judgment no 27, 1974

(27)

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

RECORD OF PROCEEDINGS

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Respondent

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RECORD OF PROCEEDINGS

INDEX OF REFERENCE

EXHIBITS put before the Court of Appeal

DOCUMENTS NOT TRANSMITTED TO PRIVY COUNCIL AND NOT THEREFORE CONSIDERED FOR INCLUSION IN THE RECORD

Exhibit Mark	Description of Document	Date
"I"	Letter from Mr. d'Postine requesting statement showing total interest charge	
"J"	H.D.McLean's reply to letter in Exhibit "I"	
"K"	Notice from P.T. Fahey creditors calling voluntary winding up meeting	
"L"	Statement of affairs produced to the meeting by P.T. Fahey	
"O"	Guarantee put in by consent as Exhibit "O"	
"P"	Letter to Mr. Fairbairn's firm of Hollings Thompson and Fairbairn giving formal notice of demand for payment of the then outstanding sum and also giving Mr. Fahey notice of his liability under the guarantee	13th May 1971
"Q"	Letter from Mr Fairbairn suggesting a 2nd Mortgage over Mr. Fahey's house property	19th May 1971
"R"	Copy letter sending Mortgage to Mr Fairbairn	1st June 1971
"S"	Copy of a fresh Mortgage and accompanying letter	
"T"	Letter from Mr. Fairbairn to Mr. Easther	25th June 1971
"U"	Letter Mr. Easther to Mr. Fairbairn	6th July 1971
"V"	Ledger of Fahey Construction Company	
"W"	Copy of the Memorandum of Association of M.S.D.Speirs Lismited under a previous name of Marton Sash and Door Timber Co. Ltd.	
"X"	A copy of the last annual report of Speirs Ltd and a copy of the prospectus for a debenture issue.	

IN THE PRIVY COUNCIL NO. 27 of 1973

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

RECORD OF PROCEEDINGS

In the Supreme Court of New Zealand Wellington District Wellington Registry

No. 1

Statement of Claim undated

No. 1

STATEMENT OF CLAIM

IN THE SUPREME COURT OF NEW ZEALAND)
WELLINGTON REGISTRY)No. A.275/1971

BETWEEN: M.S.D.-SPEIRS LIMITED a duly incorporated company having its registered office at Marton and carrying on business as a Timber Merchant. PLAINTIFF

A N D PETER THOMAS FAHEY of Walton Avenue, Waikanae, Company Director. DEFENDANT

STATEMENT OF CLAIM

THE PLAINTIFF by its solicitor Peter Benn Easther sues the Defendant and says:-

1. BY a guarantee in writing dated the 2nd December 1968, the Defendant guaranteed to the Plaintiff the due and punctual payment of all moneys due and payable to the Plaintiff by FAHEY CONSTRUCTION COMPANY LIMITED a duly incorporated Company having its registered office at Waikanae and carrying on business as a builder with respect to all materials supplied to the said Fahey Construction Company Limited by the Plaintiff.

In the Supreme Court of New Zealand Wellington District Wellington Registry

No. 1

Statement of Claim undated (continued)

2. THE said Fahey Construction Company Limited has made default in payment of the moneys due and payable to it to the Plaintiff and there is as at the 1st day of June 1971 due and owing to the Plaintiff by the said Fahey Construction Company Limited the sum of Fifteen thousand nine hundred and sixteen dollars and ten cents ($15,916.10).

3. THAT the default of the said Fahey Construction Company Limited in payment of the said debt still continues.

4. THAT demand has been made on the Defendant by the Plaintiff for payment of the said moneys due to it but the Defendant has refused or neglected to make such payment to the Plaintiff.

WHEREFORE the Plaintiff claims to recover against the Defendant and prays judgment for:-

(a) The sum of $15,916.10

(b) The cost of these proceedings

(c) Such further or other relief on the premises as may be just.

This Statement of Claim is filed by Peter Benn Easther, Solicitor for the Plaintiff whose address for service is at the offices of Messrs. J.S.B. Brown & Kemp, Solicitors, Kodak House, 292 Lambton Quay, Wellington.

In the Supreme Court of New Zealand Wellington District Wellington Registry

No. 2
Statement of Defence
30th September 1971

No. 2

Statement of Defence

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN	M.S.D. SPEIRS LIMITED	Plaintiff
A N D	PETER THOMAS FAHEY	Defendant

Statement of Defence

Thursday the 30th day of September 1971

The defendant by his solicitor ALFRED STEPHEN FAIRBAIRN says:

1. In answer to the allegations contained in paragraph 1 of the statement of claim the defendant says:-

   (a) He admits that Fahey Construction Company Limited is a duly incorporated company having its registered office at Waikanae and carrying on business as a builder.

   (b) He admits that on or about the 2nd day of December 1968 he signed and delivered to the plaintiff an instrument in the following terms, namely:-

   "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."

   (c) He says that the said instrument is a contract of indemnity and not of guarantee.

   (d) Except as expressly admitted he denies every allegation contained in the said paragraph.

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

No. 2

Statement of Defence
30th September 1971
(continued)

2. In answer to the allegations contained in paragraph 2 of the statement of claim the defendant says:-

(a) He admits that Fahey Construction Company Limited is liable to the plaintiff in a sum the amount of which he does not know precisely and which he believes to be as yet unascertained.

(b) He says that in any case the amount of that debt is less than the sum of $15,916.10.

(c) Except as expressly admitted the defendant denies each and every allegation contained in the said paragraph.

3. The defendant admits that Fahey Construction Company Limited has not discharged its liability to the plaintiff, and in all other respects the defendant denies the allegations contained in paragraph 3 of the statement of claim.

4. In answer to the allegations contained in paragraph 4 of the statement of claim the defendant says:-

(a) He denies that demand has been made on him by the plaintiff for the said sum of $15,916.10 or for any sums.

(b) He admits not having paid the said sum of $15,916.10 or any part of it to the plaintiff.

(c) He repeats his denial that Fahey Construction Company Limited is indebted to the plaintiff in the said sum or any greater sum.

(d) Except as expressly admitted the defendant denies each and every allegation contained in the said paragraph.

AND FOR A SECOND OR ALTERNATIVE DEFENCE

the defendant repeats the admissions,

allegations and denials hereinbefore contained and says:-

5. If it be the fact that Fahey Construction Company Limited is unable to pay for any materials it has purchased from the plaintiff it is not known and cannot yet be ascertained:

(a) For what specific materials the said company is unable to pay the plaintiff.

(b) What amount the said company is unable to pay the plaintiff on account of any such materials.

AND FOR A THIRD OR ALTERNATIVE DEFENCE

the defendant says:-

6. (a) The plaintiff is and at all material times has been a person bona fide carrying on the business as a timber merchant in the course of which and for the purposes whereof the plaintiff lent and lends money at a rate of interest exceeding 10% per annum.

(b) The plaintiff is and at all material times has been a money-lender within the meaning of the Moneylenders Act 1908: and is not and at no material time has been, registered as a moneylender.

This statement of defence is filed by Alfred Stephen Fairbairn of Paraparaumu, solicitor for the defendant, whose address for service is at the offices of Messieurs C.J. O'Regan, Arndt, Peters & Evans, Solicitors, 17 Grey Street, Wellington.

In the Supreme Court of New Zealand Wellington District Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean Examination

No. 3

COURT NOTES OF EVIDENCE

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN M.S.D. SPEIRS LIMITED Plaintiff

A N D P.T. FAHEY Defendant

NOTES OF EVIDENCE TAKEN BEFORE QUILLIAM J.

Hearing: 24, 25 October, 1972

Counsel: Cooke Q.C. and McGechan for Plaintiff
Harding and Evans for Defendant

Mr McGECHAN OPENS AND CALLS:

HAMISH DUNCAN McLEAN (Sworn). I have been secretary since 1957. My duties involve general secretarial duties such as a company secretary would have, such as generally overseeing credit arrangements. I have some responsibilities in relation to books, the books of the company are under my control. Has the company in the past made sales of building materials to Mr Fahey personally? Yes; on checking the records, supplies were made to Mr Fahey as far back as 1963. When did such supplies cease? They ceased when the company became a limited liability company which from memory I feel would be in November 1967. This document now produced to me is the ledger statement of Peter Fahey between November 1963 and June 1967. (EXHIBIT A). (Witness referred to bundle of documents). These are statements of both P. Fahey personally and then go on to Fahey Construction Company statements. (EXHIBIT B). Do you recall any question arising in 1967 as regards Speirs credit policy? Yes, the directors were worried at the overdue position of certain debtors. What were your instructions from the Board? These were to in short words get that money in. What did you do in consequence of those instructions? A letter was caused to be written and sent to all overdue clients. (Witness referred to letter). This is the letter sent out to our clients outlining recently

adopted new credit policy which was to apply (EXHIBIT C). What was the position as regards interest on overdue accounts set forth in that letter? It was stated that interest would be charged on accounts that were three months or more in arrears. Was Mr. Fahey's account as at that date, April 1967, overdue? Yes, it would be. By more than three months? I would say so. Did the company debit Mr. Fahey with interest in terms of that letter? Yes, interest was debited to P. Fahey personally. How in the bookkeeping way was this carried out? It was done through journal entries. What followed from these? The journal entry was processed and then the amount appeared on the monthly statements which Mr Fahey would have received. It would have appeared in the net column of the statements. Most of the material purchased would have been subject to discount but the interest was definitely net. That practice has continued although recently it has been changed - the interest charged is not made by journal entry but is debited on an invoice, for ease and convenience. Who calculated the interest in Fahey's case? The Branch Manager at Waikanae. This was within his control. What system was used? The Branch Manager would take the statement, ascertain the statement of a certain month, ascertain the amount outstanding over three months and three months, add the two together and compute the interest from which the journal entry in the early stages and latterly the invoices were calculated and made out. What system was applied in relation to crediting payments received? If a client made a payment during that month these interest calculations were made at the end of each month and had a client made a payment during that month it was deducted from the overdue portion and no interest was charged on the payment which had been made it was credited. (Witness referred to Statement of 30 June 1968) Can you identify an item for interest? Yes, J.E. 80 for $44.35. What was the meaning of the reference J.E.? That is the journal entry. Why was this amount a net amount rather than a discounted amount? Because the interest is net and is easily discernable by the clients. Can you tell the Court the manner in which this exhibit was calculated? It would have been calculated by taking the amounts outstanding at the 31st May that were three months and over three months

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean Examination (continued)

overdue, adding them together and then working out the one per cent on the total, but in this case a cheque for $1,000 had been received on the 27th June and was therefore deducted from the total and leaving a balance seen from the statements of $4434.57 showing as outstanding for over 3 months. In actual fact the Branch Manager could have charged interest on that additional amount. Was this principle used in all the statements forwarded to Fahey? Yes, to the best of my knowledge. As an example if an item was purchased on 1 January and was not paid for when would interest begin to run, on what date? At the end of May, it would appear on the May statement which would be three months after the normal 20th payment would have been due. Does your company expect its customers to check their monthly statement? Yes, and I would say they do in most cases. What items if any besides interest appear in the net column? There would only be the odd ones such as small purchases of a minor nature which may not be sufficient to warrant discount and any others which would be larger items such as if precutting had been done for a client. Were invoices sent out for net items? Yes, with the exception of the interest. Were invoices sent out for the discounted amount? Yes. Could Mr Fahey have made enquiry of the company in relation to items which he wished to query? Yes, definitely. Do you recall queries by him in relation to any account? No. Was any question made to yourself? No. Perhaps I should say he complained about the rate of interest being charged and having to pay interest but he never complained or said he wasn't going to pay it or shouldn't pay it, he always said he would have to pay it. They were in discussions I had with Mr Fahey. Did he clear his personal account with the company after he ceased trading personally? Yes. When did he do this? Yes, in March 1968 by the payment, two payments, one of $2,500 and the other of $194941.00. Did the amounts outstanding in respect of which those payments were made include interest? They did. After the change-over from the trading with Mr Fahey to trading with Fahey Construction Co. Ltd. did the practices initiated with Mr Fahey continue or were they altered? They continued on the same basis. Would you turn your mind to August, 1968, was your company concerned at the position in relation to

Fahey Construction Company? Yes. How much was owing as at 1 August 1968? As at 1 August 1968 there would have been $6,859.84 owing. (Witness referred to letter). This is a letter from myself to Mr Fahey requesting that he meet me at Waikanae on 30 August 1968 to discuss the position of his account due to the unsatisfactory state of your account. (EXHIBIT D). I subsequently met with him as in the letter, Mr Jennings our marketing manager and myself met Mr Fahey at our Waikanae Branch Office on 30 August 1968. Would you recall for the Court as best you can the conversation which took place? Trading generally was discussed and including problems Mr Fahey was having with certain of his clients and then the position of his own account, the company's account was discussed, and we, I asked Mr Fahey and informed him that I had had instructions that the account was to be brought up to date and that a substantial payment would be required failing which the company required a mortgage over some freehold property that he may have and which I knew he had from the statement position which he had given me or else a personal guarantee. Was the guarantee to cover any - what was it intended to cover, the guarantee? It was intended to cover past and future supplies and a complete account of Fahey Construction Limited. Did you make any statements to Mr Fahey as to what would happen if a mortgage or guarantee was not available? Mr Fahey would have been told that his account would not be able to be carried on in the condition it was unless we got a mortgage or a guarantee. Do you recall any specific words along those lines? Can I be definite to this point, that if it was not made at this meeting it was definitely made in discussions with him by myself. Did you take any details of his personal position at this time? Yes, details of his position were given to me. Did they appear satisfactory or unsatisfactory? They appeared very satisfactory otherwise we would not have allowed him to trade, or the company to trade. Was any arrangement agreed at that meeting? At that meeting no, no final arrangement was reached with the exception that he was told that unless his account was brought up to date within a very short time we would have to have the guarantee or mortgage over the property within a month.

