and substantial repair and condition. And that it shall be lawful for any person thereto authorised by the Bank from time to time to enter upon the said land or any part thereof and if the Mortgagor fails to perform the foregoing convenant then the Bank may if it thinks proper authorise its agents or surveyors with workmen and others to enter upon the said land and make good all defects damages and amendments which have happened to or are requisite for the said premises and the Mortgagor will on demand pay to the Bank the costs charges and expenses of and occasioned thereby together with interest thereon at the rate aforesaid until the time of the repayment thereof and the said land shall be a security for the repayment of such costs charges and expenses with interest thereon as aforesaid and the Bank may if it sees fit charge the same to the current account of the Mortgagor *or the Debtor*.

5.—THAT in case default is made by the Mortgagor in payment on Demand of any of the principal moneys or interest hereby secured or in the observance of any of the covenants contained or implied herein and any such default is continued 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 and authorities mentioned and given in and by Section 77 of the Transfer of Land Act 1958. And it shall be lawful for the Bank to sell the said land or any part thereof either separately or together with any other real or personal property mortgaged by the Mortgagor (f) to the Bank and that whether the said real property is under the Transfer of Land Act 1958 or not and also to reserve roads or other easements over appurtenant to or out of the land hereby mortgaged or any such other real property mortgaged by the Mortgagor to the Bank and to grant any such easements to any person.

(f) If (b) filled in, insert here "as such Representative."

6.—THAT the Mortgagor will insure against fire in the name of the Bank with such company and for such amount as the Bank shall require. And that all moneys recovered on any insurance in the name of the Mortgagor against any risk of erections on the said land not maintained under the covenant implied by the foregoing words shall if so required by the Bank be laid out in rebuilding or repairing the same erections or such of them as may be destroyed or damaged or alternatively shall be applied in or towards discharge of the moneys hereby secured. And for the consideration aforesaid the Mortgagor declares that the Mortgagor will hold every such insurance and all moneys payable thereunder as trustee for the Bank upon trust to apply the same in accordance with this Convenant and the Mortgagor hereby irrevocably appoints the Bank and each Bank officer (as hereinafter



defined) to be the Attorneys and Attorney of the Mortgagor to obtain payment of and give receipts for all moneys payable under any such insurance and to apply the same in accordance with this Convenant.

7.—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 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 not withstanding the currency of any such Bill of Exchange or Promissory Note. PROVIDED ALWAYS that this covenant shall be deemed a collateral security only and that neither this covenant nor anything contained in this Mortgage shall operate to merge the simple contract remedy on any such Bill of Exchange or Promissory Note or the simple contract remedy of the Bank in respect of any debt or liability hereby secured nor shall any action on any such Bill or Note or for any such debt or liability be defended on the ground of any supposed merger.

8.—THAT nothing herein contained shall prejudice or affect any lien or security which the Bank is entitled to by reason of the deposit of the titles relating to the said land or any other security the Bank now holds or may hereafter hold or take.

9.—THAT the titles for the said land shall if the Bank so requires remain in its custody during the continuance of this Mortgage.

10.—*THAT in respect of all moneys due by or on account of the Debtor and hereby secured:—*

(a) *AS between the Mortgagor and the Bank the Mortgagor shall be a principal debtor for the whole of the moneys hereby secured.*

(b) *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 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. And that the Mortgagor will not by reason of any payment which may be made by him under this Mortgage prove for or claim any dividend out of the estate of the Debtor if the Debtor is unable to pay his creditors in full in competition with the Bank and so as to diminish the dividends to which but for such proof or claim the Bank would be entitled. And that this Mortgage shall be considered to be in addition to any other mortgage guarantee or security which the Bank now has or which it may hereafter take for the debts of the Debtor or any part thereof and that while any money remains secured by this Mortgage the Mortgagor will not in any way claim the benefit or seek the transfer of any such mortgage or security or any part thereof.*

(c) *THAT a copy or statement of the account of the Debtor in the books of the Bank signed by the Manager for the time being of the Bank at the Office where such account may be kept or by any Bank Officer (as hereinafter defined) or any account stated or settled by or between the Bank and the Debtor shall be conclusive evidence of the state of accounts between the Bank and the Debtor.*

(d) *THAT any demand on the Debtor shall be deemed to have been duly made and received if signed as a Demand and given to the Debtor or if left at or sent through the Post Office as a letter addressed to the Debtor at his last known or usual place of abode or business.*

(e) *THAT where the Debtor is a partnership no change in the constitution of such partnership shall affect prejudice or extinguish this Mortgage.*

(f) *THAT when there shall be more than one person included in "the Debtor" the death of one or more of such persons shall not affect prejudice or extinguish this Mortgage.*

11.—THAT by releasing or compounding with any one or more of the persons included in "the Mortgagor" *or in "the Debtor"* for the liability of such persons under this Mortgage the Bank shall not be deemed to discharge the others or other of such persons from liability hereunder or in any way to limit or affect their liability hereunder.

