IN THE PRIVY COUNCIL No. 27 of 1973

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND

BETWEEN:

PETER THOMAS FAHEY (Defendant) Appellant

- and -

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

CASE FOR RESPONDENT

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1. This is an appeal from a judgment of the Court of Appeal of New Zealand (McCarthy P. Richmond and Beattie J.J.) given on 31st August 1973 dismissing with costs an appeal by the present Appellant against a judgment of the Supreme Court of New Zealand (Quilliam J.) given on 14th November 1972 wherein it was adjudged that the Respondent recover from the Appellant the sum of $11,853.43 with costs. p.52 p.40

2. The origin of the proceedings was an action commenced in the Supreme Court at Wellington. The Respondent, as Plaintiff, filed a Statement of Claim in which, so far as is relevant to this appeal, it was alleged that by a guarantee in writing dated 2nd December 1968 the Appellant guaranteed to the Respondent the due and punctual payment of all monies due and payable to the Respondent by Fahey Construction Company Limited with respect to all materials supplied to that company by the Respondent. It was further alleged that Fahey Construction Company Limited had made default in payment of monies due and payable to the Respondent and that there was as at 1st June 1971 owing by it to the Respondent the sum of $15,916.10. It was further alleged that such default by Fahey Construction Company Limited still continued, and that demand had been made on the Appellant by the Respondent for the payment p.1 p.2

of the said monies but that the Appellant had refused or neglected to make payment.

p.3 3. The Appellant filed a Statement of Defence by which the Appellant

(i) Admitted that on or about 2nd December 1968 he signed and delivered to the Respondent an instrument in terms later set forth in judgments delivered herein.

(ii) Alleged that the said instrument was a contract of indemnity and not of guarantee.

p.4 (iii) Admitted that Fahey Construction Company Limited was liable to the Respondent in a sum not precisely known and believed to be unascertained and in any case less than $15,916.10.

(iv) Admitted that Fahey Construction Company Limited had not discharged its liability to the Appellant.

(v) Admitted not having paid the sum of $15,916.10 or any part of it.

(vi) Otherwise denied the allegations made in the Statement of Claim.

p.5 As a further or alternative defence the Appellant alleged that if Fahey Construction Company Limited were unable to pay for any materials purchased from the Appellant it was not known and could not yet be ascertained for what specific materials the said company was unable to pay the Respondent, and what amount the said company was unable to pay the Respondent on account of any such materials. For a third or alternative defence the Appellant alleged that the Respondent was carrying on business as a timber merchant in the course of which the Appellant lent money at a rate of interest exceeding 10% per annum, was a money lender within the meaning of the Money Lenders Act 1908, and was not registered as a money lender.

4. At the commencement of the hearing before the Supreme Court the Respondent applied for and by consent was given leave to amend the Statement of Claim herein by reducing the

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amount claimed from Ø15,916.10 to Ø11,853.43 taking into account a dividend received by the Respondent in the liquidation of Fahey Construction Company Limited between the time of issue of proceedings herein and the commencement of the said hearing. p.28-29

5. Quilliam J. giving the judgment of the Supreme Court found the following facts. p.28 ff p.29

The Respondent is a supplier of building materials. As such the Respondent supplied the Appellant from 1963 until about November 1967. p.29,11 3-4

In November 1967 the Appellant formed his business of a building contractor into a company, known as Fahey Construction Company Limited. p.29,11. 4-6 p.29,11. 6-11

Materials were then supplied to the Company on credit in accordance with a well recognised practice. p.29,1.11

In April 1967 the Respondent became concerned at the extent to which it was being expected to carry out-standing accounts, and on 5th April 1967 it sent a circular letter to all customers setting out its proposed credit policy. p.29,1.12-14 p.29,11.18-21

The policy was that payment for goods supplied was due on the 20th of the month following supply. Discount would not be allowed if the account was not paid by that date. Interest at the rate of 1% per month would be charged upon any accounts three months or more overdue. p.29,11.21-27

That credit policy was applied thereafter to the accounts of the Appellant and, later, of Fahey Construction Company Limited. This rate of interest was on an annual basis, a high rate. It was charged deliberately to try to ensure that customers would pay accounts promptly. p.29,11.28-30 p.29,11.30-35

The payment received from a customer was applied first towards outstanding interest, next towards reduction of accounts three months or more overdue, and finally in reduction of the balance of account. p.29,11.36-41

In March 1968 the Appellant cleared his personal account. Fahey Construction Company Limited however soon fell into arrears. p.29,11.42-44 p.29,1.5