TO BENCH: Is that what one of you told him, that

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean Examination (continued)

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean Examination (continued)

it would be within a month? Yes, I would have said. Did you say it, can you remember saying it or not? I wouldn't swear that I did say it but I believe that I did.

TO COUNSEL: Was there any discussion at this meeting as regards the wording of any guarantee? I think that a discussion on the guarantee came up at a later meeting. Was there comment on interest rate at this meeting? Yes, I probably raised it first and Mr Fahey raised it and felt that the rate was too high and that he shouldn't be paying it, and I can remember informing him that we did not wish to charge him interest but we preferred him to pay his account.

TO BENCH: When talking about these things are you talking about himself personally or the company? The company.

MORNING ADJOURNMENT.

TO COUNSEL: You have given evidence that Mr Fahey thought your company's rate was too high? what was your reply? Pay the account and there would be no extra charge. Did you make any statements as to Speirs' policy on this? Yes, the policy would have been outlined; it was outlined. In what terms? In the terms of the company's policy that it was not their desire to charge interest, it was their desire, that the interest charge was put there as an incentive to the client to pay his account. What was his response to this? His response was something like "I can't pay the account of Fahey Construction so therefore I suppose I have got to pay the interest" or words to that effect. Did your company continue to debit the account after that? Yes. Turn to the end of 1968, had the Fahey Construction account been brought up to date by then? No, it had deteriorated. What did the future position of Fahey Construction look like? At that stage and according to information Mr Fahey had given me it appeared as though the company was trading profitably but had spent its money on purchasing property for future sale. What was the amount of the outstanding account as at 1 December 1968? $10,070.06. On the 30th November 1968 it was $6,125.36, sorry, $10,070.05. Did you take any steps to contact Mr Fahey? Yes. What did you do?

I visited him. Did anyone go with you? I visited him on two or three occasions, on some of those Paul Thompson from Waikanae was with me, and on other occasions I saw him on his own. Can you recall whether on the occasion at the end of 1968 Mr Thompson was with you? On one of the occasions he was with me. What did you say to Mr Fahey? On this occasion late in 1968? On an occasion late in 1968 he was told that his account would have to come up to date or else the mortgage and personal guarantee that we had spoken about previously would have to be forthcoming. Did you request him to sign a form of guarantee? Yes. Our standard form of guarantee is as follows. (Witness referred to document). This is the guarantee concerned, our standard form of guarantee that we have been using for a long time. (EXHIBIT E). What was the guarantee to be for? The guarantee was to cover supplies that had already been made plus future purchases. Was any statement made to Mr Fahey as to what would happen if he did not sign a guarantee? Our policy was reiterated to him and he was told that unless the account was brought up to date or the guarantees given that the company, i.e. M.S.D. Speirs, would be unable to continue supplies. Did Mr Fahey sign the standard form of guarantee? No he did not, but he did say "No, I don't want that form, I know what you require" or words to that effect. Did he express any intentions as regards a different form of guarantee? No, all he said was "I know what you require, I know what a guarantee is". Was any arrangement made as to drawing up another form of guarantee? None whatsoever. Did Mr Fahey indicate whether he would draw a guarantee himself? Do you recall discussions with Mr Fahey following that particular meeting in relation to the topic of interest charged? Do you recall writing to Mr Fahey in relation to proposals by a certain group of Waikanae businessmen? Yes, this is the letter concerned, a copy of the letter sent to Mr Fahey after verbal discussions with him and it refers to interest at 1% per month. (EXHIBIT F). Did that proposal subsequently proceed? No it did not. Do you recall writing to him or his company on 12 March 1970 in relation to the outstanding accoun t? Yes. This is the letter concerned. (EXHIBIT G). Did the amount involved in that letter include interest? Yes. Do you recall writing to him or his company on 10 July 1970 in

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean Examination (continued)

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean
Examination (continued)

relation to his outstanding account? Yes. This is the letter concerned, a copy. (EXHIBIT H). The amount mentioned includes interest. What is the meaning of the last paragraph of that letter? That amount would be the amount that the three months and over account would be paid. Had there been any earlier discussion that that matter related to? Yes, discussions had been held with Mr Fahey in an endeavour for him to get his account down below the three months column so that he would not have to pay interest, his company would not have to pay interest. Do you recall other discussions on the topic of interest? Not specifically. Do you recall Mr Fahey on behalf of his company challenging the debits for interest inserted in these statements of the company? No. Did he on any occasions complain about having to pay interest as a matter of principle? In discussions he had said "You are a bit hot" or words to that effect "in charging me interest" but he never actually complained or stated that he wasn't going to pay it. On any occasions when we had discussions and the matter of interest came up, I always came back to the answer "Pay your account and there will be no interest" and "we would rather have you pay your account and there would be no interest". His reply would invariably be "I can't pay it so I guess I am stuck with it" or words to that effect. Do you recall attending a meeting in June 1971 concerning Mr Fahey, the Construction Company's position? In June 1971 that would be the meeting I attended with Mr Easther. Mr Easther, Mr Fairbairn who is the solicitor for Fahey Construction and myself and Mr Fahey, the four of us were present at this meeting. The meeting was held in Mr Fahey's office of the Waikanae Aluminium Co. Ltd. at Waikanae. The purpose of attending that meeting was that it had been arranged that Mr Fahey would give a mortgage over his house property to M.S.D.Speirs Limited. (MR HARDING OBJECTS). What was said at this meeting? At the meeting at Waikanae between Mr Fairbairn, Mr Fahey, Mr Easther and myself a form of mortgage had been prepared by Mr Easther and had been sent down to Mr Fairbairn for signature by Mr Fahey and Mr Fahey had not signed it because the security was not the security he desired to give. Was there then some discussion over whether an alternative security could be given? Yes, that was the purpose of the meeting,

to arrange security over suitable material to MSD Speirs and Mr Fahey and it was eventually agreed that a second mortgage be taken over the Waikanae Aluminium property building . What was the sum to be secured? This I could not be sure of, but it would be the amount outstanding as at that date. Did that amount include interest? Yes. Did Mr Fahey subsequently execute this form? No, he would not. What reason did he give for not executing the form? At that meeting Mr Fahey stated that he would execute the mortgage because Mr Easther went through the mortgage step by step, I can remember this, he went through it and said "I am going back to prepare another mortgage, I don't want to have to amend it again, are we all satisfied that what is in this document is satisfactory". Can you recall any reason given for non-execution? At that meeting there was none, he was going to sign. I do not recall any reason given subsequently. The document now referred to me is a letter from Mr d'Postine who was the Accountant for Fahey Construction. He requests a statement showing total interest charges to date, and also please confirm amounts owing to you at 31 March 1970-71 and the interest charges for each of these years. (EXHIBIT I). I replied to that letter and this is a copy of my reply. (EXHIBIT J). I mention in that letter a difficulty in computing interest paid in the past. Was such a calculation subsequently made? Yes, it was made and the information was given to Mr d'Postine. That information was given to Mr d'Postine the day after the meeting of the creditors of Fahey Construction Company. What was Mr d'Postine's response? (OBJECTION).

TO BENCH: Was this in the presence of Mr Fahey? No.

TO COUNSEL: How long have you been associated with MSD Speirs? 25 years. I regard myself as familiar with its customs and practices. This practice of charging interest on overdue accounts is a common practice and getting more so. The purpose of doing this is to get their clients to pay their accounts promptly. I can bring to mind other organisations comparable to our company that do this. Winstones, C. and A. Odlins, Feldmans and Oxmans Timber Company would be other companies that to my knowledge charge interest. From your

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean Examination (continued)

knowledge of the building world can you say whether the charge for interest would be an expected thing on the part of the company? Nowadays yes. Yes, it would be. Refers to statements (Exhibit C). The amount showing for 1 June 1971 is $15,916.10. Did your company instruct Mr Easther to take steps to recover that money? Yes. From who was the endeavour to recover? Mr Fahey, and no-one else. The balance due by the company as at 6 August 1971 being the date of liquidation is in the vicinity of $16,400, but I haven't my papers here to verify that. Do you recall attending a meeting of creditors of Fahey Construction Company? At Waikanae, yes, on the 16th August, 1971. I recall any remarks by Mr Fahey as to whether or not interest was agreed, yes, in my notes I have noted down where Mr Fahey had said in his accounts he was owing personally to the company.

TO BENCH: What is your recollection of what was said at that meeting of creditors? At that meeting of creditors it was ascertained that the account of Fahey Construction Co. had shown in the accounts that there was an amount of nearly $14,000 owing by Mr Fahey personally to the company and during questioning Mr Fahey remarked that there was approximately $3,000 of interest in that amount. And at that same meeting Winstone's credit manager got up after our company's interest was discussed and Winstone's credit manager immediately jumped up and said "We have an agreement that you will pay interest as well, at the moment there is no interest included in our account but there will be."

TO COUNSEL: Can you recall the remarks by Mr Fahey as to whether he would agree that his company owed the money? Yes, he did. I can identify the documents handed to me, the first one is a notice from P.T. Fahey as chairman of Fahey Construction Co. Ltd. calling of creditors' voluntary winding up meeting. I can identify the signature on the notice as P.T. Fahey. Was he present at that meeting? Yes. (EXHIBIT K). That is a statement of affairs produced to the meeting by Mr Fahey. (EXHIBIT L). The amount due to Speirs at this meeting was $15,916.10. I have caused a study to be made on the number of accounts on which interest has been charged from June 1970 to June 1971 and as a result of this certain schedules have been

prepared. I can identify the two documents now handed to me as the schedules concerned. (EXHIBITS M and N). Has MSD Speirs ever operated as a finance company? No. Its main type of trading is builders' supply merchants. It charges interest on overdue accounts in an endeavour to get our clients to pay their accounts promptly. (Guarantee put in by consent as EXHIBIT O).