12.—THAT the Mortgagor shall not be entitled to a discharge of this mortgage so long as there is any liability actual or contingent of the Mortgagor to the Bank under any guarantee or other document executed by the Mortgagor.

13.—AND the Mortgagor hereby attorns and becomes tenant from day to day to the Bank of the said land at a daily rental equal in amount and varying in amount with the interest from time to time payable as hereinbefore mentioned to be paid at such times and in such manner as the Bank from time to time by notice to the Mortgagor requires and all rental up to the date of any demand as aforesaid shall immediately become payable on the making of such demand and the rental if not otherwise required shall be paid by half-yearly payments on the thirtieth day of June and the thirty-first day of December in every year the first payment (unless otherwise demanded) to be made on whichever of such days is next after the date hereof and all rent payable to the Bank by virtue of the aforesaid attornment shall when received be applied by it on account and in reduction of the moneys for the time being hereby secured. 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 convenants contained or implied herein it shall be lawful for the Bank at any time thereafter and either during the currency of or at the end of any half-year without giving any previous notice of its intention so to do or any notice to quit to enter upon and take possession of the said land and to determine the tenancy created by the aforesaid attornment AND that the Bank may at any time after default is made let and execute any lease or agreement for a lease of the said land or any part thereof either separately or together with any other real or personal property mortgaged by the Mortgagor to the Bank for such term to such person for such rent and on such conditions as the Bank thinks fit. AND for the consideration aforesaid the Mortgagor hereby irrevocably appoints the Bank and each Bank Officer (as hereinafter defined) to be the Attorneys and Attorney of the Mortgagor for all such purposes.

14.—AND the Mortgagor hereby agrees with the Bank and appoints and declares as follows:—

(a) Any Receiver of the income of the said land appointed by the Bank under the powers conferred by the Property Law Act 1958 shall in addition to the powers therein set forth have the following powers all of which shall be excercised (without the Bank's taking possession of the said land) by the Receiver as the agent of and in the name of the Mortgagor and not in the name of the Bank:—

(i.) To supervise and direct the carrying on of any business carried on by the Mortgagor on the said land or continue to carry on the same as the agent of the Mortgagor and to apply the net proceeds as income of the said land;

(ii.) To make contracts of agistment for grazing of stock on the said land and to receive all moneys payable under any contract of agistment whether made by the Receiver or not;

(iii.) To let or lease or agree to lease the said land or any part of it for such term at such rent and upon such conditions as the Receiver thinks fit and to accept a surrender of any tenancy or lease of the said land whether created by the Receiver or not;

(iv.) For the purpose of giving effect to any tenancy to surrender or transfer the tenancy created by paragraph thirteen hereof.

(b) For the consideration aforesaid the Mortgagor hereby irrevocably appoints every Receiver so appointed by the Bank to be the Attorney of the Mortgagor to exercise all the powers aforesaid.

(c) Sections 109 and 110 of the Property Law Act 1958 shall apply with respect to the aforesaid powers of any Receiver so appointed and to the acts and defaults of the Receiver in relation thereto and to the application of the net proceeds of any business carried on by him and to all other moneys received by him in the exercise of the aforesaid powers as if those powers were set out in that Act.

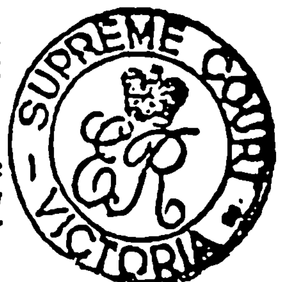
15.—In this Mortgage where the context and the circumstances so admit or require:

"Bank Officer" shall mean the General Manager, the Chief Manager Branch Banking Division, the Manager Credit and Lending for Victoria or any Attorney for the time being respectively of the Bank or the Manager or Acting Manager for the time being of the Bank at [illegible]

"Demand" means a demand in writing under the seal of the Bank or signed in the name of or on behalf of the Bank by any Bank Officer or signed by the transferees of the Bank and given to the Mortgagor personally or left on the said land or sent through the Post Office by a registered letter directed to the Morgagor or to the then registered proprietor of the said land at his address appearing in the Register Book.

EXHIBITS

"A"
Instrument of Mortgage 6th February 1976 (Contd.)



EXHIBITS

"A" Instrument of Mortgage 6th February 1976 (Contd.)

