

11/1981

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

B E T W E E N :

PAULINE BURNES Appellant

- and -

TRADE CREDITS LIMITED Respondent

CASE FOR THE APPELLANT ON THE APPEAL

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| | | <u>Record</u> |
| 10 | 1. This is an appeal by leave of the Supreme Court of New South Wales by Order finally granted under the Order in Council of 1909 on the 31st March, 1980 from an Order of that Court dated the 7th August, 1979 (Street CJ, Samuels and Mahoney JJA) allowing an appeal from a Judgment of the District Court of New South Wales at Sydney in favour of the defendant setting aside the said judgment and directing in lieu thereof judgment for the plaintiff in the sum of \$8,583.31. | p. 69
p. 68 |
| | 2. The appeal involves questions as to whether : | |
| 20 | (a) On its true construction a guarantee made between an Assignor of the Respondent as Lender and the Appellant and another as guarantors was discharged by reason of variations in the obligation guaranteed; | |
| | (b) On its true construction Clause 14 of the said Guarantee includes an extension of the term of the mortgage and an increase in the interest rate under the said mortgage from 9% to 16% per annum; | p. 43 |
| 30 | (c) On its true construction Clause 18 of the | |

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said Guarantee includes an extension of the term of the mortgage and an increase in the interest rate under the said mortgage from 9% to 16% per annum;

(d) On its true construction Clause 25 of the said Mortgage includes an extension of the term of the original mortgage and an increase in the interest rate under the said mortgage from 9% to 16% per annum;

(e) The words, "at any" where secondly appearing in Clause 18 of the said Guarantee were inserted in error and should be deleted and that after "time" thereafter the word "or" should be added in the said Clause of the said Guarantee; 10

~~(f) The Respondent is entitled to the benefit of the Guarantee and the Appellant bound by it notwithstanding the fact that the assignment of the said Guarantee occurred after the date for repayment of the said mortgage had passed.~~

- p. 10
ll. 21-25
3. On the 12th July, 1972 D.G. Hogan Pty. Limited, (the original Creditor) contracted to sell to Civic Private Hotel Pty. Limited (the Debtor) certain land under the Real Property Act 1900 as amended. 20
- pp. 18-25
4. On the 12th October, 1972 Civic Private Hotel Pty. Limited executed a Memorandum of Mortgage in favour of D.G. Hogan Pty. Limited to secure payment to it of \$100,000.00 on 12th October, 1975 and interest thereon at 9% payable monthly.
- pp. 10-17
5. On the 12th October, 1972 the Appellant and her then husband Victor Joseph Burnes executed a Deed of Guarantee of the said debt. 30
- p. 25
6. On the 18th October, 1973 the said Mortgage was assigned to the Respondent and registered in its name pursuant to the provisions of the Real Property Act 1900 as amended (NSW).
- p. 8
ll. 34-35
7. On the 12th October, 1975 the due date for payment of the principal sum pursuant to the said mortgage the said principal sum was not paid.
- pp. 26-27
8. On the 25th November, 1975 the Respondent and the Debtor entered into a Memorandum of Variation of 40

the Mortgage in accordance with Section 91 of the Conveyancing Act 1919 as amended N.S.W. which Memorandum was duly registered. The said Memorandum provided that the rate of interest payable under the said mortgage should be increased from 9% to 16% per annum computed from the 12th October, 1975 and that the term or currency of the said mortgage should be extended to the 12th October, 1976.