XXM: MR. HARDING: I think you may have made an error in your evidence: I put it to you, you made an affidavit, I am going to refer to your affidavit of 9 September 1971, perhaps you would just read paragraph 6 for me? (Referred to witness). In that you say quite clearly do you not that Fahey said he was going to write out his own form of guarantee? Yes. Well then was your recollection very faulty in that respect today just on that point? On that point it could have been. Was it or was it not? I said that it may have been at a later meeting that this was done, but I had numerous meetings with Mr Fahey. You did say there that you had no recollection of Fahey having said he would make his own document? Today I did say he did mention he would make his own, he knew what he wanted. Your evidence is at page 6, line 3 - "Was any arrangement made as to drawing up another form of guarantee? None whatsoever"? I misunderstood the question, I understood the question to be that did Mr Fahey suggest that was there any discussion on the form of guarantee that would be prepared. Looking at line 5 of the evidence, did you misunderstand this question - "Did Mr Fahey indicate whether he would draw a guarantee himself"? Which do you say is the correct version, he did or he didn't say he would draw up his own? I took it that my reply implied that he was going to draw his own guarantee up because he knew what he wanted. In your affidavit you said he said this? I can't be sure. I have not got my affidavit, but if you say so I must have said it. Are we not talking about the same thing when I said he says that he knows what is required and he will do it. (Witness referred to Affidavit). Paragraph 6 - on the right-hand margin you find something, read it? (Witness reads - "Defendant stated that he would not ... guarantee".) Has your company got a licence

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean Cross-examination (continued)

under the Moneylenders Act? No, we do not regard ourselves .... You spoke of a meeting in 1967. I think you stated, I am not sure of the dates, in which you said Mr Fahey objected to interest and then said the company could not pay its accounts? He objected to the rate, not to paying interest. Did he think 1% per month too high? Yes, we were getting his trade and he didn't think he should have to pay it. Would it be fair to say that Fahey has appeared to resent the rate charged in meetings between you and him? No, periodically. As to the rate? Yes, but not every time we have met. On a number of occasions? Yes. (Refers to Exhibit E). You will agree I expect that this document is a guarantee and does not use the word "interest" does it? No. And what it does say is "all and every sum or sums of money hereafter owing by the Debtor to you for such goods." Those are the words? Yes. Interest is reckoned is it after three months on the overdue balance of the account whatever that happens to be? Yes. The balance is a figure in the debtor's ledger, shown in the debtor's ledger? Yes. And you could not relate it I suppose to anything specific? We could given the time. How could you say he paid half the amount due for a consignment of timber that interest on some balance or other was attributable to half that? The figure is stated in the accounts against the item and amounts concerned, in certain cases it is stated against that the amount he has paid. The point I am on and I expect you agree with me is a customer doesn't pay interest on certain goods but on the balance in the accounts at a certain date ...? Yes, after those goods, the total in that three months column is for certain goods, and once those goods get into the three months column that is the amount charged for them. Those goods or part of them depending on the credit? They are not part of the goods normally. Last year at the request of the solicitor for defence you supplied a couple of statements of Fahey Company's account, remember that? I would like to refresh my memory on that. (Refers to material in the two memoranda). That I think may have been done from our Waikanae Branch. (Figures accepted as being correct). (Witness produces combination of the statements shown in the two memoranda as EXHIBIT 1). First of all column A is interest? Yes. And those amounts are included in column B aren't they? Yes. And on C

the credits and the outstanding balance on the date shown on column D? Yes. The credits there total $33,642.69 do they not, if I am correct? And there is a further allowance for recent dividend of $4,062.47, and if the interest is deducted from those payments, deducting the interest from the total credits leaves $37,513.67? Yes. And if I add the dividend $4,062.47 to total credits do I get $37,705.16? Yes.

In the Supreme Court of New Zealand Wellington District Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Hamish Duncan McLean Cross-examination (continued)

LUNCHEON ADJOURNMENT.

XXM:(continued) With regard to Exhibit L at the time that was prepared you had not yet supplied details of interest that Mr d'Postine had postulated? Yes, that would be correct.

REXM: NO QUESTIONS.

TO BENCH: I am not sure whether you told us or not - when a payment was received from the Fahey Construction Company in what manner was that applied to the outstanding indebtedness? Firstly, towards payment of interest and then applied to the other accounts, first of all to the interest. First of all in payment of principal and then of interest? No, first and foremost in payment of interest and then of outstanding principal. And were the principal reductions first those which were three months or more old? Yes.

To the Bench

MR McGECHAN CALLS:

Edwin Gibbon Wakefield Jennings Examination

EDWIN GIBBON WAKEFIELD JENNINGS (Sworn): I live at Palmerston North and I am the Marketing Manager of MSD Speirs. In the month of August 1968 I recall a meeting with Mr Fahey at that time. Was anyone with you then? Yes, Mr McLean the Company Secretary was with me at this time. What transpired at that meeting? The purpose of the meeting was firstly to endeavour to get payment of the construction account of Fahey and failing that to explore the ways open to us to get security for that account. What was said to

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Edwin Gibbon Wakefield Jennings
Examination (continued)

Mr Fahey by yourself and Mr McLean? He was asked for payment of his account, and if payment could not be made we then explored the financial position of the Fahey Construction Company with a view to taking a security over the account or some asset that was available for that purpose. (It is agreed that at the various meetings Mr Fahey demurred at the rate of interest but agreed that his company would have to pay it). Was there any discussion at this meeting as regards a personal guarantee of Mr McLean of the account? The matter was discussed in the light of Fahey Construction not being able to pay the amount at the time, and that in the event of him not being able to pay and the continuation of supplies was desired some form of guarantee would be required. Was any time limit put on a continuation of supplies before a personal guarantee would be needed? Not a specific time. Was any indication given? I think that the terms were within a reasonable time, meaning within the next two months.

TO BENCH: Who meant that and was it actually expressed? In very general terms. In general terms a period of two months was stated at the meeting? Yes, within two months without suggesting an exact date.

TO COUNSEL: For how long have you been associated in the building industry? 22 years. I regard myself as familiar with current practices. Is charging interest on overdue accounts a common practice? Yes. Can you name any other large comparable organisations with the same system? Winstone Limited, C. & A. Odlin Timber and Hardware Co., Felvins Supplies and Distributors and Oxman's Timber and Hardware Limited.

Cross-examination

XXM: MR. HARDING: I suppose the content of the meeting could be summed up as this - your company is owed a great deal of money and you wanted a guarantee for that? Yes, I think that would be correct. Were you there on an occasion when Fahey said he didn't want to sign the standard form of guarantee but would write one out himself or words to that effect? No.

REXM: NO QUESTIONS.

MR McGECHAN CALLS:

PAUL NICHOLAS ROBERT THOMPSON (Sworn): Waikanae, Manager of the Waikanae Branch of MSD Speirs. (Mr Harding concedes that the figures as disclosed in Exhibit 1 are in all respects correctly calculated). For that reason no invoices or supporting records are put in evidence at this stage relating to those figures but the Plaintiff is reserved leave to have produced later, if necessary any such relevant documents and the defendant will consent accordingly.

Did Mr Fahey have a habit of enquiring from you as regards invoices missing from his statements or invoices he considered incorrect? He did inquire and when invoices were found to be missing by him, not received in the mail or missing, we had forwarded copies, but as far as habit was concerned, this was only on the occasion when he didn't have them. Did he ever query with you any debits on the statements relating to interest? No, never. Did you ever tell him that interest charges would be scrubbed? No. I can recall an occasion on which Mr Fahey showed me certain invoices. The occasion was once only and the amount of invoices were two; he wanted to know why he had received two invoices for interest through the mail. Were invoices generally sent out for interest? No. Interest to March 1970 had been charged by journal entry only and from this date they were charged by pro forma invoice and on this occasion invoices should not have been sent to Mr Fahey and this was explained to him. My words at the time were not that the interest should be scrubbed but you should not have received these (the invoices) meaning that you should not have received these through the mail as they were pro forma invoices only. (Refers to Exhibit B). Was any interest debited in that money? Invoice 9258 for $38.27. Turn to the month of May 1970 - was there any interest debited there? No. Turn to the month of June 1970, statement dated 30 June 1970, was any interest debited there? No. Can you account for the fact that interest was not charged on the statements for these months? I have checked the records and interest was charged, but as I explained to Mr Fahey through a misunderstanding

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Paul Nicholas Robert Thompson Examination (continued)

in the office staff invoices had been sent to him and on checking further these invoices had shown up on a missing invoice register for that month, and they were charged by journal entry in October, or should I say corrected in October. Where does the entry correction appear in the statement of October? Journal entry 39, $46.33. Following your discussion with Mr Fahey at which he produced certain invoices for interest, did the company continue to charge interest as before? Yes. Do you recall a meeting in December 1968 concerning Mr Fahey? Yes. Who was present at that meeting? Mr Fahey, Mr McLean and myself. Was anything mentioned in relation to a guarantee by Mr Fahey? By Mr Fahey, Yes; it was mentioned by Mr McLean and Mr Fahey, the mentionming of the guarantee was not introduced by Mr Fahey. What was said by Mr McLean with relation to the guarantee? Mr McLean requested that a personal guarantee be requested for MSD Speirs to cover Fahey Construction Company, a personal guarantee to cover the account. Was any proposed document shown to Mr. Fahey? This I can't be positive on, but I do know when we offered our own personal guarantee, and whether this was shown to Mr Fahey or not I do not know, Mr Fahey said he would produce his own personal guarantee rather than on our own letter-head on our own personal guarantee form. Was any arrangement made for the preparation of such guarantee? As far as preparation goes, no; he said he would produce his own guarantee and I was to pass it to Mr McLean. And did that subsequently happen? No. On speaking to Mr McLean I asked had he received one from the office at Marton and he ... I spoke to Mr McLean and after the conversation I went round to Mr Fahey's office and asked him, sorry, told him, we had not received this personal guarantee from him and offered him the wording we wanted in the guarantee and he said he could produce his own as he knew how to word such things. Did he subsequently produce a guarantee to you? Yes. Would MSD Speirs have continued supplies to Fahey Construction if the guarantee had not been given? Do you have authority as Branch Manager as to whether or not supplies can be withheld? Yes. Could you have made a decision yourself to withhold supplies from Fahey Construction? Yes. Did you tell Mr Fahey supplies would be withheld without his guarantee? No, it didn't get to that stage, he gave us the guarantee and supplies continued.

For how long have you been with the building industry? 18 years. Do you know the practice of charging interest on overdue accounts? Yes. Is it done by any other comparable organisations? Yes, to my knowledge, Winstone's and Felvins.

XXM: MR. HARDING: When you indicated to Mr Fahey as I expect you did that your company intended having its account closed, that its company was in danger of having its account closed, you were speaking on instructions? Yes. Just one point about the pro forma invoice, is it ordinarily sent to customers? No.

REXM: NO QUESTIONS.

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Paul Nicholas Robert Thompson
Examination (continued)

Cross-examination

Mr McGECHAN CALLS:

Peter Benn Easther
Examination

PETER BENN EASTHER (Sworn): I am a solicitor resident at Marton and my firm are solicitors for the plaintiff company. Did you in May 1971 receive certain instructions from MSD Speirs Limited with relation to this company? Yes, I was instructed by Speirs to take proceedings for the collection of account in excess of $15,000 from Fahey Construction Co. Ltd. and from Mr Fahey personally under a guarantee. I was given the name of Mr Fairbairn as solicitor for the company and for Mr Fahey and I got in touch with him by 'phone relating to the outstanding accounts and the money owing. Did you subsequently write to him? Yes I did, and I produce letter dated 13th May to Mr Fairbairn's firm of Hollings, Thompson and Fairbairn giving formal notice of demand for the payment of the then outstanding amount of $15,604.62 said to be due by the company and also giving Mr Fahey notice of his liability under the guarantee and I produce the letter (EXHIBIT P). At this time were certain negotiations between yourself and Mr Fairbairn in train? Yes, I had made it clear that Speirs did not wish to issue