"The Debtor" shall be deemed when the Debtor is a person to include his executors and administrators and when the Debtor consist of more than one person to include each one and every two or more of such persons and their respective executors and administrators and when the Debtor is a firm to include the persons from time to time constituting such firm and each one and every two or more of them and their respective executors and administrators and also to include each one and every two or more of the executors or administrators included within the foregoing definition.

"The Mortgagor" shall include the successors in title of the Mortgagor. And all convenants by the Mortgagor shall be deemed to be binding on his successors in title. And when more persons than one are included in the term "the Mortgagor" their liability shall be joint as well as several.

Any words importing the singular number shall include the plural and vice versa; any words importing the masculine gender shall include the feminine; the word "person" shall include corporation; pronouns used of the Bank shall in their application to transferees of the Bank be read as pronouns appropriate to such transferees; if the Mortgagor *or the Debtor* is a company this Mortgage shall be read as if for the pronouns used for the Mortgagor *or the Debtor as the case may be the prounouns appropriate to a company were* substituted and as if any necessary grammatical changes were made; any reference to any Act shall apply to any statutory amendment modification or re-enactment thereof; all covenants herein contained or implied by any Act for the time being in force and on the part of the Mortgagor to be performed or observed shall if the Mortgagor consist of more than one person be deemed to be both joint and several; and if the name of the Debtor is not filled in in the space on the first page for the name and address and occupation of the Debtor this Mortgage shall be read as if all words printed in Italics were omitted.

16.—THE provisions of any Act or Regulation now or hereafter to be in force providing for the postpayment of payment of debts or for reducing the amount or interest payable on any debt or for diminishing the liability of any mortgagor or debtor or for taking away or restricting the exercise of any rights or remedies exercisable by any mortgagee or creditor are expressly excluded from applying to this security.

And for better securing the payment in manner aforesaid of the principal and interest and other moneys for the time being hereby secured and the observance and performance of the convenants aforesaid the Mortgagor HEREBY MORTGAGES to the Bank all his estate and interest and all the estate and interest which the Mortgagor is entitled or able to transfer or dispose of in ALL THAT piece of land or all those pieces of land referred to in the following Schedule and being the whole of the land now comprised in the relative Certificates of Title or Crown Grants subject to limitation as to depth if any.

	Crown Portion or Allotment	Crown Section	Town or Township or City	Parish	Certificates of Title or Crown Grants Vol.	Folio
					9543	560

* References to Lot of Subdivision to be omitted.

When Number of Allotment Section or Portion is not inserted use first column for description as shown on the Title.

Dated the 6th day of February 1976

Signed by the said* Chana ZYNGIER
* Mortgagor's name in full.
in the State of Victoria
in the presence of
[signature]
[illegible] Melbourne

[signature: Chana Zyngier]

Signed by the said*
* Mortgagor's name in full.
in the State of Victoria
in the presence of

Executed by THE COMMERCIAL BANK OF AUSTRALIA LIMITED by being signed in Victoria by BASIL CHRISTIE Its [illegible] under Power filed Number [illegible] in the presence of

[signature]

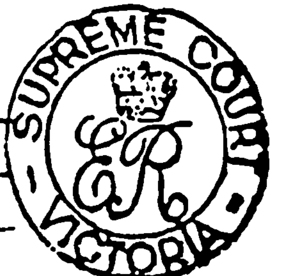
BANK OFFICER, [illegible] STREET, MELBOURNE

[signature]
MANAGER VICTORIAN CREDIT AND LENDING

ENCUMBRANCES HEREINBEFORE REFERRED TO

The easements (if any) affecting the said land

The encumbrances (if any) appearing at the foot of the relative Certificates of Title to the said land



EXHIBITS

"A"
Instrument of
Mortgage
6th February 1976
(Contd.)

THE COMMERCIAL BANK OF AUSTRALIA LIMITED

DISCHARGE OF MORTGAGE

DUTY STAMP

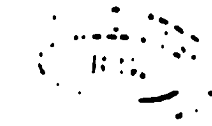
THE COMMERCIAL BANK OF AUSTRALIA LIMITED doth hereby for valuable pecuniary consideration discharge the within Mortgage and release the within described land from everything therein contained.

Dated the ______________ day of ______________ 19__.

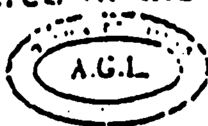
A Memorandum of the above Discharge of Mortgage was entered on ______________
in the Register Book Vol.______________ Fol.______________

____
Assistant Registrar of Titles.

H664211 7th July, 78
Entered 18th Aug., 78



... within instrument
has been entered in the Register Book



DATED ______________ 19

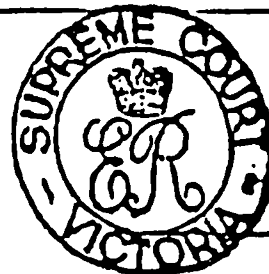
THE COMMERCIAL BANK OF AUSTRALIA LIMITED

TO

Mortgage.

