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Record

IN THE PRIVY COUNCIL No.42 of 1984

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

10 B E T W E E N:

SCHOLEFIELD GOODMAN & SONS LIMITED

Appellant
(Second Defendant)

- v -

CHARNA ZYNGIER

First Respondent
(Plaintiffs)

20 - and -

WESTPAC BANKING CORPORATION

Second Respondent
(First Defendant)

CASE FOR THE FIRST RESPONDENT

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1. The principal issue arising on this appeal is whether the Appellant is entitled to an assignment of the mortgage given by pp. 90 - 93 the First Respondent ("the Respondent") to the Second Respondent ("the bank"). The Appellant can only have such a right if it is entitled to contribution from the Respondent in respect of the payment by the Appellant of the amount of the bills upon pp. 94 - 108 dishonour. For a surety's right to the benefit of securities held by the creditor is only in aid of a right of indemnity against the principal debtor or a right of contribution against co-sureties. A surety's entitlement to the benefit of securities, which is essentially a right of subrogation, is a secondary right. That right does not give the surety access to securities in the hands of the creditor if there is no principal right of indemnity or contribution as against the debtor: Yonge v. Reynell (1852) 9

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Hare 809, at pp. 818-819 (68 E.R. 744); Duncan Fox & Co. v. North and South Wales Bank (1880) 6 App. Cas. 1, at p. 13; Cornfoot v. Holdenson (1932) V.L.R. 4, at p. 8.

2. The question for determination, therefore, is whether the Appellant has a right of contribution from the Respondent in respect of the payment by the Appellant of the amount of the bills upon their dishonour. This in turn raises two issues, viz:

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(1) Was the Appellant a surety or quasi-surety for the debt of Zinaldi & Co. Pty. Ltd. to the bank on the bills as acceptor?

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(2) If so, was the Appellant a co-surety in respect of the debt for which the Respondent was a surety so that the Appellant and the Respondent enjoyed rights of contribution inter se?

3. It is submitted that the Appellant was not a surety of the liability of Zinaldi & Co. to the bank on the bills, and, accordingly, the Appellant acquired no rights as a co-surety to contribution from the Respondent.

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4. A drawer or indorser of a bill of exchange is not a surety nor does he have the rights of a surety except in special circumstances in aid of the enjoyment of rights conferred by contract or the general law. In the Duncan Fox Case, Lord Blackburn expressly held (at pp. 18-19) that there was neither principle nor authority for saying that a drawer or indorser was, during the currency of the bill, a surety, or in the nature of a surety, to the indorsee. Lord Watson also thought (at pp. 21, 23) that there was no foundation in law for the proposition that the drawer or indorser of a bill of exchange became entitled, in a question with the holder, to the same equities as if he had been a proper surety for the acceptor. After a bill is dishonoured, however, the drawer or indorser, although primarily liable on the bill and not strictly a surety for the acceptor,

has (in common with a surety) a right to come upon the security pledged to the holder (bank) by the acceptor. But this right is, as Lord Selborne said (at p. 14), limited to cases where the question arises as between the indorser and acceptor only and in respect of securities given by the acceptor. This right does not render the drawer or indorser a surety for all purposes, but merely gives the drawer or indorser the benefit of securities in certain limited circumstances.

5. The limited nature of the indorser's rights to securities in the hands of the holder is made plain by Lord Blackburn when his Lordship said, at p. 20:

> "If this be correct, it seems to me that the question in the present case is reduced to this: what are the due proportions as between the indorsers and the security created by one of the acceptors on his separate estate? If a third person, not a member of the firm or liable for its engagements, had become surety or pledged his estate as security to the bank for the general balance due to it from the firm, it might be contended, at least plausibly, that he became only surety for the balance after all indorsers had paid, and was therefore entitled to say that, as between him and the indorser, the indorser should pay all before the surety paid anything. I do not express any opinion how that would be. But the owner of the pledged estate in this case was himself one of the firm and an acceptor of the bill, and as such liable to the indorser. And if the bank had applied the whole of the proceeds of the security, as far as they went, to the payment of these bills, it seems quite clear that Samuel Collins Radford could not have come on the indorsers to repay him part of the debt which he had thus paid. The answer would have been that he was, as between him and the indorsers, bound to pay the whole. And it follows, that if the bank comes upon the indorsers first, they must have the right to be recouped out of the security, unless the bank had

an option to favour whichever set of those liable it pleased, which the reasoning of Lord Eldon seems to me to treat as manifestly inconsistent with the doctrine of equity."

Lord Blackburn accorded to an indorser this limited right not "without some hesitation" and being constrained by the authority of Craythrone v. Swinburne (1807) 14 Ves. 160 and Stirling v. Forrester (1821) 3 Bligh 575. But, had the matter been res integra, his Lordship was "by no means sure that it would not have been better to say that every one should have the full extent of his rights given by contract, express or implied, and no more." It is submitted that there is no warrant in principle or in authority for extending the rule in the Duncan Fox Case to enable an indorser to come upon the security in the hands of the holder which was pledged not by the acceptor himself, but by a third person, namely, the acceptor's surety.