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Peter Benn Easther Examination (continued)

proceedings against the company or Mr Fahey personally if either payment could be arranged or if some adequate security could be given over Mr Fahey's personal assets to cover the amount of the debt. There were considerable 'phone discussions between myself and Mr Fairbairn in the middle of which I was advised that Mr Fahey had gone to Australia and I understood he wouldn't be back until the 24th May. Did you at that stage write a letter in relation to the matter dated 19th May? Yes; I received a letter from Mr Fairbairn dated the 19th May in which Mr Fairbairn suggested that a second mortgage be given over Mr Fahey's house property and also giving the description of Mr Fahey's house property and the factory property at Waikanae and containing other notes relating to the term of any proposed security. I now produce that. The letter ends by saying "We shall confirm arrangements in due course". (EXHIBIT Q). Between that date, the date of receipt of that letter and the 1st June, I had further 'phone discussions with Mr Fairbairn and shortly before the 1st June it was arranged that security would be given by Mr Fahey over his house property. Was this in your recollection a firm arrangement? Yes, I understood that by that time Mr Fairbairn had been able to obtain instructions from Mr Fahey and that the mortgage would be executed when it was prepared by me and sent to Mr Fairbairn. The mortgage was accordingly prepared by me and sent to Mr Fairbairn on the 1st June. This copy letter and copy document now produced to me, the copy of letter prepared by me, enclosing the two copies of the mortgage which I preparedin accordance with the discussions I had with Mr Fairbairn. (EXHIBIT R). When did you anticipate return of these documents? I expected the mortgages to be returned within a matter of a few days. It had been made clear to Mr Fairbairn that my instructions were to either commence proceedings against the company and Mr Fahey or to obtain immediate execution of this security. Did Mr Fahey execute this document? I heard nothing from Mr Fairbairn and got in touch with him and understood that Mr Fahey was not prepared to sign this mortgage because his wife objected to the house being used as security for this debt. Following on that what steps did you take? A further attempt was made to negotiate and as a result a meeting was arranged at Waikanae on

the 17th June at which Mr Fahey, Mr Fairbairn, Mr McLean and myself were present and it was held in Mr Fahey's office and the purpose of this meeting was to decide what security would be given in consideration of Speirs not issuing proceedings against the company for its debt and against Mr Fahey under his guarantee. What happened next? At this meeting Mr Fahey advised Mr McLean and myself that he was prepared to give this security and confirmed that in the light of his wife's opposition he was not prepared to give it over his house property. Was an alternative security arranged? Yes, after a fairly long discussion it was agreed that the security would be over a factory in Waikanae owned by Mr Fahey and an area of some 12 acres of land also owned by him. I asked for and was given a copy of the mortgage which I sent down to Mr Fairbairn and I then proceeded to go through the typewritten parts of the mortgage to make certain that all parties were clear as to what was being arranged. Do you recall mentioning the principal sum concerned? Yes. What was it? It was the figure shown in this document I have $15 ..... I recall mentioning the rate of interest, when this was first mentioned Mr Fairbairn said that he felt the rate of interest of 1% per month was too high and there was a fairly full discussion myself and Mr McLean, concerning the history of the charging of interest by the company at the end of which Mr Fahey agreed that he had in the past agreed to pay this interest to Speirs. Can you recall the wording? No I can't recall the exact wording but Mr McLean reminded him of a conversation which had been held, and I tbink I reminded him of the fact that interest had been charged over I think a number of years and goods supplied and received after the interest had been charged. There was a long discussion with Mr Fahey and he said that he had agreed to this being charged but I don't know the exact words. What arrangements were made as to the signature on the mortgage? There was a long discussion about the terms of the mortgage, the duration of it, and it was finally agreed for it to be payable on demand subject to certain conditions which would be confirmed in a letter written by me, and it was at that stage after this discussion that again I said to Mr Fahey and Mr Fairbairn that I didn't wish to prepare a second security unless Mr Fahey was quite happy

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Peter Benn Easther Examination (continued)

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Peter Benn Easther Examination (continued)

about the terms of the security and I again went through the terms as agreed, and asked for an undertaking that the fresh mortgage would be signed immediately and returned to Mr Fairbairn and the reply was "Yes, that will be done subject to the checking of the last invoices in the last statement supplied to the company by Speirs to Fahey Construction Company". Did you subsequently after the meeting prepare a fresh mortgage and forward it to Mr. Fairbairn? Yes, I went straight back to Marton with Mr McLean and prepared a fresh mortgage in accordance with the arrangement made and forwarded it and arranged to have it delivered by hand to Mr Fairbairn on the same day and I produce the copy of the fresh security plus the accompanying letter setting out the name, the basis upon demand which the term was entered upon the mortgage. (EXHIBIT S). At the conclusion of the meeting Mr Fahey, you told us, wished to correct the correctness of the last few invoices in the last statement, was any remark made to him by anyone as to what these invoices were? Mr McLean told Mr Fahey that these last few entries would be interest only and that if there was any miscalculation of these items an adjustment would be made. Was there any suggestion that .... (OBJECTION.. Harding leading). This was the only reservation given by Mr Fahey in relation to the execution of this second security and there was no statement made by Mr Fahey that he wished to check on the correctness of the charging of interest by Speirs or any other reservation apart from the checking of the last few items. Did you subsequently receive a letter from Mr Fairbairn bearing on this? Yes. I produce this letter dated 25th June 1971. (EXHIBIT T). Did you reply by letter dated 6th July 1971? Yes. (EXHIBIT U).

Cross-examination

XXM: MR. HARDING: You said a little while ago that only one reservation was made by Fahey and that is to check those last few entries on the invoice; would you agree that that was a leading question? (Agreed). The meeting you had was one in which proceedings had been very definitely threatened was it not? Yes. Are you satisfied that the talk was not without prejudice? I can't recall the words without prejudice being used at all during the whole of this meeting. Then you are not satisfied it was not without prejudice?

I am satisfied that agreement was reached in toto at that meeting; I don't recall the words being used, nor did I understand it at any stage the meeting to be without prejudice. Do you remember asking Mr Fairbairn whether he had thought about that? He didn't raise the question in his letter. Knowing you were going to give this evidence, didn't it occur to you to ask Mr Fairbairn that the meeting would be without prejudice? No, he has given evidence on oath throughout this case, in affidavits and at no stage has he mentioned any meetings being without prejudice. Do you recall how much evidence he gave about the discussions? My memory is that Mr Fairbairn's evidence or affidavit gave fairly precise details of the discussions which took place. How long is it since you saw his affidavit? About a week, only last week. And that is your recollection of it? Yes. Mr. Fairbairn refers to certain clauses in the affidavit sworn by me and relating to it and answers those allegations. Is that what you recollect reading a few days ago, and the rest of your evidence is on what occurred about a year ago? Yes.

REXM: NO QUESTIONS.

AFTERNOON ADJOURNMENT.

Mr McGECHAN CALLS:

WILLIAM JOHN EINSON COWAN (Sworn): I live in Wellington, Chartered Accountant and the liquidator of Fahey Construction Company. I appear in this Court under subpoena. I have in my possession the books of Fahey Construction Company to the best of my knowledge. How have interest charges by MSD Speirs Limited been treated in the books? They have been treated as an expense in the books of the company and in some cases a portion of the interest has been passed on to Mr Fahey. Can you turn to the reference in the ledger relating to the company? I have page 40 in the ledger of Fahey Construction, entries shown are numerous but amongst them is an entry for $12,000 relating to interest from Speirs. That has been treated as either an expense to the business or charged through the current account of Mr Fahey. You put that as either or, why do you say that? Because there are interest charges

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

William John Einson Cowan Examination (continued)

other than that relating to MSD Speirs and the total interest charges have been apportioned as between an interest charge with the company and a charge to Mr Fahey's current account. I now produce the ledger. (EXHIBIT V). Turning to the Journal, do you find any entries bearing on the matter in the Journal? There is an entry on p.18 relating to interest from MSD Speirs Limited and this entry shows that Mr Fahey's current account has been debited with $311.48 and there is a credit for a purchase of the same amount in the purchaser's account and the relation to the journal entry is approximate interest charges from MSD Speirs Limited included in purchases from 1 April 1971. Turn to p.15; there is an entry of the 31st March 1971 debiting interest with $1,200 and crediting purchases with the same amount. The narration to this Journal entry is approximate interest charged by MSD Speirs Limited for year ending 31 March 1971, and it further goes on $833.19 charged as per statements available according to P.T. Fahey $15,604.62 (approximate) owing to them as at 31 March 1971. There is another Journal entry and I am not sure whether this is in respect of the action ... (It is acknowledged for the defendant that the evidence as shown that the course of dealing between the company and the plaintiff has included interest charges on overdue accounts). (Acquiesced or accepted by the Company). Do you have in your possession copies of the annual accounts? Yes. Do these reconcile the treatment of interest in the books? Yes, they do. Have you made any calculations directed towards ascertaining a further probable dividend to be paid? Yes. What conclusions have you reached? Payment could range from 4.4¢ in the $1. to as high as 14.2¢ in the $1 by way of an additional dividend.

Cross-examination

XXM: MR HARDING: Can you tell us the amount to which Speirs are admitted for proof? $16,249.90.

REXM: NO QUESTIONS.

Allan Leslie Woodward Examination

Mr McGECHAN CALLS:

ALLAN LESLIE WOODWARD (Sworn): I live in Marton and I am the Managing Director of MSD Speirs Limited and I have been in that position since 1966.

Is the document now shown to you a copy of the Memorandum of Association of the company under a previous name? Yes, the company used to be known as Marton Sash and Door Timber Co. Ltd. I now produce that to the Court. (EXHIBIT W). Are the documents before you now a copy of the last annual report of Speirs and a copy of the Prospectus for a debenture issue? Yes, they are. (EXHIBIT X). Do these documents to your knowledge correctly state the scope of activities? Yes. What are the principal activities of the company? They cover afforestation, joinery and timber manufacture, retailing of a wide range of building materials, cottage construction and land development. Does the company engage in the business of lending money? Not at all. Does the company as a fact lend money to people? The company does not lend money to people in the normal course of its business. Does it have any subsidiary of it lending money? No. Has there been any decision by your Board with reference to making loans of money? There has never been any such decision by our Board of Directors. Does the company on occasion take mortages over property? On rare occasions the company does take security over a property to secure monies owing on account for material supplied. Does the company have any substantial trade debtors? It has very substantial trade debtors. Has it at any time been concerned as to the promptness of payment? Because of the magnitude of the trade debtors the company has the matter of prompt payment is one of continual concern. Did the company take any steps in 1967 in relation to that problem? Yes, in 1967 the Company decided to charge a rate of interest on accounts which had been outstanding for three months or more which it was felt would encourage the debtors to pay as promptly as they possibly could. Has this been done by any of your competitors in a similar way? A number of them charge interest over their accounts. Can you say whether this is a common practice within the building industry? I understand it is a common practice in the area in which we operate. Prior to these proceedings, had the company any notion that its practice may infringe where money lending is concerned? No.

XXM: MR HARDING: I am referring you to Exhibit W which is the company's Memorandum of Association

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Allan Leslie Woodward Examination (continued)

Cross-examination

In the Supreme Court of New Zealand Wellington District Wellington Registry

Respondent Company's evidence

No. 3

Court Notes of Evidence 24th 25th October 1972

Allan Leslie Woodward Cross-examination (continued)

which is dated 1907: has it been altered since, do you know? I don't recollect any alteration since 1907. In the present document, have you read it by the way? Not recently. Do you know of any power to lend money to customers as distinct from people? .....

REXM: NO QUESTIONS.

CONCLUSION OF EVIDENCE FOR PLAINTIFF.

Mr Harding for the Defendant does not propose to call evidence and moves for Judgment.

No. 4

Reasons for Judgment of Quilliam J.

14th November 1972

No. 4

REASONS FOR JUDGMENT OF QUILLIAM, J.

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON DISTRICT
WELLINGTON REGISTRY

BETWEEN M.S.D. SPEIRS LIMITED Plaintiff

A N D PETER THOMAS FAHEY Defendant

REASONS FOR JUDGMENT OF QUILLIAM J.

Hearing: 24 and 25 October 1972

Judgment: 14.11.72

Counsel: Cooke Q.C. and McGechan for the plaintiff, Harding and Evans for the defendant.

This is an action to recover the amount allegedly owing by the defendant under what is said to be a guarantee. The amount claimed was

reduced at the hearing and is now $11,853.43.

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

No. 4

Reasons for Judgment of Quilliam J.

14th November 1972 (continued)

The facts were not seriously in dispute and may be summarised as follows. The plaintiff is a supplier of building materials and as such supplied the defendant from 1963 until about November 1967 when he formed his business of a building contractor into a company. Materials were then supplied to the company which was known as Fahey Construction Company Limited. The supplying on credit of building materials to builders is a well-recognized practice but in April 1967 the plaintiff became concerned at the extent to which it was being expected to carry outstanding accounts. It took the view that builders who were unable to meet promptly their payments for supplies should arrange finance with their banks or other lending institutions. Accordingly, on the 5th April 1967, the plaintiff sent a circular letter to all its customers, including the defendant, in which it set out its proposed credit policy. That policy was that payment for goods supplied was required to be made by the 20th of the month following supply; the cash discount of 2½% would not be allowed if the account was not paid by that date; and an interest charge of 1% per month would be made upon any accounts which were three months or more overdue. Thereafter this policy was put into effect and applied to the accounts of the defendant and, later, of his company. The rate of interest charged was, upon an annual basis, a high rate. The evidence of the plaintiff was that this was done deliberately in order to try and ensure that its customers would regard it as beneficial to pay their accounts promptly.