Under the "Transfer of Land Act 1958"

A Memorandum of the within Instrument was entered on ______________
in the Register Book Vol.______________ Fol.______________



____
Assistant Registrar of Titles.

EXHIBITS

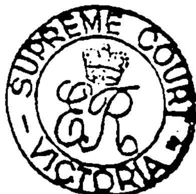
"B"
Bill of Exchange
17th August 1976

I CERTIFY THE TYPEWRIT[illegible]
PAGES TO B[illegible]
THE ORIG[illegible] Exhibit "B" [illegible]
PURPORTS TO BE [illegible]
OFFICE.
DATED THIS 26th DAY OF July 1984

Deputy PROTHONOTARY OF THE
SUPREME COURT

EXHIBIT "B"

BILL OF EXCHANGE



EXHIBITS

"B"
Bill of
Exchange
17th August
1976
(Contd.)

"JGA 8"

£ 576.97 No. 4502 009

London 17th August 1976.

2 Fitzroy Square London W1

Two
ONE HUNDRED AND ~~THIRTY ONE~~ DAYS (~~131~~) FIXED AFTER DATE of this FIRST of Exchange (second of the same tenor and date unpaid) Pay to the order of

THE COMMERCIAL BANK OF AUSTRALIA LIMITED,.

the Sum of

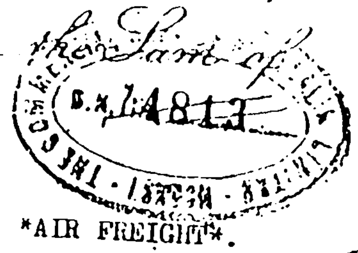
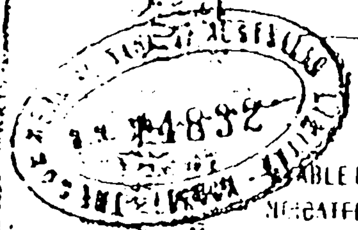
:: FIVE HUNDRED AND SEVENTY SIX POUNDS AND NINETY SEVEN PENCE ::

PAYABLE IN AUSTRALIAN CURRENCY AT THE RATE OF EXCHANGE INDICATED IN NOTATION HEREON PLUS THE AMOUNTS FOR STAMPS POSTAGE AND CHARGES ALSO THERE INDICATED value received in goods

AIR FREIGHT.

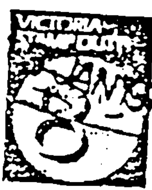
To ZINALDI & CO,.
315 LATROBE STREET, MELBOURNE, VICTORIA 3000
AUSTRALIA,.

Schofield, Goodman & Sons
BILL MANAGER.

EXHIBITS

"B"
Bill of
Exchange
17th August
1976
(Contd.)



REFER TO ACCEPTOR SIGHTED AND REACCEPTED ....
PAYABLE AT THE COMMERCIAL BANK OF AUSTRALIA
LIMITED 260 SWANSTON ST., MELBOURNE TO MATURE
2/1/77

ZINALDI & CO.

Zinaldi & Co

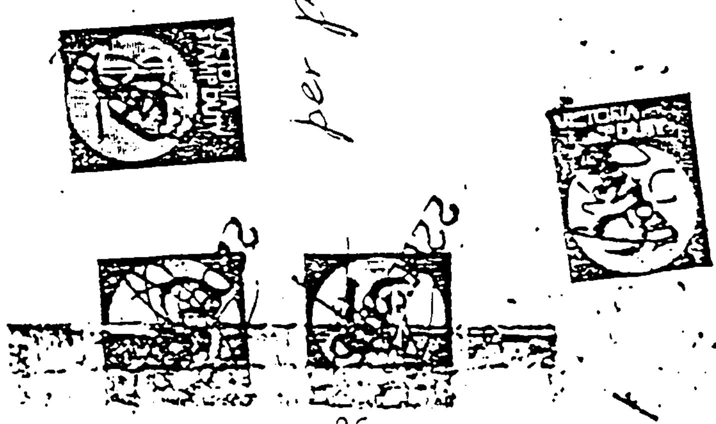
per pro

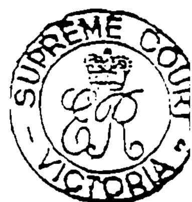
25th August 1976
Sighted & Accepted & Made
Payable at