6. The net effect of the Duncan Fox Case is as follows:

(a) A drawer or indorser of a bill of exchange is not a surety for the acceptor, but has some of the rights of a surety in aid of the right of indemnity conferred by the law merchant (and later codified by the Bill of Exchange Act) upon the drawer or indorser.

(b) The rights of the drawer or indorser of a bill extend in a case such as Duncan Fox to giving him the benefit of securities provided by the acceptor himself to the holder in aid of the drawer's or indorser's right of indemnity against the acceptor.

(c) A drawer or indorser does not obtain access to securities provided by strangers to the bill whether under the general law or under sec. 5 of the Mercantile Law Amendment Act 1856 (U.K.) (19 & 20 Vict. c. 97) (the precursor of sec. 72 of the Supreme Court Act 1958 (Vic.)).

7. Further, the Duncan Fox Case did not concern rights of contribution between co-sureties but rights of indemnity by the drawer or indorser against the acceptor. The right of the drawer or indorser to indemnity from the acceptor arose from the law relating to bills of exchange. Between parties to a bill, rights of indemnification followed a statutory order of liability. The relationship was one of primary liability of the acceptor and secondary liability of the drawer or indorser and the right of the drawer or indorser to access to securities provided by the acceptor himself. The securities sought by the "quasi surety" were those provided by "the principal debtor" himself, not by a "surety of the principal debtor". The decision in the Duncan Fox Case is, therefore, not authority for a general proposition that a drawer or indorser of a bill who pays the holder is entitled to the benefit of all securities which the holder has in his hands at the time of payment in aid of a right of indemnity or contribution. Nor are the decisions in Aga Ahmed Ispahany v. Crisp (1891) L.R. 19 Ind. App. 24 and State Savings Bank Commissioners (Vic.) v. Patrick Intermarine Acceptances Ltd. (1981) 1 N.S.W.L.R. 175 authorities for such a general proposition.

8. In Aga Ahmed Ispahany v. Crisp the right to come upon the security was conferred by contract. Furthermore, the statement of principle in that case extracted from the Duncan Fox Case is limited to "securities given by the acceptor which the holder has in his hands at the time of payment, and upon which he has no claim except the bill itself": (1891) L.R. 19 Ind. App. 24, at p. 29. It is submitted that the principle in Duncan Fox applies only to securities given by the acceptor because it is only against the acceptor that an indorser or drawer has a right of indemnity.

9. In the Patrick Intermarine Case, a right of indemnity existed between indorsers of a bill, but there is nothing in that case which supports the view that an indorser would be entitled to the benefit of all securities, whether given by the indorser or

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his surety, which the holder has in his hands at the time of payment.

10. It is submitted on the first question, therefore, that the
pp. 94 - 108 Appellant was not a surety for the bills. It had rights as a
pp. 94 - 108 party to the bills to which some of the rights of a surety adhered in relation to other parties, including the holder. These rights did not, however, extend to enable the Appellant to have the benefit of the securities given to the bank by the
pp. 94 - 108 Respondent, who was a stranger to the bills. If, contrary to this submission, the Appellant was prima facie entitled to the benefit of the securities held by the bank at the time of payment, the Appellant does not come within the principle in the
pp. 94 - 108 Duncan Fox Case because, at the time of payment of the bills, the securities in the hands of the bank were not securities upon which the bank had any claim except for the bills themselves.
p. 61, ll. 13 - 16 At the time of payment, there were still on foot other transactions between the bank and Zinaldi & Co. which were still the subject of the security given by the Respondent: cf. Dalgety Ltd. v. Commercial Bank of Australia Ltd. (1981) 2 N.S.W.L.R. 211. In none of the cases is an equitable right to securities recognised which is to be held in suspension until the securities
p. 78, ll. 4 - 8 were not required by the creditor. Fullagar J. was right in concluding that "the right to contribution (or indemnity), without which no right to assignment of securities can ever accrue, must exist at (or immediately after) the moment of payment by the paying co-surety, or it will never exist at all."

11. Furthermore, if, contrary to the foregoing submissions, the Appellant is treated as a surety for the debt constituted by
pp. 94 - 108 the bills, it was not a co-surety with the Respondent for a debt for which the Respondent was a surety so as to bring into operation the rules as to contribution between co-sureties. The question whether the Appellant and the Respondent were co-sureties for the same debt or obligation depends upon the proper characterisation of the obligation of each of the Appellant and the Respondent to the bank.

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12. The Appellant and the Respondent were not legally liable to the bank as obligors in respect of the same obligation. They did not have a common or co-ordinate liability to the bank. They were not sureties for the same debt. The Appellant's liability to the bank arose out of the bills and by the operation of sec. 62 of the Bills of Exchange Act upon dishonour of the bills. The Respondent's liability to the bank, on the other hand, did not arise out of the bills or by reason of the operation of the Act. Her liability arose upon demand by the bank for the balance owing by Zinaldi & Co., on its current account with the bank. As O'Bryan J. said : "The obligations of the competing parties arose out of separate and distinct subject matter. The bank had no direct recourse to the Plaintiff on the bills whereas it had direct recourse to Scholefield. Scholefield, on the other hand, had no direct recourse to the plaintiff on the bills." The liabilities of the parties were not truly of equal status and they were not, therefore, sureties for the purposes of the doctrine of contribution : Molsons Bank v. Kovinsky (1924) 4 D.L.R. 330.