Upon a payment being made by a customer, the plaintiff applied that payment first, towards outstanding interest, next towards the reduction of those accounts which were three months or more overdue, and finally in reduction of the balance of the account.

In March 1968 the defendant cleared his personal account with the plaintiff by making two payments. The defendant's company, however, was soon in arrears with its account and by the 1 August 1968 owed a total of $6,859.84 of which $3,657.77 was more than three months overdue and

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

No. 4

Reasons for Judgment of Quilliam J.

14th November 1972 (continued)

therefore bearing interest. On the 20 August 1968 the plaintiff's secretary wrote to the defendant and asked to see him in order to discuss "the unsatisfactory state of your account". A meeting took place on the 30 August 1968 at which the defendant's trading problems were discussed. The defendant was told that his company's account must be brought up to date, failing which security would be required in the form of a mortgage or personal guarantee by him. This discussion seems to have had little effect and by the 1 December 1968 the company's indebtedness to the plaintiff had increased to $10,070.06. The plaintiff's secretary again saw the defendant and told him that the account must be brought up to date or the mortgage or guarantee previously referred to would be required. The defendant was also told that unless one of these courses was followed the plaintiff would not be able to continue supplies. The defendant was shown the plaintiff's standard form of guarantee and asked to complete it. He said he was not prepared to sign that form but that he knew what was required and would write out his own form of guarantee. This document was not immediately forthcoming but finally, on the 2 December 1968, the defendant prepared, signed and handed to the plaintiff's representative a document 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 "

The account of the defendant's company fluctuated after that but, notwithstanding payments it made, the position became worse until by June 1971 it had reached a total indebtedness of $15,916.10 including interest. The supply of materials evidently ceased then. On the 13 May 1971 the plaintiff, by its solicitors, had made written demand upon the defendant's company and upon the

defendant personally for payment of the amount owing by the company. The present writ was issued on the 7 July 1971 claiming $15,916.10 from the defendant upon the basis of the document of 2 December 1968 given by him. Subsequently, the defendant's company went into liquidation and a first dividend paid in the liquidation resulted in the receipt by the plaintiff of $4,062.47 thereby reducing the indebtedness to $11,853.43. Evidence was given by the liquidator that a further dividend is expected to be paid of between 4.4 cents and 14.2 cents in the dollar.

Upon these facts the plaintiff seeks judgment for the balance owing by the company. Judgment is resisted by the defendant upon four grounds:

(1) That the document of the 2 December 1968 is not a guarantee but an indemnity.

(2) That, whether the document is a guarantee or an indemnity, any liability under it has been satisfied by payments made by the company.

(3) Alternatively, that the plaintiff's action is premature until it is ascertained how much money the company is not in a position to pay.

(4) That the provisions of the Moneylenders Act 1908 are a bar to the plaintiff obtaining judgment.

I deal with these in turn and first with the question of whether the document is a guarantee or an indemnity.

The definition of a guarantee is well-known and is stated in 18 Halsbury 3rd Ed., p.411, para. 767 as follows:

> "A guarantee is an accessory contract whereby the promisor undertakes to be answerable to the promisee for the debt, default, or miscarriage of another person whose primary liability to the promisee must exist or be contemplated."

As to the distinction between a guarantee and an

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

No. 4

Reasons for Judgment of Quilliam J.

14th November 1972
(continued)

indemnity there appears the following passage in the same volume at p. 416, para. 775:

> "Although a contract of guarantee may be described as a contract of indemnity in the widest sense of the term indemnity, yet contracts of guarantee are distinguished from contracts of indemnity ordinarily so called by the fact that a guarantee is a collateral contract to answer for the default of another person, and thus is a contract that is ancillary or subsidiary to another contract, whereas an indemnity is a contract by which the promisor undertakes an original and independent obligation."

This distinction is discussed at some length in Yeoman Credit Limited v. Latter (1961) 2 All E.R. 294. That was the case of a hire purchase agreement entered into for the purchase of a motor car by an infant. As is usual in such cases the plaintiff required that an adult complete the printed form at the end of the agreement which was described "Hire Purchase Indemnity and Undertaking". The question arose as to whether this was an indemnity or a guarantee. The facts of that case are of no assistance here but the discussion of principle as to the distinction between guarantee and indemnity is of considerable help. The first passage on the subject appears in the judgment of Holroyd Pearce L.J. at p. 296 as follows:

> "In its widest sense a contract of indemnity includes a contract of guarantee. But, in the more precise sense used in various cases dealing with s. 4 of the Statute of Frauds, 1677, and used in the arguments in this case, a contract of indemnity differs from a guarantee. An indemnity is a contract by one party to keep the other harmless against loss, but a contract of guarantee is a contract to answer for the debt, default or miscarriage of another who is to be primarily liable to the promisee."

Similarly, Harman L.J. at p. 300 said:

> "Apart from that, the object of the document appears on its face to be to protect the

plaintiffs against loss - to see them harmless - rather than to make good the infant's liability. The satisfying of the infant's liability might (indeed, would, in this case) have resulted in a profit to the plaintiffs, as appears from the writ itself, where a much larger sum is claimed against the infant than against the second defendant. My Lord has shown clearly that in other circumstances the second defendant's liability might have been heavier than the infant's, and not have arisen out of his default; for, if the infant, without making any default, had (as the hire-purchase contract expressly allowed him to do) put an end to the hiring by returning the car after paying half its price, he would have gone scotfree, while the second defendant would still be under liability for the balance of the hire-purchase price. This alone shows that the second defendant's contract was not one of guarantee for the infant, but of indemnity to the plaintiffs."

Whether the document signed by the defendant was a guarantee or an indemnity is I think a matter of the intention of the parties as appearing from the document and having regard to the surrounding circumstances. Applying the test enunciated by Holroyd Pearce L.J. there can, in my view, be no doubt that the document is a guarantee. Apart from the fact that it purports to guarantee, it clearly envisages a primary obligation on the company. The liability which the defendant has assumed is to pay for materials in the event of the company not being in a position to do so. This cannot be construed as a primary obligation to keep the plaintiff harmless against loss. It is no more than to meet the default of the company if default there should be.

The second ground of the defence was that any liability under the guarantee has been satisfied by payments made by the defendant company. This depends upon a consideration of two matters. The first is whether the liability of the defendant under the guarantee includes interest charges made against the company and the second is whether the guarantee extends to cover the company's indebtedness prior to the date it was executed.

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

No. 4

Reasons for Judgment of Quilliam J.

14th November 1972 (continued)

The obligation undertaken by the defendant was "to pay for any materials which are purchased". It was argued for the defendant that the interest charged was not a payment for materials but a charge upon monies overdue. The construction of the document will depend upon the nature of the document itself interpreted in the light of the surrounding circumstances. It must first be observed that this was not a precise or professionally drawn document. Moreover, it was an obligation entered into by the defendant as a result of the trading situation which had been reached by his company. The company's indebtedness had arisen through the debiting to its account of materials purchased from time to time. Each of those purchases was a separate transaction. In respect of every individual purchase the payment for which was outstanding for three months or more an interest charge was made. It was contended for the defendant that the interest charge was merely in respect of a balance in current account and bore no relation to any individual purchase. This does not appear to me to be correct. Interest was charged on the total of purchases outstanding for three months or more. Whether or not it was done I can see no reason why a separate calculation could not have been made in respect of the cost of each individual purchase. The company's secretary, in cross-examination, said that, given time, just such a calculation could have been made. Had it been done the result in respect of the total of such purchases would seem to have been the same as the calculation of the balance of the overdue accounts at the same date. However that may be, there is nothing in the guarantee to suggest that it was to be limited only to the net cost of purchases. In view of the circumstances known to both parties when the guarantee was given I find it impossible to say that the obligation assumed by the defendant was to exclude the interest. The effect of the interest charge, applied as it had been to the defendant's knowledge over a period of years, was to add to the original cost of the materials. This increased cost was, in my view, the cost of materials which the defendant was undertaking to meet.

Next is the question as to whether the guarantee covers the company's indebtedness prior

to the date of the document. The guarantee used the expression "guarantee to pay for any materials which are purchased". It is contended for the defendant that the word "are" can only be regarded as referring to future purchases. Here again it is necessary to pay regard to the fact that the document is not a precisely drawn one and to the circumstances in which it was signed. It was a form of security demanded by the plaintiff because of the company's increasing indebtedness and was a condition of the continuation of supplies. I find myself unable to accept that in the light of those circumstances either party believed that the guarantee was intended to cover only future supplies. If the word used admitted of no other construction than that then it must be construed in that way. I do not think, however, that the word "are" in that context must be so rigidly interpreted. I draw some assistance from the view taken by the Court of Appeal in Public Trustee v. McKay (1969) N.Z.L.R. 995. That case, which was very different from the present case, involved the interpretation of the words in s.88(4) of the Social Security Act 1954, "The decision of the Minister that any person is or is not a hospital patient...". It was argued that the expression "is or is not" could not be construed as "was or was not" as this would involve writing words into the statute. Dealing with this argument Turner J. said at p.1005:

> "I do not treat this question as one involving writing words into a statute. I regard it simply as a question whether "is" should be construed "is or was" or not. Every consideration of common sense appears to me to support the proposed wider construction. I think that it would lead to much inconvenience, and indeed to absurdity, to construe the section in the way proposed by Mr Cooke. If the Minister may effectively certify only to the position on any particular day, the result must be that certificates will decide no more than the position on the day on which they are given. There would have to be certificates from day to day, and I cannot think that this effect can have been intended by the Legislature. I am of opinion that the word "is" is used in this subsection without any temporal significance at all."

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

No. 4

Reasons for Judgment of Quilliam J.

14th November 1972 (continued)

I readily concede that that case has little similarity to the present one but I think it assists in deciding the kind of approach which the Court may properly make to the interpretation of an expression such as that now under consideration. Common sense demands that the guarantee should not be construed in any such narrow sense as to limit its meaning to something which I am sure neither party ever contemplated.

The decision which I have reached on the questions of interest and past indebtedness means that the argument advanced for the defendant that any liability under the guarantee has been satisfied by payments made must fail. That argument involved a calculation from the figures produced in evidence which omitted interest payments and also amounts owing up to the date of the guarantee. With those amounts restored the argument advanced disappears.

The third ground of defence was that the action is premature until it is ascertained how much money the company is not in a position to pay. This defence was based upon the evidence of the liquidator of the defendant's company that a further dividend, as yet not finally ascertained, is to be paid. I understood counsel for the defendant to place some reliance in support of this ground on the case of Montague Stanley & Co. v. J.C. Solomon Ltd. (1932) 2 K.B. 287, but it does not appear to me that this case has any real relevance. I think this ground of defence is met by the finding I have already made that the document is a guarantee as distinct from an indemnity. It is of the essence of a guarantee that upon the payment of the principal debt the surety is entitled to subrogation against the principal debtor. The amount of the debt has been clearly established. Upon payment of that sum the defendant will be entitled under his rights of subrogation to receive whatever further dividend the company may pay.

I turn finally to the defence that the provisions of the Moneylenders Act 1908 are a bar to the plaintiff succeeding. The question here is as to whether the plaintiff is"a moneylender" as defined by s. 2 of that Act, the relevant part of which is as follows:

> "In this Act, if not inconsistent with the context, "moneylender" includes every person (whether an individual, a firm, a society, or a corporate body) whose business is that of moneylending, or who advertises or announces himself or holds himself out in any way as carrying on that business;"

None of the exceptions to that definition contained in the balance of the section apply here. The plaintiff's contention is that the transactions in the present case between itself and the defendant's company do not amount to a loan and that therefore the definition cannot be made to apply.