.... STREET

NOTATION

AMOUNT OF BILL	-	$576-97
AIRMAIL POSTAGE		$ -42
OTHER CHARGES		£
TOTAL STERLING AMOUNT		£ 577-39
CONVERTED AT		$ ~~857-19~~
£ stg. = $1.4846		
OVERSEAS STAMP DUTY		$ ~~1-08~~
TOTAL OVERSEAS CURRENCY		$ 858-27





EXHIBITS

EXHIBITS

"C"

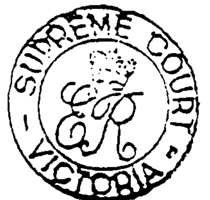
Bill of Exchange
19th August 1976

I CERTIFY THE TYPEWRITING ON THE PAGES TO BE A TRUE ... THE ORIGINAL Exhibit "C" ... PURPORTS TO BE ... OFFICE.
DATED THIS 24th DAY OF July 1984

Deputy PROTHONOTARY OF THE SUPREME COURT

EXHIBIT "C"

BILL OF EXCHANGE



EXHIBITS

"C"
Bill of
Exchange
19th
August
1976
(Contd.)

"JCA 9"

010 Due 30/12/76 6/1/77 31/1/77

£ 2725.92 S: 4516

London 19th August, 1976

2 Kings Square London W1

Two hundred and twenty three days (223) FIXED AFTER DATE of this FIRST of Exchange (second of the same tenor and date unpaid) Pay to the order of

THE COMMERCIAL BANK OF AUSTRALIA LIMITED,. the Sum of

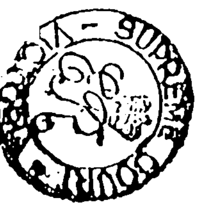
:: TWO THOUSAND SEVEN HUNDRED AND TWENTY FIVE POUNDS AND NINETY TWO PENCE ::

PAYABLE IN AUSTRALIAN CURRENCY AT THE RATE OF EXCHANGE INDICATED IN NOTATION HEREON PLUS THE AMOUNTS FOR STAMPS, POSTAGE AND CHARGES ALSO THERE INDICATED value received in goods *AIR FREIGHT*.

To ZINALDI & CO.,
315 LATROBE STREET, MELBOURNE,
VICTORIA, 3000 AUSTRALIA,.

Schofield Goodman & Sons, Ltd.

BILL MANAGER.



SIGHTED AND REACCEPTED ....
PAYABLE AT THE COMMERCIAL BANK OF
AUSTRALIA LIMITED 260 SWANSTON STREET
MELBOURNE TO MATURE 6/1/77 FIXED.

ZINALDI & CO.

....

EXHIBITS

"C"
BILL OF
EXCHANGE
9th August
976
Contd.)

TOTAL	
AMOUNT OF BILL	£2725 92
AIRMAIL POSTAGE	£ 42
OTHER CHARGES	£
TOTAL STERLING AMOUNT	£2726·34
CONVERTED AT	$ ~~4.........~~
£ stg. = $ 1 4857	
OVERSEAS STAMP DUTY	$ ~~.......~~
TOTAL OVERSEAS CURRENCY	$4054·63

REFER TO ACCEPTOR

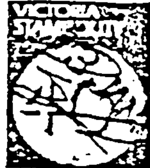
ZINALDI r/o

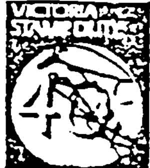
7/9/76

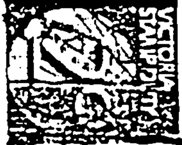
HEREON PAYABLE AT

SIGNED ACCEPTED

THE COMMERCIAL BANK OF AUSTRALIA LIMITED
260 SWANSTON STREET
MELBOURNE







SIGHTED AND REACCEPTED.......
PAYABLE AT THE COMMERCIAL BANK

EXHIBITS

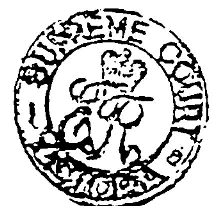
"D"
Bill of Exchange
13th October 1976

I CERTIFY ...
PAGES ...
THE ORI... Exhibit "D" ...
URPORTS ...
FFICE.
DATED THIS 26th ... July ... 84

Deputy PROTHONOTARY OF THE
SUPREME COURT

EXHIBIT "D"

BILL OF EXCHANGE



JGA 10'

Due 11/1/77

£ 6357.95 No. S: 4908 London 3/1/77 13th October, 1976. 011

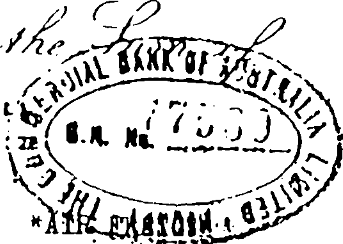
2 Fitzroy Square London W1

NINETY DAYS (90) FIXED AFTER DATE of this FIRST of Exchange (second of the same tenor and date unpaid) Pay to the order of