Discussions between the Respondent and the Appellant followed in August 1968, and in December 1968, in which the Appellant was informed that the account of Fahey Construction Company Limited must be brought up-to-date or mortgage security or a personal guarantee by the Appellant be given. p.30,11.1-19 p.30,11.13-19

The Appellant was shown the Respondent's standard form of guarantee and asked to complete it. He declined, but said that he knew what was required and would write out his (p.30,11.20-21 (p.56-57 (p.30,11.21-24

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p.30,l.26 own form of guarantee. On 2nd December 1968 the Appellant prepared, signed and handed to the Respondent's representative a document

p.30,ll.29-38 which was as follows :-

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

I PETER T. FAHEY hereby guarantee to pay for any materials which are purchased from M.S.D. SPEIRS 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 "

p.30,ll.41-43 By June 1971 the account of Fahey Construction Company Limited had reached a total indebtedness of $15,916.10 including interest. On 13th May 1971 the Respondent

p.30,l.44 made demand upon the Company and upon the Appellant personally for payment. The

p.31,ll.2-3 present proceedings issued on 7th July 1971.

p.31,l.6 Subsequently Fahey Construction Company Limited went into liquidation. A further

p.31,ll.11-12 dividend is expected from the Company in liquidation to the Respondent of between 4.4 cents and 14.2 cents to the dollar.

p.31,ll.14-31 6. Quilliam J. stated that judgment was resisted by the Appellant upon four grounds:-

p.31,l.16 (i) The document of 2nd December 1968 was said by the Appellant not to be a guarantee, but to be an indemnity.

p.31,l.18 (ii) That, whether the document is a guarantee or an indemnity, liability under it had in the Appellant's contention been satisfied by payments made by the company.

p.31,l.22 (iii) Alternatively, in the Appellant's contention the Respondent's action was premature until it was ascertained how much money the company was not in a position to pay.

p.31,l.26 (iv) That, in the Appellant's contention,

the provisions of the Money Lenders Act 1908 were a bar to the Plaintiff obtaining judgment.

As to the first ground, Quilliam J. cited 18 Halsbury 3rd Edition paragraph 767 as to the definition of a guarantee, and paragraph 775 as to the distinction between a guarantee and and an indemnity. A guarantee is an accessory contract whereby the Promisor undertakes to be answerable to the Promisee for the default of another, whose primary liability to the Promisee must exist or be contemplated. The distinction between guarantee and indemnity is that a guarantee is a collateral contract to answer for the default of another, whereas an indemnity involves an original and independent obligation. Reference was made to Yeoman Credit Limited v. Latter (1961) 2 All E.R. 294. Whether the document is a guarantee or indemnity is a matter of intention as appearing from the document and having regard to surrounding circumstances. The document was a guarantee. It purported to guarantee, and clearly envisaged a primary obligation on the company. It could not be construed as a primary obligation on the Appellant to keep the Respondent harmless against loss.

p.31,l.33
p.32,l.32
p.32,l.16
p.33,ll.24-28
p.33,l.30
p.33,ll.31-33
p.33,ll.36-37

As to the second ground, Quilliam J. stated this as involving two matters. The first was whether liability under the guarantee included interest charges, and the second was whether the guarantee extended to cover indebtedness prior to the date it was executed. The construction of the document depended upon the nature of the document itself interpreted in the light of the surrounding circumstances. Quilliam J. pointed out that it was not a precise or professionally drawn document. There was nothing in the guarantee to suggest that it was to be limited only to the nett cost of purchases. In view of the circumstances known to the parties when the guarantee was given the obligation assumed by the Appellant included interest. Quilliam J. took into account surrounding circumstances, Public Trustee v. Mackay (1969) N.Z.L.R. 995, 1005, and commonsense, to construe the wording of the guarantee instrument as covering liabilities

p.33,ll.40 ff
p.33,l.43
p.33,ll.4-6
p.33,ll.46-49
p.34,ll.5-8
p.34,ll.8-10
p.34,ll.35-38
p.34,ll.38-41
p.35,ll.5-8
p.35,l.20
p.36,l.6

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existing at the date the instrument was given as well as future liabilities. With liability for interest payments and amounts owing up to the date of the guarantee included the contention of the Appellant that liability under the guarantee had been satisfied failed.

p.36,l.10-19

p.36,l.20 ff

As to the third ground, Quilliam J. ruled that as the document was a guarantee and not an indemnity the Appellant was liable for the indebtedness of Fahey Construction Company Limited, which was clearly established.