The question of what constitutes a loan will depend on the true nature of the particular transaction. The Moneylenders Act, unlike the corresponding legislation in the Australian States, does not contain a definition of "loan". Pannam in The Law of Moneylenders in Australia and New Zealand discusses the characteristics of a loan at common law and concludes at p. 6, "In essence then a loan is a payment of money to or for someone on the condition that it will be repaid". It is, I think, clear that the obligation to pay interest does not of itself constitute a transaction a loan. It has been held that contracts for sale by instalments are not loans. This was the view of the High Court of Australia in Rabone v. Deane (1915) 20 C.L.R. 636 upon the question of whether a sale of shares to be paid for in instalments over ten years at 3% per annum constituted a loan of money. The vendor was to remain the registered owner until the payments were completed and the purchaser agreed to execute a mortgage as further security. Griffith C.J. rejected the argument that this transaction was a loan and said at p. 640:

> "It was simply a case of a security taken by an unpaid vendor for the price of goods sold. Mrs Neale was not satisfied to take the security of the shares alone, but asked for and received security over certain land of the defendant. This makes it all the clearer that the case was one of a security taken by an unpaid vendor. The point is not seriously arguable."

In the Supreme Court of New Zealand
Wellington District
Wellington Registry

No. 4

Reasons for Judgment of Quilliam J.

14th November 1972 (continued)

After discussing the decision in Rabone v. Deane, Pannam comments at p. 7:

> "In principle an instalment sale cannot be categorised as a loan because it cannot be said that a vendor makes a payment of money to the purchaser who in turn promises to repay it."

The analogy between an instalment sale and a credit sale is I think sufficiently close to suggest that the decision in Rabone v. Deane may be regarded as helpful in the present case. That decision may not be binding on me but I respectfully agree with the passage I have cited.

Some of the corresponding Australian statutes include in the definition of "loan" a forbearance to require payment. On this subject Pannam comments at pp. 21-22:

> "As a matter of general principle it would be difficult to show that a forbearance from requiring payment of money owing constituted a loan. If A. owes B. £1,500 in respect of the unpaid purchase price of a new car the mere fact that B. forbears from requiring A. to pay the £1,500 does not translate B. from an unpaid vendor to an unpaid lender. Arrangements made between parties as to the payment of moneys owing as a result of some legal obligations do not, as a rule, affect the character of that obligation. If the debt is due under a contract of loan then the debt is properly described as being in respect of a loan and any forbearance from demanding the debt does not alter its character. Similarly if a debt is in respect of goods sold and delivered, work and labour done, or professional services rendered, then the fact that there is a forbearance does not alter its character as having arisen under those contracts."

I was referred also to the decision of the Privy Council in Chow Yoong Hong v. Choong Fah Rubber Manufactory (1962) A.C. 209. That was a case of the discounting of cheques, the facts in which are quite unlike the present case. In the

course, however, of discussing what may amount to a loan so as to fall within the scope of moneylending Lord Devlin said at pp. 216-217:

> "There are many ways of raising cash besides borrowing. One is by selling book-debts and another by selling unmatured bills, in each case for less than their face value. Another might be to buy goods on credit or against a post-dated cheque and immediately sell them in the market for cash. Their Lordships are, of course, aware, as was Branson J., that transactions of this sort can easily be used as a cloak for moneylending. The task of the Court in such cases is clear. It must first look at the nature of the transaction which the parties have agreed. If in form it is not a loan, it is not to the point to say that its object was to raise money for one of them or that the parties could have produced the same result more conveniently by borrowing and lending money. But if the Court comes to the conclusion that the form of the transaction is only a sham and that what the parties really agreed upon was a loan which they disguised, for example, as a discounting operation, then the Court will call it by its real name and act accordingly."

The reference in this passage to buying by credit is another indication of the kind of transaction which is not to be regarded as a loan.

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. I accordingly conclude that there is here no question of a loan and that the provisions of the Moneylenders Act have no application.

The plaintiff has established its right to succeed against the defendant upon the guarantee and there will be judgment for the plaintiff for $11,853.43 with costs according to scale and disbursements and witnesses' expenses as fixed by the Registrar. I certify for a second day at $63.00. If there are any interlocutory matters

In the Supreme Court of New Zealand Wellington District Wellington Registry

No. 4

Reasons for Judgment of Quilliam J.

14th November 1972 (continued)

on which costs were reserved and on which the parties are unable to agree counsel may submit memoranda and I will fix them.

Solicitors: Evans, Easther, Harris & Goodman, MARTON, for the plaintiff.

Hollings, Thompson & Fairbairn, PARAPARAUMU, for the defendant.

No. 5

Judgment of the Supreme Court

14th November 1972

No. 5

JUDGMENT OF THE SUPREME COURT

IN THE SUPREME COURT OF NEW ZEALAND
WELLINGTON REGISTRY

BETWEEN	M.S.D. SPEIRS LIMITED	Plaintiff
A N D	PETER THOMAS FAHEY	Defendant

JUDGMENT AFTER TRIAL

This action coming on for trial on the 24th and 25th days of October 1972 before His Honour Mr Justice Quilliam after hearing the Plaintiff and the Defendant and the evidence then adduced IT IS ADJUDGED that the Plaintiff recover from the Defendant the sum of $11,853.43, together with the sum of $791.10 for costs, disbursements and witnesses expenses as set by the Registrar and set out in the Schedule annexed.

DATED the 14th day of November 1973.

By the Court

L.S. 'R.B. Twidle'

Deputy Registrar.

No. 6

In the Court of Appeal of New Zealand

No.6

Notice of Motion on Appeal by Peter Thomas Fahey

28th November 1972

NOTICE OF MOTION ON APPEAL BY PETER THOMAS FAHEY

IN THE COURT OF APPEAL OF NEW ZEALAND

No. C.A. /73

BETWEEN PETER THOMAS FAHEY of Walton, a venue, Waikanae, Company Director Appellant

A N D M.S.D. SPEIRS LIMITED a duly incorporated company having its registered office at Marton and carrying on business as a Timber Merchant Respondent

TAKE NOTICE that this Honourable Court will be moved by counsel on behalf of the abovenamed appellant on Monday the 5th day of February 1973 at 10 o'clock in the forenoon or so soon thereafter as counsel can be heard ON APPEAL from the judgment of the Supreme Court of New Zealand at Wellington delivered on the 14th day of November 1972 by the Honourable Mr. Justice Quilliam in action No. A.275/71 in which the appellant was defendant and the respondent was plaintiff UPON THE GROUND that the said judgment is erroneous in fact and law.

DATED at Wellington this 28th day of November 1972.

'A.S. Fairbairn'

Solicitor for Appellant

In the Court of Appeal of New Zealand

No.7

Reasons for Judgment of Court of Appeal

31st August 1973

No. 7

REASONS FOR JUDGMENT OF COURT OF APPEAL

IN THE COURT OF APPEAL OF NEW ZEALAND C.A.64/73

BETWEEN: PETER THOMAS FAHEY Appellant

A N D M.S.D. SPEIRS LIMITED Respondent

Coram: McCarthy P.
Richmond J.
Beattie J.

Hearing: 15 August 1973

Judgment: 31 August 1973

REASONS FOR JUDGMENT OF COURT OF APPEAL

The Court, per Richmond, J.

This is an appeal from a decision of Quilliam J. in a civil action in which the respondent (to which we shall refer as "Speirs Ltd") recovered judgment against the appellant (Mr. Fahey) for a sum of $11,853.43 claimed by Speirs Ltd as owing to it by Mr Fahey under a guarantee.

The essential facts as found by the Judge and as they appear from the evidence were as follows. Speirs Ltd is a supplier of building materials and, as such, supplied materials to Mr. Fahey in the course of his business as a building contractor from 1963 until about November 1967. Mr. Fahey then formed his business into a company called Fahey Construction Co. Ltd. (to which we shall refer as "Fahey Construction Co.") Thereafter Speirs Ltd supplied building materials to the Fahey Construction Co.

In April 1967 Speirs Ltd sent a circular letter to all its customers, including Mr.Fahey, in which it set out the policy which it would thereafter follow in relation to the payment of accounts. In this letter it was stated that payment for materials would be due on the 20th of the month following supply and that the cash

discount of 2½% would not be allowed if the account was not paid on due date. It was further stated that when an account became three months overdue an interest charge of 1% per month would be applied until the account was paid, and finally that legal action for the recovery of the full amount due might be instituted once an account became three months overdue. This policy was adopted to avoid a state of affairs in which Speirs Ltd was concerned at the extent to which it was being expected to carry outstanding accounts. The primary object was to encourage customers to pay their accounts promptly.

Thereafter Speirs Ltd adopted the practice in relation to their customers, including Mr.Fahey, and later the Fahey Construction Co., of applying payments received from customers first towards outstanding interest, next towards the reduction of those accounts which were three months or more overdue, and finally in reduction of the balance of the account.

Shortly after Mr. Fahey had formed his business into a company, he paid off all monies owing by him to Speirs Ltd for materials supplied to him personally. However, the Fahey Construction Co. was soon in arrears with its accounts and in August 1968 Mr. Fahey was told that the Fahey Construction Co. account must be brought up to date, failing which security would be required in the form of a mortgage or personal guarantee by him. In spite of this warning, the Company's indebtedness to Speirs Ltd had by 1st December 1968 increased to $10,070.06. Mr. Fahey was then told that unless the account was brought up to date or the mortgage or guarantee previously referred to was given by Mr. Fahey, Speirs Ltd would not continue supplies of materials. On 2nd December 1968 Mr. Fahey prepared signed and handed to Speirs Ltd a document in the following form:-

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

I PETER T. FAHEY hereby guarantee to pay for any materials which are purchased from

In the Court of Appeal of New Zealand

No.7

Reasons for Judgment of Court of Appeal

31st August 1973 (continued)

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 "

Thereafter the Fahey Construction Co. carried on ordering and obtaining supplies from Speirs Ltd. until the month of May 1971. During this period the total value of materials supplied by Speirs Ltd. was $37,513.67. During the same period the total of interest charges made by Speirs Ltd. was $1,975.06. The total payments made by Fahey Construction Co. to Speirs Ltd was $33,642.69. As at 31st May 1971 the Fahey Construction Co. was indebted to Speirs Ltd on a general balance in its account with Speirs Ltd in a sum of $15,916.10.

It is important to note that throughout the period of trading from December 1968 onwards the earlier practice as to the appropriation of payments received from the Fahey Construction Co. was continued without change. It also appears from the evidence that the first four payments which were made by the Fahey Construction Co. after the document of 2nd December 1968 had been signed by Mr. Fahey were payments of $3,000, $2,000, $5,000 and $3,500 respectively. These were obviously payments generally on account of the indebtedness of Fahey Construction Co. to Speirs Ltd. They total $13,500 and were thus more than enough to pay off completely the outstanding balance of $10,070.06 owing by the Fahey Construction Co. prior to 2nd December 1968 together with any interest thereon. In saying thus we are assuming for the moment that there was nothing in the circumstances of the case which prevented the operation of the ordinary principles laid down in Clayton's case 1 Mar. 572, 605.

On 13th May 1971 Speirs Ltd. made written demand upon the Fahey Construction Co. and upon Mr. Fahey for payment of the amount then owing. No payment was made in response to these demands and a writ was issued on 7th July 1971 claiming $15,916.10 from Mr. Fahey upon the basis of a document of 2nd December 1968. Subsequently the Fahey Construction Co. went into liquidation and

the first dividend resulted in the receipt by Speirs Ltd of $4,062.47, thereby reducing the indebtedness to $11,853.43. Evidence was given by the liquidator that a further dividend is expected. He estimated that the dividend would be between 4.4¢ and 14.2¢ in the dollar. Taking that dividend at the higher figure, it would amount to $1,164.35.

Before Quilliam J. the action was defended upon four grounds:-

(1) That the document of 2nd December 1968 was an indemnity and not a guarantee.

(2) That in any event the document applied only to materials supplied by Speirs Ltd to the Fahey Construction Co. after the document was signed on 2nd December 1968. Accordingly there was no liability under it as payments thereafter made to Speirs Ltd (including the first dividend in the liquidation) were more than enough to meet the price of all materials supplied during the period December 1968 - May 1971. This argument also involved a contention that Mr. Fahey was not responsible for interest charges.