THE COMMERCIAL BANK OF AUSTRALIA LIMITED, the sum of

:: SIX THOUSAND THREE HUNDRED AND FIFTY SEVEN POUNDS AND NINETY FIVE PENCE

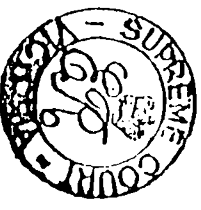
PAYABLE IN AUSTRALIAN CURRENCY AT THE RATE OF EXCHANGE INDICATED IN NOTATION HEREON PLUS THE AMOUNTS FOR STAMPS POSTAGE AND CHARGES ALSO THERE INDICATED value received in goods



To ZINALDI & CO.,
315 LATROBE STREET, MELBOURNE,
VICTORIA, 3000 AUSTRALIA.

Schofield, Goodman & Sons, Ltd.

BILL MANAGER. R King



EXHIBITS

"D"
Bill of
Exchange
13th October
1976
(Contd.)

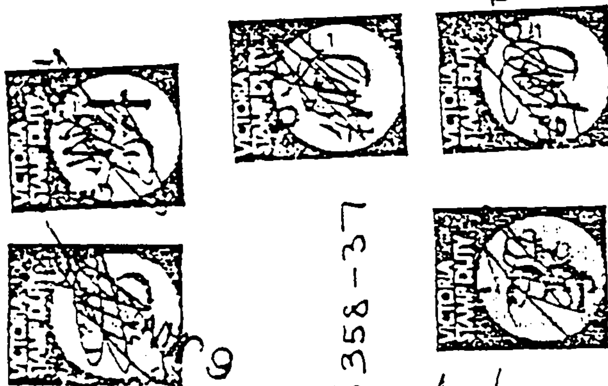
"D"

28/10/76

SIGHTED ACCEPTED AND MADE PAYABLE
AT COMMERCIAL BANK OF AUSTRALIA
260 SWANSTON STREET, MELBOURNE

....
ZINALDI & CO.

REFER TO ACCEPTOR



6358-37

NOTATION

AMOUNT OF BILL	£6357.45
AIRMAIL POSTAGE	£ .42
OTHER CHARGES	£ [illegible]
TOTAL STERLING AMOUNT	£ [illegible]
CONVERTED AT £ stg. = $ 1.3569	$ [illegible]
OVERSEAS STAMP DUTY	$ [illegible]
TOTAL OVERSEAS CURRENCY	$8635.5[illegible]

I CERTIFY [illegible]
PAGES [illegible]
THE [illegible] Exhibit "E"
PURPOSES [illegible]
OFFICE.
DATED THIS 24th DAY OF July 1984

[signature]

Deputy PROTHONOTARY OF THE SUPREME COURT

EXHIBITS

EXHIBITS

"E"
Bill of Exchange
21st October
1976

EXHIBIT "E"

BILL OF EXCHANGE

"E"
BILL OF
EXCHANGE
21st
October
1976
(Contd.)

JCA 11

85 No. S. £ 5,491.83 ... 1/77 ... er, 1976 012 Due: 31/ ... London 21st October ... Grey Square London W1

102 EIGHTY(88) DAYS FIX ... One hundred two EIGHT DATE ... ER Exchange ... of this FIRST of

ond of the same ... (second date) ... and unpaid) Pay to ... the order of

COMMERCIAL BANK OF ... THE A LTD. AUSTRALIA ... Sum of ... the

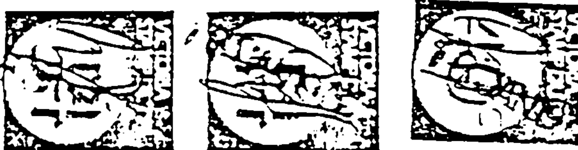
FOURHUNDRED&NINETYONE ... .FIVETHOUSAND EIGHTY POUNDS & EIGHT ... IVEPENCE. "AIR FREIGHT"

CURRENCY AT THE RATE OF EXCHANGE ... PAYABLE IN AUSTRALIAN CURRENCY ... NGE
HEREON PLUS THE AMOUNTS ... INDICATED IN NOTATION ... FOR
CHARGES-ALSO-THERE-INDICATED ... STAMPS, POSTAGE, AND ... value received ... in goods

& CO., To ZINALDI
LATROBE STREET, 315,
MELBOURNE, VICTORIA, AUSTRALIA. ... BILL MANAGER ... Schofield ...