p.36,l.42 ff

p 37,l.8-9

As to the fourth ground, Quilliam J. referred to Section 2 of the Money Lenders Act 1908 defining "Money Lender", and ruled that none of the statutory exceptions to the definition applied. However the question arose whether the transactions in the present case amounted to a "loan"

p.36,l.19

p.37,l.13

p.38,l.17

p.38,l.42

Quilliam J. referred to Pannam, The Law of Money Lenders in Australia and New Zealand, p.6 and pp 21-22, and Rabone v. Deane (1915) 20 C.L.R. 636,640, and Chow Yoong Hong v. Choong Fah Rubber Manufactory (1962) A.C. 209, 216-217. The transaction involved in the present case is no more than a transaction of sale and purchase. The

p.39,l.3-7

fact that the unpaid Vendor stipulates for and receives interest on the outstanding purchase price does not alter the character

p.39,l.7-9

of the transaction. There is no question of a loan. The provisions of the Money Lenders Act have no application.

7. The Appellant appealed from the judgment of Quilliam J. on the ground that

p.41

the judgment was erroneous in fact and law. The appeal was heard on the 15th day of August

p.42ff; p.52

1973. Judgment was reserved and delivered on the 31st day of August 1973 dismissing the appeal with costs.

p.42-45

8. Richmond J. delivering the judgment of the Court of Appeal re-stated the facts in terms similar to those of Quilliam J., with the following differences. Richmond J. did not refer to the Appellant being shown the

(p.30,l.20-24; (cf.p.43,l.25-(40

Respondent's standard form of guarantee, being asked to complete the same, declining, and stating he would write out his own form

p.44,l.7-16

of guarantee. Richmond J. made specific

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reference to the value of materials supplied and interest charges by the Respondent and payments made by Fahey Construction Company Limited, in the period from 2nd December 1968 until 31st May 1971. Richmond J. made further specific reference to the continuance of earlier practices as to the appropriation of payments received by the Respondent from Fahey Construction Company Limited during the period 1968 onwards, and the first four payments made after 2nd December 1968. p.44,ll.17-40

9. Richmond J. noted the four grounds of defence advanced before Quilliam J., and that substantially the same arguments were advanced by the Appellant on appeal. p.45,ll.9-32 p.45,ll.36-38

10. Richmond J. agreed with the ruling of Quilliam J. that the document of 2nd December 1968 was a guarantee rather than an indemnity. The document could not be construed as imposing a primary liability on the Appellant. No question of the Appellant's liability could arise unless there was in the first place an actual default by Fahey Construction Company Limited, Richmond J. agreed however with Counsel for the Appellant that the contingency upon which the Appellant's liability would arise under the guarantee was something more than mere default by Fahey Construction Company Limited. The Respondent must prove the additional fact that the company was not in a position to pay all of its current indebtedness. Clearly in the present case the company was not in fact in a position to pay all of its current indebtedness. It was open to the Respondent to sue forthwith on the guarantee. This conclusion disposed of the argument that the action was premature. p.45,1-32 p.46,ll.12-14 p.46,ll.17-19 p.46,l.20 ff p.47,ll.9-12 p.47,ll.13-14

11. Richmond J., differing from Quilliam J., ruled that the guarantee given on 2nd December 1968 did not relate to the pre-existing debt of £10,070.06. The words "are purchased" appearing in the guarantee are in their ordinary and natural sense descriptive of goods to be purchased in the future. There is no ambiguity in the language of the document, and accordingly no recourse to extrinsic evidence is permissible. Moreover, the surrounding circumstances disclosed contemplation of future supply of goods p.47,ll.31-32 ff p.47,ll.34-36 p.47,l.37-l.39 p.47,l.40-

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p.48,l.3 to which the language of the guarantee aptly applied. Richmond J., concurring with
p.48,ll.12-13 Quilliam J., considered that the guarantee covered interest. The guarantee is to pay
p.48,ll.15-18 for any materials which are purchased from the Respondent in the event of Fahey Construction Company Limited not being in a
p.48,ll.18-20 position to do so. It does not say how much the guarantor is to pay for the materials.
p.48,ll.20-26 Because of this incompleteness, regard to
p.48,l.27 ff surrounding circumstances is permissible. From the evidence, the terms of payment including payment of interest were well established and known to both parties to the guarantee, and the guarantor controlled the terms of purchase on the part of Fahey
p.48, l.38 ff Construction Company Limited. Richmond J. considered it quite clear that the parties must have intended the Appellant would pay whatever sum Fahey Construction Company Limited was liable to pay. The guarantee should not be limited merely to the actual price of such materials.