(3) That the action was premature because it had not yet been ascertained exactly how much money the Fahey Construction Co. was in a position to pay. This would not be known until the amount of the final dividend was determined.

(4) That the credit policy adopted by Speirs Ltd. had resulted in that company carrying on the business of moneylending and because it was not registered as a moneylender the action must fail.

Quilliam J. found against Mr. Fahey on all these points and accordingly entered judgment in favour of Speirs Ltd. for the sum of $11,853.43.

In support of the present appeal, Mr. Harding advanced substantially the same arguments as he had done in the Supreme Court. It is convenient to consider in the first place whether Quilliam J. was right when he held that the document of 2nd December 1968 was a guarantee rather than an indemnity. We think he was. After referring to the case of Yeoman Credit Ltd. v. Latter (1961)

In the Court of Appeal of New Zealand

No.7

Reasons for Judgment of Court of Appeal

31st August 1973 (continued)

2 All E.R. 294 he said:-

> "Apart from the fact that it purports to guarantee, it clearly envisages a primary obligation on the company. The liability which the defendant has assumed is to pay for materials in the event of the company not being in a position to do so. This cannot be construed as a primary obligation to keep the plaintiff harmless against loss. It is no more than to meet the default of the company if default there should be."

We think it quite impossible to construe the document as imposing a primary liability on Mr. Fahey. His liability could only arise if the Fahey Construction was not "in the position to" pay for any material which it had purchased from Speirs Ltd. No question of Mr. Fahey's liability could arise unless there was in the first place an actual default by the Fahey Construction Co. in payment for goods as the account fell due. In deference to Mr. Harding's argument, however, we say at once that we agree with him that the contingency upon which Mr. Fahey's liability would arise under the guarantee was something more than mere default by the Fahey Construction Co. Effect must be given to the words of the document "not being in the position to do so". In our opinion the effect of these words was to make it necessary for Speirs Ltd., before that company could recover under the guarantee, to prove not only a default by the Fahey Construction Co. but also the additional fact that that company was not in a position to pay. In this way the present document differs somewhat from the ordinary type of guarantee under which the creditor need do no more than prove default by the debtor. We are not, however, prepared to construe the document in the way suggested by Mr. Harding, namely, as making Mr. Fahey liable only for such loss as Speirs Ltd could establish after the determination of the exact amount which the Fahey Construction Co. was in a financial position to pay in reduction of its total indebtedness. In our view, it was sufficient for Speirs Ltd. to establish both default and an inability on the part of the Fahey Construction Co. to meet the <u>whole</u> of the amount for the time being owing by it. Put in another way, we do not construe the

contingency expressed in the guarantee as one which could not occur so long as the Fahey Construction Co. was in a position to pay some part, however small, of the total amount currently owing. Once the position was reached, as it clearly was in the present case, when the company was not in a position to pay all of its current indebtedness then the contingency envisaged by the guarantee eventuated and it was open to Speirs Ltd to sue forthwith on the guarantee for the whole amount without first exhausting its remedies against the company. This conclusion disposes of Mr. Harding's submission that the action was premature and could not be properly brought until the amount of the final dividend in the liquidation was ascertained. Mr. Fahey's undertaking was of a quite different kind from that which was under consideration in the case relied on by Mr.Harding, namely Montague Stanley & Co. v. J.C. Solomon Ltd. (1932) 2 K.B. 287.

The next submissions made by Mr. Harding concern the correct interpretation of the guarantee. First he contended that it relates in terms only to goods supplied after 2nd December 1968 and does not relate in any way to the pre-existing debt of $10,070.06. Quilliam J. took the view that the document, when construed in the light of the surrounding circumstances, applied to the pre-existing debt as well as to the future supply of materials. We have found ourselves constrained to take a different view. The guarantee in terms is:- "To pay for any materials which are purchased from M.S.D. Speirs Ltd". The words in italics are in their ordinary and natural sense descriptive of goods to be purchased in the future. We are of opinion that in this respect there is no ambiguity in the language of the document and accordingly no recourse to extrinsic evidence is permissible.

In the present case the surrounding circumstances in fact were:-

(1) Mr. Fahey was the Managing Director of and a substantial shareholder in the Fahey Construction Co.

(2) That company was indebted to Speirs Ltd in a sum of approximately $10,000.

In the Court of Appeal of New Zealand

No.7

Reasons for Judgment of Court of Appeal

31st August 1973 (continued)

(3) Speirs Ltd was threatening to discontinue supplies unless the account was brought up to date or Mr. Fahey gave a mortgage or guarantee.

Those circumstances would not in any event assist the appellant, as they disclose that the parties had in contemplation a subject matter, namely a future supply of goods, to which the language of the guarantee aptly applied.

The second question of construction raised by Mr. Harding is as to whether or not the guarantee covers interest as well as the actual price of materials supplied. Quilliam J. thought that it did. We have come to a similar conclusion. It is to be noted that the language of the guarantee is incomplete. The guarantee is to pay for any materials which are purchased from Speirs Ltd in the event of Fahey Construction Co. not being in a position to do so. It does not expressly say how much Mr. Fahey is to pay for the materials. Because of this incompleteness in the language of the guarantee, it is permissible to have regard to the surrounding circumstances in order to ascertain the nature of the dealings between Speirs Ltd and the Fahey Construction Co. which the parties had in contemplation and also the relationship of the parties to one another. From the evidence it appears that at the time when the guarantee was signed the terms as to payment, including payment of interest, which had been earlier adopted by Speirs Ltd, were well established and known to both parties to the guarantee and, furthermore, that Mr. Fahey, as manager of the Fahey Construction Co., had it in his own hands to decide from time to time as to what further purchases would be made and upon what terms they would be made. In all these circumstances, and as a matter of necessary implication, it seems to us quite clear that the parties must have intended that Mr. Fahey would pay whatever sum the Fahey Construction Co. was liable to pay in respect of materials supplied according to the arrangements between that Company and Speirs Ltd. In our view then the guarantee ought not to be limited, as submitted by Mr. Harding, merely to the actual price of such materials.

The question then arises whether the view which we have taken, differing as it does in one respect from that which found favour with Quilliam J, can affect the actual result of this appeal. Because of the construction which he placed upon the guarantee it was not necessary for Quilliam J. to consider whether the monies which he found owing by Mr. Fahey to Speirs Ltd at the time of judgment included any part of the antecedent debt of $10,070.06 or any interest thereon. Whether they did so or not depends upon the right of Speirs Ltd as between itself and Mr. Fahey, to appropriate payments received from the Fahey Construction Co. after 2nd December 1968 in accordance with the ordinary rule in Clayton's case. The question of a creditor's right of appropriation, as between himself and a surety is fully dealt with in 18 Halsbury's Laws of England (3rd Edn.) at pp 493-494.

It is well established that 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. This is made quite clear by the judgments of the Court of Appeal in In Re Sherry - London and County Banking Co. v. Terry (1884) 25 Ch.D. 692. The judgment of the Earl of Selborne L.C., in particular, recognises that unless the terms of the contract of guarantee expressly or impliedly provide otherwise the mere fact of suretyship does not take away from the principal debtor and the creditor those powers which they would otherwise have of appropriating payments towards the discharge of some other debt owing by the principal debtor and not covered by the guarantee.

An example of a contract between a surety and a creditor forming an exception to the general rule is found in a case relied on by Mr. Harding, namely Kinnaird v. Webster (1878) 10 Ch.D. 139. That was a decision of Bacon, V.C. and was subsequently explained by him in Browning v. Baldwin (1879) 40 L.T. 248 as a decision which depended upon the interpretation which he gave to the particular document containing the guarantee. A further example of this type of case is to be found in a decision of the Court of Appeal in

In the Court of Appeal of New Zealand

No.7

Reasons for Judgment of Court of Appeal

31st August 1973 (continued)

Bank of Australasia v. Wilson (1885) N.Z.L.R. 3 C.A. 130 where the guarantee was "in respect of transactions with the Bank after the 13th February 1883". This language necessarily involved bringing into account subsequent credits as well as subsequent debits as both together formed the "transactions with the bank". We are, however, quite unable to find anything in the language of the guarantee signed by 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 accounts overdue for more than three months, and finally to other indebtedness.

It is perhaps worth noting that if the Fahey Construction Co. had appropriated payments to goods supplied after 2nd December 1968 then Mr. Fahey, as surety, would have been entitled to the benefit of that fact. A case illustrating this point is Marryatts v. White (1817) 2 Stark. 101; 171 E.R. 586. The report is a brief one, but it appears that the debtor made payments exactly corresponding in amount to the price of goods ordered after a guarantee had been given and furthermore was allowed discount for prompt payment. Lord Ellenborough, while recognising the general right of the creditor to appropriate payments to a pre-existing debt, held that in the circumstances the payments should be regarded as appropriated to subsequent purchases and thus to have been made in relief of the surety. There is, however, no evidence to support any such inference in the present case. As mentioned earlier in this judgment, the first four payments which were made by the Fahey Construction Co. after the guarantee was given were obviously paid generally on account of that company's indebtedness and were in themselves more than sufficient to clear off the antecedent debt and any possible interest thereon. For these reasons, we are of opinion that the result of this appeal is not in any way affected by the view which we have taken that the guarantee applied only to the future supply of materials.

What we have said so far covers all the matters which were raised by Mr. Harding except for the question of the Moneylenders Act 1908.

Mr. Harding referred us to exception (d) contained in s.2 of the Moneylenders Act 1908 which excludes from the definition of moneylender "any person bona fide carrying on ..... any business in the course of which and for the purpose whereof he lends money at a rate of interest not exceeding ten per cent per annum." It is of course true that in the present case the rate of interest charged by Speirs Ltd on overdue accounts exceeded 10 per cent per annum. This fact, however, cannot possibly make Speirs Ltd a "moneylender" unless at least it be first demonstrated that Speirs Ltd was engaged in lending money. This question was dealt with at some length by Quilliam J. who, after discussing various authorities, came to the following conclusion:-

> "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. I accordingly conclude that there is here no question of a loan and that the provisions of the Moneylenders Act have no application."

With the foregoing conclusion we completely agree. In our view it is quite untenable to suggest that the transactions between Speirs and Fahey Construction Co. in the present case at any stage involved a loan of money.

For the foregoing reasons the appeal is dismissed. The respondent is entitled to its costs of the appeal which we fix at $300 together with disbursements.

In the Court of Appeal of New Zealand

No.8

Formal Judgment of the Court of Appeal

31st August 1973

No. 8

FORMAL JUDGMENT OF THE COURT OF APPEAL

BETWEEN PETER THOMAS FAHEY of Walton Avenue, Waikanae, Company Director,

Appellant

A N D M.S.D. SPEIRS LIMITED a duly incorporated company having its registered office at Marton and carrying on business as a Timber Merchant.

Respondent

Before: The Right Honourable the President.
The Honourable Mr. Justice Richmond.
The Honourable Mr. Justice Beattie.

Friday the 31st day of August, 1973

This appeal coming on for hearing on the 15th day of August 1973 UPON HEARING Mr. Harding of counsel for the appellant and Mr. McGechan and Mr. Reed of counsel for the respondent IT IS ORDERED that the appeal be dismissed with costs against the appellant in the sum of $300.

By the Court

L.S.

D.V. Jenkin

Registrar

No. 9

ORDER GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

In the Court of Appeal of New Zealand

No. 9

Order Granting final Leave to Appeal to Her Majesty in Council

14th December 1973

BETWEEN PETER THOMAS FAHEY of Walton Avenue, Waikanae, Company Director,

Appellant

A N D M.S.D. SPEIRS LIMITED a duly incorporated company having its registered office at Marton and carrying on business as a Timber Merchant.

Respondent

Before: The Right Honourable the President
The Honourable Mr. Justice Speight.

Friday the 14th day of December 1973

UPON READING the appellant's notice of motion dated the 12th day of December 1973 AND UPON HEARING Mr. Anastasiou of counsel for the appellant and Mr. McGechan of counsel for the respondent IT IS ORDERED BY CONSENT that the appellant have final leave to appeal to Her Majesty in Council from the judgment of this Court given on the 31st day of August 1973.

By the Court

L.S.

