Privy Council Appeal No. 15 of 1989

(1) The Chase Manhattan Bank and
(2) Robert Stewart Kirby *Appellants*

v.

The Sanitary Laundry Company Limited *Respondent*

FROM

THE COURT OF APPEAL OF BARBADOS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE
17TH DECEMBER 1990

Present at the hearing:-

LORD KEITH OF KINKEL
LORD GRIFFITHS
LORD ACKNER
LORD OLIVER OF AYLMERTON
LORD JAUNCEY OF TULLICHETTLE

*[Delivered by **Lord Keith of Kinkel**]*

This appeal is concerned with a tripartite transaction entered into in September 1976 by the first appellant ("Chase"), the respondent ("Sanitary") and Barclays Bank International Limited ("Barclays"), the principal matter at issue being whether or not that transaction was illegal as being in contravention of section 34(3)(a) of the Exchange Control Act (Cap. 71).

Prior to the date of the transaction Sanitary was, and had for a considerable time been, a customer of Barclays. A majority of the shares in Sanitary was owned by a company registered in Panama, so that it was controlled by persons resident outside Barbados. So any loan to Sanitary required the permission of the Central Bank of Barbados as Exchange Control Authority by virtue of section 34(3)(a) of the Exchange Control Act, which so far as material provides:-

> "Except with the permission of the Authority, no person resident in the Island shall lend any money or securities to any body corporate resident in Barbados which is by any means controlled (whether directly or indirectly) by persons resident outside Barbados."

Barclays had at various times obtained permission to lend money to Sanitary and in August 1975 held as

security for its advances (a) an equitable mortgage dated 30th January 1950, (b) first and second further charges dated 5th June 1962 and 3rd September 1968 and (c) a debenture constituting a floating charge on all the property of Sanitary dated 29th January 1969. On 13th August 1975 the Central Bank gave permission for an overdraft of $200,000 and a term loan of $64,191.70. The mortgage and the charges were stamped to cover the sum of $75,000 and the debenture was stamped to cover the sum of $330,000, making a total of $405,000 for which the securities would be good.

In 1976 Sanitary decided to transfer its banking business to Chase, and by letter dated 26th February 1976 Chase agreed to grant Sanitary a 5 year term loan of $275,000 and an overdraft of up to $125,000, but the former was later reduced to $260,000. Chase applied to the Central Bank for permission for these two facilities, totalling $385,000, and this was granted on 5th August 1976. On 29th July 1976 Chase wrote to Barclays stating that Sanitary's debt to the latter (then estimated at $186,000) would be repaid by Chase when the documentation was in order. On 30th July 1976 Sanitary formally requested an overdraft of up to $125,000, and on 22nd September 1976 it signed a promissory note in respect of the term loan of $260,000.

Thereafter Barclays, Chase and Sanitary executed an Indenture of Assignment and Mortgage dated 23rd September 1976, ("the Indenture"). The Indenture recited the equitable mortgage, the two further charges and the debenture as being held by Barclays in security of advances to Sanitary, and further recited that the sum of $405,000 was due and owing to Barclays by Sanitary. This was incorrect. The amount due by Sanitary to Barclays was in fact at the time $211,509.71. The Indenture went on to provide that in consideration of the sum of $405,000 paid by Chase to Barclays the latter assigned to Chase the sum of $405,000 due by Sanitary and also the mortgage, the further charges and the debenture. There followed various other provisions not material for present purposes.

On the same day, 23rd September 1976, a representative of Chase attended at Barclays' premises in Bridgetown and handed over a cheque for $405,000 in favour of Barclays expressed as being for the account of Sanitary and received in exchange Barclays' cheque for $193,490.29 in favour of Chase expressed as being for the account of Sanitary. The sum of $193,490.29 represented the difference between $405,000 and the amount at the time due and owing by Sanitary to Barclays, namely $211,509.71.

Chase then opened a statement of Sanitary's account with it. The first entries, dated 23rd September 1976, showed debits of $405,000 and of an (irrelevant) sum of

$120.96 and credits of $193,490.29, $260,000 being the amount of the agreed term loan, and an (irrelevant) sum of $2,198.71, and also the consequential credit balance of $50,560.04. On the same day Barclays closed its statement of account with Sanitary showing a debit of $193,490.29, a credit of $405,000 and a nil balance.