p.49,ll.11-19 12. Richmond J. then considered the rights of the Respondent as between itself and the Appellant to appropriate payments received by the Respondent from Fahey Construction Company Limited after 2nd December 1968 in accordance with the ordinary Rule in
p.49, l.15 Clayton's Case. Reference was made to 18
p.49, l.18 Halsbury's Laws of England 3rd Edition p.p.
p.49,l.20 ff 493 - 494. In general, a surety who gives a continuing guarantee in respect of the future indebtedness of a principal debtor cannot insist on the creditor appropriating future payments towards future indebtedness rather than towards an antecedent debt.
p.49, l.26 In re. Sherry - London and County Banking Co. v. Terry (1884) 25 Ch.D.692. Unless the guarantee expressly or impliedly provides otherwise the mere fact of surety-ship does not take away from the principal debtor and the creditor powers to appropriate payments towards discharge of a debt of the principal debtor not covered by the
p.49,l.40 guarantee. Kinnaird v. Webster (1878)
p.49,l.42 10 Ch.D. 139, as explained in Browning v. Baldwin (1879) 40 L.T. 248, is an example of an exception, depending upon interpretation of the particular document
p.50, l.1 involved. Bank of Australasia v. Wilson

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(1885) N.Z.L.R. 3 C.A.130 involved a guarantee with particular wording. The present guarantee signed by the Appellant contains nothing requiring the Respondent to depart from the practice which it had always followed of appropriating payments first to interest, then to accounts overdue more than three months, and finally to other indebtedness. Marryatts v. White (1817) 2 Stark. 101; 171 E.R. 586 is distinguishable on the facts. The first four payments made by Fahey Construction Company Limited after the guarantee was given were paid generally on account of the company's indebtedness and were in themselves more than sufficient to clear off the antecedent debt and any possible interest thereon. The result of the appeal was therefore unaffected by the ruling that the guarantee applied only to the future supply of materials.

p.50,11.8-15
p.50,1.21
p.50,11.35-41
p.61
p.50,11.41.45

13. Richmond J., concurring with Quilliam J., ruled further that the Respondent was not a "money lender" within the meaning of the Money Lenders Act 1908 as the transaction between the Respondent and Fahey Construction Company did not at any stage involve a loan of money.

p.51

14. The Respondent humbly admits that the decisions of the Court of Appeal and of the Supreme Court were right and should be affirmed, and that this appeal should be dismissed with costs for the following among other

R E A S O N S

1. Upon a true construction, the document executed in favour of the Respondent by the Appellant on or about 2nd December 1968 is a guarantee and is not an indemnity.

2. Upon a true construction, the said document is a guarantee by the Appellant of payment by Fahey Construction Company Limited of:

(a) the total indebtedness of Fahey

Construction Company Limited as at 2nd December 1968 including interest accrued due to that date; and also

(b) indebtedness subsequent to that date including interest thereon.

3. Insofar as the said document may be held not to guarantee payment by Fahey Construction Company Limited of indebtedness to the Respondent existing as at 2nd December 1968, then, pursuant to Clayton's Case, payments made subsequently to 2nd December, 1968 should be regarded as applied first against such past indebtedness, and secondly against subsequent indebtedness, leaving such subsequent indebtedness partially unsatisfied.

4. This action is not premature, as being founded upon a guarantee it could be brought by the Respondent upon default by the principal debtor Fahey Construction Company Limited, or alternatively could be brought upon default by Fahey Construction Company Limited coupled with inability on the part of Fahey Construction Company Limited to make payment in full, which default and inability is established.

5. That the Money Lenders Act 1908 does not apply to transactions in issue herein as the same were not loan transactions.

6. That, if it be held that the Money Lenders Act 1908 does apply to transactions herein in issue, then it is proper that such transactions be validated pursuant to the provisions of the Illegal Contracts Act 1970 and Statutes Amendment Act 1936.

7. That the Respondent is owed the sum of $11,853.43 by Fahey Construction Company Limited which Fahey Construction Company Limited has refused or neglected and is unable to pay and in respect of which sum the

Appellant is liable to the Respondent pursuant to the said guarantee.

8. And for the reasons given in the judgment of Quilliam J. in the Supreme Court and in the judgment of the Court of Appeal.

R.A. McGECHAN

No. 27 of 1973

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ON APPEAL

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

CASE FOR RESPONDENT

COWARD CHANCE
Royex House
Aldermanbury Square
London EC2 V7LD
Solicitor for the Respondent