PAYABLE AT THE COMMERCIAL BANK OF
AUSTRALIA LIMITED 260 SWANSTON STREET
MELBOURNE TO MATURE 31/1/77 FIXED
ZINALDI & CO

EXHIBITS
"E"
Bill of Exchange 21st October 1976 (Contd.)



NOTATION

AMOUNT OF BILL	£ 5491.85
AIRMAIL POSTAGE	£ .42
OTHER CHARGES	£
TOTAL STERLING AMOUNT	£ 5492.27
CONVERTED AT	$ ~~7617.23~~
£ stg. = $1.3869	
OVERSEAS STAMP DUTY	$ ~~6.93~~
TOTAL OVERSEAS CURRENCY	$ 7824.16

SIGHTED - ACCEPTANCE MADE PAYABLE AT THE CBA 260 SWANSTON Z. NAIR & CO. P/L

25-11-76

REFER TO ACCEPTOR

EXHIBITS

"F"

Bill of Exchange

23rd November 1976

EXHIBITS

DATED THE 26th July 1984

Deputy PROTHONOTARY OF THE SUPREME COURT

EXHIBIT "F"

BILL OF EXCHANGE

"JGA 13"

Due: 21/2/77

£ 5717.77 No. S: 5182 London 23rd November, 1976.

2 Fitzroy Square London W1

014

NINETY DAYS (90) ~~FIXED AFTER DATE~~ XXXXXX of this FIRST of Exchange (second of the same tenor and date unpaid) Pay to the order of THE COMMERCIAL BANK OF AUSTRALIA LIMITED, the Sum of

:: FIVE THOUSAND SEVEN HUNDRED AND SEVENTEEN POUNDS AND SEVENTY SEVEN PENCE ::

PAYABLE IN AUSTRALIAN CURRENCY AT THE RATE OF EXCHANGE INDICATED IN NOTATION HEREON PLUS THE AMOUNTS OF STAMPS, POSTAGE AND CHARGES ALSO THERE INDICATED value received in goods *AIR FREIGHT*.

To ZINALDI & CO.,
315 LATROBE STREET, MELBOURNE, VICTORIA 3000
AUSTRALIA,.

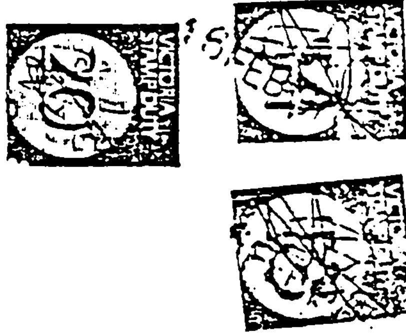
Schofield, Goodman & Sons, Ltd.
BILL MANAGER

EXHIBITS
"F"
Bill of Exchange
23rd November 1976
(Contd.)

EXHIBITS

"F"
Bill of
Exchange
23rd
November
1976
(Contd.)

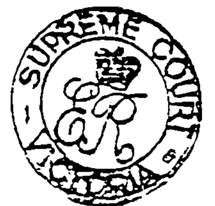
"F"



NOTATION

AMOUNT OF BILL	£ 5717.77
AIRMAIL POSTAGE	£ .42
OTHER CHARGES	£
TOTAL STERLING AMOUNT	£ 5718.19
CONVERTED AT £ stg. = $ 1.3900	$ 7948.28
OVERSEAS STAMP DUTY	$ 7.20
TOTAL OVERSEAS CURRENCY	$ 7955.48

SIGHTED + ACCEPTED
MADE PAYABLE AT
CBA 260 SWANSTON STR.
21/12/76
ZINALDI + Co



I CERTIFY THE TYPEWRITING ON THIS/THE
PAGES TO BE A TRUE AND CORRECT COPY OF
THE ORIGINAL Exhibit "G" WHICH IT
PURPORTS TO BE A COPY AS FILED IN THIS
OFFICE.
DATED THIS 26 DAY OF July 1984

Deputy PROTHONOTARY OF THE
SUPREME COURT

EXHIBITS

EXHIBITS
"G"
Letter from Second Respondent to First Respondent 16th August 1978

EXHIBIT "G"

LETTER FROM THE SECOND RESPONDENT TO THE FIRST RESPONDENT

EXHIBITS

"G"
Letter Second Respondent to First Respondent 16th August 1978 (Contd.)

THE COMMERCIAL BANK OF AUSTRALIA LIMITED

VICTORIA

DEMAND

Mrs. Chana Zyngier,

32 Nelson Road,

CAMBERWELL, VIC. 3124

TAKE NOTICE that The Commercial Bank of Australia Limited, the Mortgagee under Instrument of Mortgage from Chana Zyngier to the said Bank registered on the 2nd June, 1976 numbered G 174231 hereby demands payment of all the principal moneys and interest secured by the said Mortgage. 10

DATED at Melbourne this 16th day of August 1978.