- 10 9. The said variation of Mortgage was made without the consent of the Appellant. pp. 28-30
10. On the 25th March, 1976 D.G. Hogan Pty. Limited and the Respondent entered into a Deed whereby the benefit of the said Guarantee was assigned by D.G. Hogan Pty. Limited to the Respondent. pp. 1-3
11. On the 16th June, 1976 the Respondent commenced proceedings in the District Court of New South Wales at Sydney claiming to be entitled to recover from the Appellant and the said Victor Joseph Burnes interest then due under the mortgage and unpaid by Civic Private Hotel Pty. Limited (the Debtor). p. 9
ll. 8-9
- 20 12. In the said proceedings default judgment was entered against the said Victor Joseph Burnes.
13. The District Court of New South Wales at Sydney (Judge Godfrey-Smith) entered judgment for the Appellant. p. 43
ll. 28-29
14. The Respondent appealed to the Supreme Court of New South Wales Court of Appeal Division and on the 7th August, 1979 the said Court of Appeal allowed the Appeal, set aside the judgment for the Appellant and in lieu thereof substituted a judgment for the Respondent in the sum of \$8,583.31. pp. 44-47
p. 68
- 30 15. It is submitted that on the true construction of the said Guarantee an extension of term of the mortgage together with an increase in the interest rate under the said mortgage from 9% per annum to 16% per annum is not a further advance within the meaning of Clause 14 of the said Guarantee.
- 40 16. It is further submitted that on the true construction of the said Guarantee the extension of the term of the said Mortgage and the increase in interest rate under the said Mortgage from 9% to 16% per annum is not an indulgence within the meaning of Clause 18 of the said Guarantee.

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~~17. It is also submitted that the Respondent is not entitled to the benefit of the said Guarantee and that the appellant is not bound by it because the assignment of the said Guarantee occurred after the date for repayment of the said mortgage had passed.~~

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18. There is no authority which decides or in which consideration has been given as to whether the variation of the term and the interest rate of an existing loan constitutes an advance.

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19. There is no authority which decides that a renewal of a loan for a further term is an advance. 10

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20. Although the term "advance" has a meaning wider than "loan", the term is not wide enough to include a transaction under which money being already available to a debtor he becomes entitled to retain it for a period beyond that for which otherwise it would have been available to him.

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21. In ordinary parlance a transaction under which money being already available to a debtor he becomes entitled to retain it for a period beyond that for which otherwise it would have been available to him is not an advance or further advance. 20

p. 63
ll. 1-18

²¹
22. The cases cited by Mahoney JA do not support the proposition that a variation of the term and interest rate of an existing loan constitutes an advance or further advance.

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23. There is a distinction between the giving of credit in a particular sum for a particular time and the extending of the time for credit in the same sum. The latter transaction is not an advance or a further advance. 30

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24. For an illustration of a case where the word "advance" was held not to include the transaction in question see A.J.S. Bank v. Costello 6WN N.S.W. 94.

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25. It is submitted that the word "indulgence" in Clause 18 should be construed ejusdem generis with "consideration" "compound" with "release".

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26. The word "indulgence" should be construed against the maker of the document, the Respondent in accordance with contra proferentem rule.

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27. In ordinary parlance an increase in interest rate from 9% per annum to 16% per annum is not an indulgence.

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28. Payton v. S.G. Brooks & Sons Pty. Limited 1977 W.A.R. 91 cited by Mahoney JA is distinguishable. In that case there was an extension of time the consideration being the promise to pay interest on overdue instalments. However, there was no agreement that in consideration of the lender giving time the borrower was to pay interest at a higher rate than under the original agreement.

p.65
ll. 25-26

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29. Such an increase in interest is not within the general function of the Guarantee. Trade Indemnity Co. Limited v. Workington Harbour & Dock Board 1937 A.C. 1 at 21.

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~~30. It is submitted that the purported assignment of the benefit of the Guarantee was a purported assignment of a bare right to litigate which is not assignable. Hughes v. Fresh Pack Fruit and Vegetable Market Pty. Ltd. 1965 WAR 199 at 204; Starke on "Choses in Action" 62.~~

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31. The Appellant respectfully submits that the Order of the Supreme Court of New South Wales was wrong and ought to be reversed and that the judgment of Judge Godfrey-Smith in favour of the Appellant should be restored.

R E A S O N S

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1. BECAUSE the transaction in question was not an advance within the meaning of the Guarantee.
2. BECAUSE the transaction in question was not an indulgence within the meaning of the Guarantee.
- ~~3. BECAUSE the Respondent did not have the benefit of the Guarantee.~~

PAUL FLANNERY

Counsel for the Appellant.

No. 29 of 1980

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CASE FOR THE APPELLANT

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