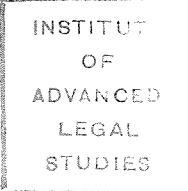


judgments no. 27, 1973



IN THE PRIVY COUNCIL

No.27 of 1973

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND

B E T W E E N:

PETER THOMAS FAHEY (Defendant) Appellant

--and--

M.S.D.SPEIRS LIMITED (Plaintiff) Respondent

APPELLANT'S CASE

- 10 1. This is an Appeal from a Judgment of the Court of Appeal of New Zealand dated 31st August, 1973, affirming a judgment of Quilliam, J. in the Supreme Court dated 14th November, 1972. Record  
p.52 19-21  
p.40 19-23
- 2. The questions in the Case are:--
  - (a) Whether, by virtue of s.2 of the Moneylenders Act, 1908 the Respondent, which had no licence under that Act, and charged interest on overdue accounts at more than 10%, was unable to recover under the guarantee hereinafter mentioned. p.15.48 -  
p.16.2  
Ex.C.p.55
  - 20 (b) Alternatively:
    - (i) Whether the Respondent, under the said guarantee, was entitled to recover from the Appellant any part of the debt of Fahey Construction Company Ltd. (hereinafter called Fahey Construction) incurred for goods supplied before 2nd December 1968, (being the date of the guarantee) or any sum for interest thereon. Record,  
p.30.31-37
    - 30 (ii) Whether, under the said guarantee, the Respondent was entitled to recover from the Appellant any sum for interest upon debts incurred by Fahey Construction for goods supplied on or after 2nd December 1968
    - (iii) Whether as between the Respondent and the Appellant, the latter was entitled, in relief of liability under the guarantee

to the benefit of payments made to the Respondent by Fahey Construction after 2nd December 1968, being the date of the guarantee.

3. The facts stated in the next 12 paragraphs hereof (numbered 4 to 15 inclusive) relate to the history of the Case up to the commencement of the action, and are not in dispute.

Record  
p.6 19-25

4. Beginning in 1963 the Respondent had regularly supplied goods to the Appellant, who was in business as a builder.

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Ex C, p.55  
Record,  
p.3. 32-36

5. On 5th April, 1967 the Respondent sent to its customers a circular giving notice of its intention to charge interest at 1% per month on accounts (sic) three months or more overdue. The Appellant objected to the charge, but acquiesced in it.

p.8 38-42

6. Fahey Construction was incorporated late in 1967, and took over the business of building carried on by the Appellant, who thereupon discharged his debt to the Respondent.

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p.14 38

7. There is no direct evidence of the Appellant's position in Fahey Construction, except that he was Chairman on 16th August 1971; but it is clear that he was the head of the business, and its manager.

8. The Respondent extended credit to Fahey Construction for goods supplied, and debited the account with interest at 1% per month on balances overdue three months or more.

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p.7 11-  
p.8 27

9. The method of accounting is described by the Respondent's accountant, Mr. McLean. But it appears from Exhibit 1 that when interest was debited at the end of a given month and no payment was received in the following month or months, interest was compounded.

p.30-13  
Ex.1,  
pp.61-2

Record  
p.10 9-11

10. The Appellant continued to complain against, and to acquiesce in, the charge against Fahey Construction of 1% per month on balances overdue three months or more.

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p.11 8-12

11. (a) Late in 1968 the Respondent declined to extend further credit to Fahey Construction unless the Appellant guaranteed the account. When asked to sign the Respondent's regular form of guarantee, the Appellant declined; and said he would furnish "his own" guarantee.

Ex.E.  
p.56.  
Record,  
pp.11,30

(b) On 2nd December 1968 the Appellant handed to the Respondent a guarantee in the following form:- p.30. 25-38

"M.S.D.SPIERS LTD.,  
Elizabeth Street,  
WAIKANAE

10 I PETER T.FAHEY hereby guarantee to pay for any materials which are purchased from M.S.D. SPIERS LTD. by FAHEY CONSTRUCTION CO. LTD. in the event of FAHEY CONSTRUCTION CO. LTD. not being in the position to do so.