For and on behalf of

THE COMMERCIAL BANK OF AUSTRALIA LIMITED

(Signed)
(F.J.R. Bolderston)
Manager
Victorian Credit and Lending

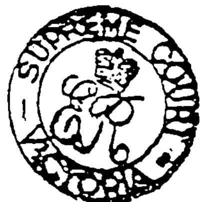


Exhibit "H"

DATED THIS 26th DAY [of] July 1984

Deputy PROTHONOTARY OF THE SUPREME COURT

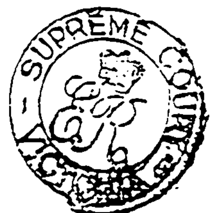
EXHIBITS

"H"

Letter from Solicitors for the Second Respondent to the Solicitors for the First Respondent
1st September 1978

EXHIBIT "H"

LETTER FROM SOLICITORS FOR THE SECOND RESPONDENT TO THE SOLICITORS FOR THE FIRST RESPONDENT



EXHIBITS

"H"

Letter from Solicitors for the Second Respondent to the Solicitors for the First Respondent 1st September 1978 (Contd.)

1st September, 1978.

Messrs. Phillips Fox & Masel,

Solicitors,

Box No. 102,

MELBOURNE DOCUMENT EXCHANGE

Dear Sirs,

Re: Commercial Bank of Australia Ltd.

Mrs. Chana Zingier - Mortgage No. G 174231

We refer to our recent discussion. We now have a copy of your recent correspondence with our client. We confirm our advice that in view of the claims made by Phillip E. Fox on behalf of the Scholefield Goodman companies against our client, and pursuant to the mortgage between our respective clients, we cannot approve a discharge of mortgage. 10

Yours faithfully,
J.M. SMITH & EMMERTON

Per: (Initialled)

Exhibit "I"

26th July 84

Deputy

EXHIBITS

"I"
Caveat
26th
September
1978

EXHIBIT "I"

CAVEAT

EXHIBITS
"I"
Caveat
26th September
1978
(Contd.)

CAVEAT FORBIDDING REGISTRATION OF ANY DEALING WITH ESTATE OR INTEREST

TO: The Registrar of Titles

TAKE NOTICE that SCHOLEFIELD, GOODMAN & SONS LIMITED the registered office of which is situate in Victoria at 19th Floor, A.M.P. Tower, 535 Bourke Street, Melbourne in the said State claims an equitable interest in ALL THAT piece of land being more particularly described in Certificate of Title Volume 8543 Folio 360 now standing in the name of Chana Zyngier which equitable interest arises pursuant to its entitlement by statute or by equity to be assigned or to have assigned to a trustee for it the right title and interest of The Commercial Bank of Australia Limited ("the Bank") in such land under and by virtue of an instrument of mortgage dated the 2nd day of June 1976 granted by the said Chana Zyngier to the Bank and registered number G 174231, the obligations of the said Chana Zyngier to the Bank under the said mortgage having been satisfied and Scholefield, Goodman & Sons Limited being entitled to contribution from the said Chana Zyngier in respect of its having discharged certain obligations of Zinaldi & Co. Pty. Ltd. to the Bank which obligations were the subject of guarantee by the said Chana Zyngier under the said mortgage AND IT FORBIDS the registration of any instrument affecting the said instrument of mortgage number G 174231 and the said interest absolutely AND IT APPOINTS the office of Philip E. Fox, Esq., Solicitor, situate at 351 Collins Street, Melbourne,

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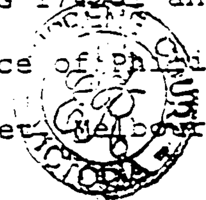

the place at which notices and proceedings relating to the Caveat may be served.

DATED the 26th day of September 1978

(Signature)

Scholefield, Goodman & Sons Limited

by its Solicitor and Agent, PHILIP E. FOX

A memorandum of the within instrument
has been entered in the Register Book.

H 247339

IN THE PRIVY COUNCIL No. 42 of 1984

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

BETWEEN:

SCHOLEFIELD GOODMAN AND SONS LIMITED — Appellant

\- and -

CHARNA ZYNGIER — First Respondent

\- and -

WESTPAC BANKING CORPORATION — Second Respondent

RECORD OF PROCEEDINGS

CLYDE & CO.,
30 Mincing Lane,
London EC3R 7BR

Solicitors for the First Respondent

MAPLES TEESDALE
21 Lincoln's Inn Fields,
London WC2A 3DU

Solicitors for the Appellant

COWARD CHANCE
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the Second Respondent