D.V. Jenkin

Registrar

In the Court of Appeal of New Zealand

No.10

Certificate of Registrar as to Accuracy of Record

19th December 1973

No. 10

CERTIFICATE OF REGISTRAR AS TO ACCURACY OF RECORD

BETWEEN PETER THOMAS FAHEY of Walton Avenue Waikanae, Company Director,

Appellant

A N D M.S.D. SPEIRS LIMITED a duly incorporated company having its registered office at Marton and carrying on business as a Timber Merchant.

Respondent

I, DOUGLAS VICTOR JENKIN, Registrar of the Court of Appeal of New Zealand DO HEREBY CERTIFY that the foregoing 71 pages of typewritten and cyclostyled matter contain true and correct copies of all the proceedings evidence judgments decrees and orders had or made in the above matter so far as the same have relation to the matter of appeal and also correct copies of the reasons given by the Judges of the Supreme Court and the Court of Appeal of New Zealand in delivering judgment therein AND I DO FURTHER CERTIFY that the Appellant has taken all necessary steps for the purpose of procuring the preparation of the record and the despatch thereof to England and has done all other acts matters and things entitling the Appellant to prosecute this Appeal.

AS WITNESS my hand and the Seal of the Court of Appeal of New Zealand this 19th day of December, 1973.

D. V. Jenkins

Registrar.

EXHIBITS

Respondent's Exhibits

EXHIBIT "C"

Exhibit "C"

LETTER dated 5th April 1967 M.S.D.SPEIRS LTD TO CLIENTS - re CREDIT POLICY

Letter, M.S.D. Speirs Ltd to Clients re Credit Policy

5th April 1967

5/4/67

To Our Clients,

Dear Sir,

re Credit Policy

In an article published recently in a trade journal, dealing with Accounting for the Building Industry, the author in commenting on the indebtedness of some builders stated -

"The whole of the blame cannot be placed on the individual concerned. In my opinion, the Merchants are, in some cases, just as responsible.

In their endless search for higher sales, they give virtually unlimited credit to those who do not justify it, and by encouraging the builder to take on more contracts, as an outlet for more sales, overburden the builder who would otherwise be a successful small businessman".

The N.Z. Master Builder's Federation made similar comments regarding the "over-extension" of credit to the detriment of the building industry some months ago, so that it is perhaps timely to bring to your attention this Company's credit policy which applies to both trade and retail accounts alike.

1. Payment for materials is due on the 20th month following supply.

2. The cash discount of 2½% will not be allowed if account is not paid on due date.

3. When an account becomes 3 months overdue, further credit will be withheld and an interest charge of 1% per month applied until such time as the account is paid in full.

Respondent's Exhibits

Exhibit "C"

Letter, M.S.D. Speirs Ltd to Clients re Credit Policy

5th April 1967 (continued)

4. Legal action for the recovery of the full amount due may be instituted once an account becomes 3 months overdue.

This policy will be rigidly enforced from the 1st April and if any clients are doubtful as to how they stand under this credit policy they are asked to contact the local Branch Manager of this Company.

Yours faithfully,
M.S.D. Speirs Ltd.

'R. Keating'

General Manager.

Exhibit "E"

Copy of Joint and Several Guarantee

undated

EXHIBIT "E"

COPY OF JOINT AND SEVERAL GUARANTEE

To: The Credit Manager,
M.S.D.-Speirs Limited,
P.O. Box 35,
Marton.

IN CONSIDERATION of your having at my/our request (as I/we do hereby admit and declare) to supply .... (hereinafter called "the Debtor") with goods on credit I/WE, the undersigned, DO (AND EACH OF US DOTH HEREBY JOINTLY AND SEVERALLY) GUARANTEE to you the due and punctual repayment by the Debtor of all and every sum or sums of money hereafter owing by the Debtor to you for such goods.

This guarantee shall be a continuing guarantee and my (our joint and several) liability hereunder shall not be impaired or discharged by your giving time or any other indulgence whatsoever to the Debtor.

DATED at ..... this ..... day of..... 19...

SIGNED by)
)
.....)
in the presence of:)

Witness: .....
Occupation: .....
Address: .....

....

Respondent's Exhibits

Exhibit "E"

Copy of Joint and Several Guarantee (continued)

undated

SIGNED by)
)
.....)
in the presence of:)

Witness: .....
Occupation: .....
Address: .....

....

ORIGINAL Head Office
SECOND COPY Guarantor
THIRD COPY Branch Files.

Respondent's Exhibits

Exhibit "M"

Letter, M.S.D. Speirs Ltd to Evans, Easther, Harris and Goodman listing number of accounts on which interest has been charged from June 1970 to June 1971

11th April 1972

EXHIBIT "M"
LETTER dated 11th April 1972 - M.S.D. SPEIRS LTD TO EVANS EASTHER HARRIS AND GOODMAN LISTING NUMBER OF ACCOUNTS ON WHICH INTEREST HAS BEEN CHARGED FROM June 1970 to June 1971

M.S.D. SPEIRS LTD

P.O. Box 35
MARTON

11/4/72

Evans, Easther, Harris & Goodman,
Box 26
MARTON

Attention Mr. Easther

Dear Sirs,

re: P.T. Fahey

As requested by Stone & Co in their letter of the 10th March 1972, we set out the details as follows:-

1. Interest charges were instituted in June 1967.

2A	Number of Accounts on which Interest Charged		2B Overdue Amount
1967	June	81	35,985-19
	July	27	23,118-58
	August	23	28,033-35
	September	63	46,784-49
	October	70	46,880-93
	November	48	22,698-81
	December	19	14,061-02
1968	January	70	30,199-43
	February	90	73,903-18
	March	62	43,220-80
	April	41	25,066-21
	May	67	44,442-77
	June	66	57,273-36
	July	66	53,260-54
	August	72	56,177-47
	September	52	47,269-87
	October	65	43,797-79
	November	78	45,633-04
	December	57	31,259-07
1969	January	74	57,473-02

	February	78	74,186-07	Respondent's Exhibits
	March	57	46,200-72	
	April	58	38,677-14	Exhibit "M"
	May	47	30,668-74	
	June	48	33,308-38	Letter, M.S.D. Speirs Ltd to Evans, Easther, Harris and Goodman listing number of accounts on which interest has been charged from June 1970 to June 1971
	July	46	55,988-29	
	August	54	32,918-06	
	September	78	67,295-82	
	October	70	57,399-28	
	November	55	44,257-22	
	December	41	34,879-43	
1970	January	42	47,767-02	
	February	59	93,121-98	
	March	46	55,879-70	
	April	35	29,502-35	
	May	34	16,680-34	
	June	48	34,935-25	
	July	53	86,495-40	11th April 1972 (continued)
	August	43	57,186-25	
	September	41	69,079-70	
	October	40	55,193-12	
	November	37	71,570-26	
	December	37	65,146-76	
1971	January	30	61,893-76	
	February	35	63,967-44	
	March	25	43,096-39	
	April	23	44,979-99	
			2,238,813-78	

3. For the period June 1967 to April 1971 the total number of Customers charged with Interest was 740.

We have prepared the figures by taking the accounts as at the last day of each month and included the interest charged during that month which should theoretically give the same answer as taking the number of overdue accounts on the first day of each month and then taking the number of accounts charged with Interest for the preceding month.

Yours faithfully,
M.S.D. SPEIRS LTD

H.D. McLean

Secretary

Respondent's Exhibits

Exhibit "N"

Schedule showing Combined Group Totals undated

EXHIBIT "N"
SCHEDULE SHOWING COMBINED GROUP TOTALS

Year	Month	Interest Charged	Amount Due
1967	June	$335-48	$46,044-77
	July	289-28	46,805-99
	August	203-44	44,296-09
	September	396-40	86,953-66
	October	376-54	88,504-19
	November	208-30	46,479-61
	December	128-82	27,116-73
1968	January	261-84	46,834-17
	February	604-11	107,960-46
	March	348-69	83,856-73
	April	188-73	46,699-88
	May	374-36	72,062-04
	June	392-37	93,931-06
	July	453-12	84,526-39
	August	456-97	90,332-67
	September	374-00	85,385-84
	October	362-47	65,769-99
	November	371-43	78,034-44
	December	288-86	55,561-22
1969	January	500-09	85,154-77
	February	634-51	97,231-65
	March	448-89	70,194-80
	April	350-51	51,820-35
	May	281-05	51,700-03
	June	263-40	58,681-12
	July	264-87	195,833-60
	August	286-83	53,104-36
	September	629-05	115,001-88
	October	591-16	128,581-13
	November	468-77	91,215-53
	December	271-81	57,743-66
1970	January	418-97	73,565-63
	February	793-55	123,849-32
	March	623-07	93,918-13
	April	291-54	34,995-12
	May	140-62	21,885-56
	June	283-25	49,653-69
	July	412-22	79,949-48
	August	476-63	84,332-71
	September	606-36	90,377-81
	October	509-57	77,056-27
	November	440-91	91,233-92
	December	567-46	80,237-36

1971	January	509-52	77,633-05	Exhibit "N"
	February	603-35	86,716-94	
	March	431-17	53,481-69	Schedule showing Combined
	April	446-09	58,940-60	
	Totals	18,960-43	3,531,249-09	Group Totals (continued)

undated

EXHIBIT "1"

Exhibit "1"

COPY OF PLAINTIFFS STATEMENT OF ACCOUNT WITH FAHEY CONSTRUCTION COMPANY LIMITED FROM MEMORANDA dated 30th September 1971 and 1st October 1971 BY COUNSEL FOR PLAINTIFF

Copy of Plaintiffs statement of Account with Fahey Construction Company Limited from Memoranda dated 30th September 1971 and 1st October 1971 by Counsel for Plaintiffs

12th October 1971

Date	A Interest Charge for Month Ending	B Total Debit for Month Ending	C Credits Recd. in Month Ending	D Balance Out-standing as at
30.11.68	£48-60	£2,613-20		£10,070-06
31.12.68	48-60	727-90	£3,000-00	7,797-96
31. 1.69	34-33	1,796-60		9,594-56
28. 2.69	44-57	670-04		10,264-60
31. 3.69	70-70	495-36		10,759-96
30. 4.69	57-98	1,867-28	2,000-00	10,627-24
31. 5.69	75-95	3,217-93		13,845-17
30. 6.69	32-65	1,629-81	5,000-00	10,474-98
31. 7.69	2-60	1,959-05	3,500-00	8,934-03
31. 8.69	21-28	1,956-06	14-04	10,876-05
30. 9.69	32-18	2,404-99	1,013-68	12,267-36
31.10.69	34-47	789-33	6,525-90	6,530-79
30.11.69	13-80	1,208-18	1,410-91	6,328-06
31.12.69	19-25	1,395-97		7,724-03
31. 1.70		260-75	2,500-00	5,484-78
28. 2.70	26-19	2,067-63		7,552-41
31. 3.70	38-27	3,035-84	2,715-94	7,872-31
30. 4.70		2,201-07	10-19	10,063-19
31. 5.70	27-57	2,599-73	2,950-00	9,712-92
30. 6.70	18-76	1,532-47	2-03	11,243-36
31. 7.70	49-11	1,107-42		12,350-78
31. 8.70	75-00	2,082-64		14,433-42
30. 9.70	97-11	630-82		15,064-24

Exhibit "1"

Copy of Plaintiffs statement of Account with Fahey Construction Company Limited from Memoranda dated 30th September 1971 and 1st October 1971 by Counsel for Plaintiffs

12th October 1971 (continued)

31.10.70	112-43	420-52		15,484-76
30.11.70	114-34	759-01		16,243-77
31.12.70	144-30	1,567-84		17,811-61
31. 1.71	150-64	240-15		18,051-76
28. 2.71	154-85	290-27	2,000-00	16,342-03
31. 3.71	142-43	262-59	1,000-00	15,604-62
30. 4.71	148-12	153-90		15,758-32
31. 5.71	157-58	157-58		15,916-10

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

RECORD OF PROCEEDINGS

MACFARLANES
Dowgate Hill House
London EC4R 25Y

Solicitors for the
Appellant

COWARD CHANCE
Royex House
Aldermanbury Square
London EC2V 7LD
Solicitors for the
Respondent