(Signed)

Peter T.Fahey "

12. Fahey Construction's indebtedness for goods already supplied, plus interest as aforesaid, was \$10,070.06 on 2nd December 1968. Ex 1, pp.61-2

20 13. Thereafter, until 31st March 1971, the Appellant continued to supply goods to Fahey Construction on the same terms as to interest. Towards the end of that period, the Respondent endeavoured to obtain security over some of the Appellant's real property, but negotiations broke down, and nothing resulted. Ex 1. pp.61-2 Record, p.24

14. The Appellant thereupon stopped the credit of Fahey Construction, whose account was then in debit \$15,916.10; and on a date not in evidence, the Respondent brought the present action against the Appellant. Ex.1 pp.61-2 Record p.1.5- p.2. 25

30 15. Before the action came to trial, Fahey Construction had entered upon a creditors' voluntary winding up; the Respondent had received, and had credited to Fahey Construction, an interim dividend of \$4062.47; and the Respondent's claim in the action was reduced, by consent, to \$11,853.43 p.14. 9-11 p.17. 4 p.29. 1

40 16. The Respondent's claim against the Appellant was for the balance shown in Exh.1, \$15916.10 reduced by the interim dividend, (\$4062.47) to \$11,853.43. pp.61-2 At the hearing of the action the Appellant contended that his obligation related to the price of goods to be purchased after the date of his guarantee; that he was entitled, in relief of that obligation, to the benefit of payments made by the debtor after the date of the guarantee, no matter how appropriated as between the Respondent and Fahey Construction; and that the state of account as between himself as guarantor and the Respondent as

principal, was, upon the true construction of the guarantee, as follows:-

Credits, Exhibit E, Column C, since 30th November 1968	\$ 33642.69	
Credit for dividend	<u>4062.47</u>	
	37705.16	
Debits, column B, since 30th November 1968	39488.73	
Less interest, column A, included in column B	1974.06	10
	<u>37513.67</u>	
	<u>\$ 191.49</u>	

17. (At the hearing of the action, and later in the Court of Appeal, the Appellant further contended in the Alternative, with reference to the document now called a guarantee. that it was not a guarantee but an indemnity, and that the loss could not be measured until Fahey Construction had been wound up; a contention which, if upheld, would have resulted in a judgment of non-suit. But that contention is now abandoned because the winding-up has been completed, or very nearly so.) 20

Exs M & N  
pp.58-61

18. At the hearing of the action, and in the Court of Appeal, the Appellant also contended, and he will contend, that the Respondent had systematically contracted, with many of its customers, to treat present and future balances as advances at interest; that it was money-lending; and that the Respondent was a money-lender within the meaning of the said Act. 30

19. At the hearing of the action, and in the Court of Appeal, the Respondent contended that upon its true construction the guarantee was a guarantee and not an indemnity, and extended to Fahey Construction's debt and accrued interest both before and after the guarantee, the interest being an addition to the price of the goods, as distinct from being charged, as the Appellant contended, upon balance of current account as the price of accommodation beyond three months. 40

20. The action came on for trial at Wellington on 24th and 25th October 1972 before Quilliam J. who, on 14th November 1972 gave judgment for the Respondent for the said sum of \$11853.43 with costs, holding that the guarantee was a

guarantee, and that it covered the whole balance of \$15916.10 shown in Exh.1, less the dividend of \$4062.47

pp.61-2

21. The Appellant's appeal against the judgment of the Supreme Court was heard by the Court of Appeal on 15th August 1973; and on 31st August 1973 the judgment of the Court was delivered by Richmond, J.

Record  
p.42. 1

10 22. The Court of Appeal held that the guarantee was not an indemnity. They held that Fahey Construction was "not in the position to pay", within the meaning of the guarantee, when it was not in a position to pay the whole of its account for all purchases, with interest on outstanding balances. They held that the guarantee applied to future purchases.

20 23. Having so decided, the Court of Appeal next held that the guarantee applied to interest, because it did not expressly say how much the Appellant was to pay for the materials; so that the current course of dealing between the Respondent and Fahey Construction required the guarantee to be treated by implication as including interest charged in respect of the balance of account as between the Respondent and Fahey Construction; beginning, that is, with the antecedent debit of \$10,070, which arose out of past purchases.

Ex 1,  
pp.61-2

30 24. The Appellant digresses to say that, of the total sum of \$1975.06 charged as interest in Column A of Exhibit 1, some \$1600 is shown upon analysing that Exhibit, to be attributable to the fact that the past debt of \$10,070.06 is brought into account.