The reason why the Indenture recited that $405,000 was owing by Sanitary to Barclays and purported to assign debt of that amount to Chase, and why the exchange of cheques procedure was gone through, was apparently that the solicitors acting for the parties believed that, if the Indenture bore to assign the debt actually owed by Sanitary to Barclays, namely £211,509.71, Chase would not get the full benefit of the amount of $405,000 for which the securities had been stamped.

During a period from 1980 till early 1982 Sanitary was in breach of various provisions of the debenture dated 29th January 1968 and of the Indenture. In addition there were other circumstances which caused Chase to have doubts about Sanitary's creditworthiness. Accordingly Chase, on 2nd June 1982, appointed the second appellant to be receiver of the property of Sanitary under powers contained in the debenture and the Indenture.

On 1st March 1983 Sanitary issued an originating summons in the High Court claiming a declaration that the appointment of the second appellant as receiver was invalid and void, and an order that the appellants account for all property of Sanitary which had come to their hands.

After some preliminary procedure the case came to trial before the Chief Justice, Sir William Douglas. On 16th September 1985 he gave judgment in favour of Sanitary granting a declaration and an order for accounting as sought. He held that the transaction which took place on 23rd September 1976 was a loan by Chase to Sanitary of $405,000, that since the Central Bank had given permission for advances of only $385,000 the loan of $405,000 contravened section 34(3)(a) of the Exchange Control Act, and accordingly that the Indenture was void, the debenture was of no effect and the appointment of the receiver was a nullity. That was the primary issue. The learned Chief Justice also decided against Chase a number of consequential subsidiary issues, which it is unnecessary to particularise. Chase appealed to the Court of Appeal and on 4th November 1988 that Court (Straugn Husbands A.C.J., Rocheford and Belgrave JJ.) dismissed its appeal. Chase now appeals to Her Majesty in Council.

Their Lordships are satisfied that the learned Chief Justice and the Court of Appeal fell into error in holding that Chase lent the sum of $405,000 to

Sanitary on 23rd September 1976. It was suggested on behalf of Sanitary that the question whether or not such a loan was made was one of fact, upon which there were concurrent findings in the courts below so as to preclude the Board from interfering. Their Lordships do not agree. The question is one of law, to be decided on a true construction of the parties' dealings in the light of the surrounding circumstances. One starts with the situation that Chase had agreed before 23rd September 1976 to grant Sanitary a term loan of $260,000 and overdraft facilities up to $125,000. Sanitary had signed a promissory note in respect of the former and a formal request in respect of the latter. Central Bank permission for advances up to these limits had been obtained. At the time when the Indenture was executed Sanitary owed Barclays $211,509.71. That was the whole amount of the debt which Barclays was in a position to assign to Chase. Thus although the Indenture recited that Sanitary owed Barclays $405,000 and purported to assign that amount of debt to Chase, in fact the Indenture was capable of assigning, and did assign, only $211,509.71 of debt. The exchange of cheques on 23rd September had the effect that $405,000 passed out of Chase's coffers into those of Barclays, while simultaneously $193,490.29 passed out of Barclays' coffers into those of Chase. The substance was that Barclays received $211,509.71, being the amount of Sanitary's debt which it had by the Indenture assigned to Chase. Barclays credited Sanitary with $405,000 and simultaneously debited it with $193,490.29. The substance of this was that Sanitary was credited with the sum of $211,509.71 which Barclays had received from Chase, thus extinguishing its indebtedness to Barclays. At the same time Chase debited Sanitary with $405,000 and simultaneously credited it with $193,490.29, the result in substance being that Sanitary was debited with $211,509.71. By reason that Sanitary was on the same day credited with the amount of the term loan of $260,000, Sanitary's account did not show any debit balance but on the contrary a credit balance of $50,568.04, after allowing certain unconnected debit and credit items. In the result, no part of the paper figure of $405,000 was ever at Sanitary's disposal. The position was that, as had been intended all along, Sanitary was entitled to draw upon Chase for the balance of the agreed term loan of $260,000 and for the agreed overdraft facility of up to $125,000, and that Sanitary's debt to Barclays of $211,509.71 had been extinguished. The conclusion is that Chase never intended to make a loan of $405,000 to Sanitary and did not do so. It may be added that it would be a grotesque result if in all the circumstances Chase were held to have been guilty of an offence under the Exchange Control Act and to have rendered itself liable to severe penalty.

It follows that all the securities assigned by Barclays to Chase were valid and effective in its hands and that

the appointment of the second appellant as receiver of Sanitary's assets is not capable of being impugned. Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the originating summons dismissed. The respondent must pay the appellants' costs before the Board and in the Courts below.