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p. 43, 11. 4-9

13. This conclusion is supported by the following considerations:

(a) The right to contribution is "bottomed in equity", and equity requires mutuality. There was here no mutuality in the rights of the Appellant and the Respondent for contribution. The Appellant could not have obtained contribution from the Respondent upon payment to the bank for an amount equal to the amount of the bills. The Appellant could only claim indemnity from the Respondent after payment by her to the bank of the whole balance of account due to the bank.

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(b) The bank did not have a choice to come against the Appellant or the Respondent for the bills. It was obliged to come against the Appellant for the bills or else bring all its other relevant transactions with Zinaldi & Co. to an end.

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(c) On a proper construction of the mortgage, the bank could never have called upon the Respondent to pay the

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amount of the bills, as distinct from some amount "in gross", unless she was at the same time called upon to pay the amount of the whole general account outstanding

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including the amount referable to the bills.

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(d) Payment by the Respondent of part of the debt

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secured by the mortgage would not discharge the bills

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unless specifically appropriated by the bank for the purpose: In re Sass (1896) 2 Q.B. 12; In re Holder (1929) 1 Ch. 205.

14. Further, if the Respondent was a surety for the amount of

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the bills in any sense, she was such a surety for the due

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performance on the bills not only of Zinaldi & Co. but of all

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other parties to the bills who might be liable, including the Appellant itself. The Respondent was, therefore, a surety in a different degree from the "suretyship" of the Appellant.

pp. 73, 11. 3 - 9

Fullagar J. was correct in deciding that if the Respondent "had paid the full amount of the ultimate balance owing on general account to the bank, and that general ultimate balance had

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included the amount of the relevant bills of exchange, she then would have been entitled not to contribution but to indemnity from the parties otherwise liable on the bill and thus from Scholefield."

15. Section 72 of the Supreme Court Act 1958 (Vic.) does not confer a right to obtain the benefit of securities in a case where there is no right of indemnity or of contribution conferred by

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contract or recognised by the general law. The precursor of sec. 72 (the Mercantile Law Amendment Act 1856 (U.K. (19 & 20 Vict. C. 97), sec. 5) was enacted for the following purposes:

(a) to unify the mercantile law in England, Scotland and Ireland in certain respects;

(b) to enable rights formerly exercisable only in equity to be enforced at law;

(c) to preserve securities which might be lost by the payment or satisfaction of the debt or duty concerned;

(d) to avoid circuity of action to obtain the benefit of securities:

Batchellor v. Lawrence (1861) 9 C.B. (N.S.) 543, at pp. 549, 551, 553, 554, 566 (142 E.R. 214); Glanville Williams, Joint Obligations, par. 95. The section does not create new primary rights. D & J Fowler (Australia) Ltd. v. Bank of New South Wales (1982) 2 N.S.W.L.R. 879 is wrong because it allowed the plaintiff recourse to a security provided by a person who was said to be a co-surety not upon the footing that the plaintiff was a surety or that he was a person liable with the alleged co-surety for the principal debt but upon the footing that the plaintiff was said to be liable with the principal debtor for the principal debt. The plaintiff in that case had no right of indemnity conferred by contract or recognised by the general law.

16. If the Appellant's claim for contribution is correct it would require a right of contribution to be conceded in every case where a third party bill is dishonoured by the acceptor and the holder has a guarantee of the acceptor's general liabilities to the holder. It would require the indorser/drawer to be regarded as a surety with the guarantor. Suretyship or quasi-suretyship would arise out of subscription to a bill as between a party and a non-party in circumstances in which it might not exist between the party and the holder/principal creditor.

17. The facts of this case are not uncommon in transactions of trade involving confirming houses and banks. If the respective rights are as the Appellant contends, it is surprising that they have not been recognised by the cases or text books. Yet apart

from the Fowler Case (which was decided under the Mercantile Law Amendment Act and not upon general principles (and which, it is submitted, was wrongly decided)), there is no support for the Appellant's contentions in a case such as this.

18. For these reasons, it is submitted that the decision of the Full Court is correct and should be upheld and that the appeal should be dismissed with costs.

ALEX CHERNOV Q.C.

JOHN KARKAR

No. 42 of 1984

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

BETWEEN:-

SCHOLEFIELD GOODMAN & SONS LIMITED
Appellant
(Second Defendant)

– v –

CHARNA ZYNGIER
First Respondent
(Plaintiffs)

– and –

WESTPAC BANKING CORPORATION
Second Respondent
(First Defendant)

CASE FOR THE FIRST RESPONDENT

CLYDE & CO.,
30 Mincing Lane,
LONDON, EC3R 7BR.

Date : 16.5.85

Ref : GTE/PJF/A.3066