Record,  
pp.61-2

40 25. The Court of Appeal next went on to consider whether, having differed from Quilliam, J. as to whether the guarantee applied to past purchases, there were grounds upon which to uphold the judgment of the Supreme Court for the whole account including interest on past purchases, less the dividend of \$4062. Having decided that the question depended upon whether the Respondent was entitled, as against the Appellant, to appropriate payments and charge interest, they said "We are, however, quite unable to find anything in the language of the guarantee signed Mr. Fahey which expressly or by implication required Speirs Ltd. to depart from the practice which it had always followed of appropriating payments first to interest, then to  
50 account overdue for more than three months, and

p.49. 20-26

Record  
pp.61-2

finally to other indebtedness." In the result, therefore, the Appellant was made liable, under the guarantee, for the whole of Fahey Construction's liability in respect of goods purchased, whether before or after 2nd December, 1968, the date of the guarantee; and also for interest on balance of account as debited in Exhibit 1.

26. As to the question under the Moneylenders Act, 1908, the Court of Appeal held that the Respondent's transactions did not amount to lending money, and adopted a dictum of Quilliam, J: 10

"Looking at the nature of the transaction involved here I can regard it as no more than a transaction of sale and purchase. The fact that the unpaid vendor stipulates for and receives interest upon the outstanding purchase price does not, in my view, alter the character of the transaction, 20 I accordingly conclude that there is here no question of a loan and that the provisions of the Moneylenders Act have no application."

pp.61-2

The Court's agreement with the passage cited involves, it is submitted that the account stated in Exhibit 1 was to be considered as an account showing interest due to an unpaid vendor on the unpaid purchase price of the goods sold.

pp.61-2

27. But Exhibit 1 is the statement of a current account, debiting interest on balances outstanding three months or more. It is impossible to relate the amount of any such balance to any given purchase. There was no need for the Respondent to attempt that in compiling the account; and there is no evidence that it was ever attempted. 30

28. As to the Appellant's liability under the guarantee, he will contend:

(a) That it is a guarantee of future purchases. 40

(b) That the effect of the judgment of the Court of Appeal is to make him liable for past purchases and the whole of the interest, as well as for purchases subsequent to the guarantee.

(c) That the judgment thus implies in the guarantee a stipulation that puts the

Appellant in the same position as if he had expressly undertaken the past debt and the interest on it.

- (d) That since the language of the written contract restricts liability to future debts, the said implied stipulation is either inconsistent with, or is repugnant to, the language; and thus either varies or contradicts the language.
- 10 (e) That accordingly, the stipulation cannot be implied.
- (f) That the opposite implication is correct, viz, that as between the Respondent and the Appellant, future payments by the debtors were to be in relief of the guarantee of future purchases, however treated in account as between the Respondent and the debtor.
- 20 (g) That in the guarantee the words "pay for any materials which are purchased" mean pay the nett purchase price; and that the interest charged is not part of the price, but is the cost of accommodation.

29. As to the question under the Moneylenders Act 1908, the Appellant will repeat the contentions mentioned in paragraph 18.

30 30. The Appellant accordingly submits that the judgment of the Court of Appeal ought to be reversed, and judgment entered in the Supreme Court for the Appellant, for the following among other

R E A S O N S

- (1) BECAUSE the Appellant's obligations were fixed by the terms of the guarantee, and not by any course of accounting between the Respondent and Fahey Construction.
- (2) BECAUSE the true construction of the guarantee is that contended for by the Appellant in paragraph 28.
- 40 (3) BECAUSE, if such is the true construction of the guarantee, nothing was due under it to the Respondent.
- (4) BECAUSE, if extraneous evidence was admissible to construe the guarantee, the Court of Appeal omitted to consider the following surrounding circumstances, viz:

Record  
p.47. 40-  
p.48. 3

- (a) That the Appellant was not liable for the debts of Fahey Construction.
  - (b) That the Appellant had refused to guarantee the accrued debt.
  - (c) That the Appellant had consistently objected to interest being charged.
- (5) BECAUSE, if the guarantee had contemplated past purchases, Fahey Construction was "not in the position to pay" when the guarantee was given; so that the reference to inability to pay, as a future "event" must have been meaningless, inasmuch as one day's further credit would have been enough to activate the guarantee. 10
- (6) BECAUSE, for present purposes, the present facts and the language of the present guarantee are indistinguishable respectively from those in Kinnaird v. Webster, 10 C.D.139, as explained in Browning v. Baldwin 40 L.T. 248; and in Bank of Australasia v. Wilson (1885) N.Z.L.R. 3 C.A. 130. 20
- (7) BECAUSE the Respondent's claim, if otherwise valid in whole or in part, was barred by the Money-lenders Act, 1908.

R. E. HARDING



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Appellant

- and -

M.S.D.SPEIRS LIMITED (Plaintiff)  
Respondent

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APPELLANT'S CASE

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