

11/81

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL C.A. 58 OF 1978

BETWEEN:

PAULINE BURNES

Appellant

AND:

TRADE CREDITS LIMITED

Respondent

TRANSCRIPT RECORD OF PROCEEDINGS

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SOLICITORS FOR THE APPELLANT

Holman Webb & Co.,  
167 Macquarie Street,  
SYDNEY.

By their Agents:

Ingledeu Brown Bennison & Garrett,  
51 Minories,  
LONDON. EC3N 1JQ U.K.

SOLICITORS FOR THE RESPONDENT

Philip Malouf & Company,  
Philip Court,  
141-143 Elizabeth Street,  
SYDNEY.

By their Agents:

Clifford-Turner & Co.,  
~~11 Old Jewry,~~  
LONDON. EC2R 8DG U.K.

*Book from 11 Old Jewry  
New Bridge Street,  
London EC4V 6BY*

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STATEMENT OF LIQUIDATED CLAIM

IN THE DISTRICT COURT

OF NEW SOUTH WALES

No. of 1976

AT SYDNEY

BETWEEN	<u>TRADE CREDITS LIMITED</u> registered office 160 Clarence Street Sydney.	5
		Plaintiff
AND	<u>VICTOR JOSEPH BURNS</u> 9 Springfield Avenue, Potts Point. <u>AND PAULINE BURNS</u> BURNES of 2 Bower Street, Manly.	10
		Order 20.8.76 Defendant

Issued 16 JUN 1976. 15

The plaintiff claims \$8,583.31 in respect of the cause of action pleaded overleaf.

C.A. Malouf Plaintiff's Solicitor Philip Malouf & Company, Solicitors, 141-143 Elizabeth Street, Sydney.	20
-------------------------------------------------------------------------------------------------------------------------	----

which is the plaintiff's address for service.

To the defendant: 25

1. You are liable to suffer judgment unless notice of the grounds of your defence, prepared in accordance with the rules and verified by your affidavit, is received in the registry at 225 Macquarie Street, Sydney within 28 days after service of this Statement of Claim upon you. If you file such a notice the action will be heard (if either party requires a hearing) at the first place mentioned in the heading of this document. If that place is inconvenient to you, you may have a right under section 55 of the District Court Act, 1973, to have the action transferred to a more convenient place. 35

2. You may at any time before judgment pay the amount claimed into the registry, whereupon further proceedings against you in the action will be stayed, but you will remain liable for the costs incurred by the plaintiff before the payment. The plaintiff's costs incurred up to the time of service of this Statement of Claim are: 40

Statement of Liquidated  
Claim

	\$	¢	
Court fees	10	00	
Solicitor's costs	72	00	5
Service fees	:	:	
Total	82	00	

together with any further fees properly paid or payable for service.

N.B. PAYMENT WILL ONLY BE ACCEPTED IN THE REGISTRY IF MADE BY CASH, MONEY ORDER, BANK CHEQUE OR SOLICITOR'S CHEQUE. 10

3. You may at any time before judgment confess the plaintiff's claim or part thereof, and you may apply for an order for leave to pay the amount due by instalments. (Forms for these purposes are obtainable at the registry.) You and the plaintiff may sign and file an agreement as to the amount due and terms of payment. Any order made, or agreement filed, as to instalments will be binding on the plaintiff so long as the instalments are paid when due. 15

On ordinary business days, whether the Court is sitting or not, the registries at Sydney are open for business from 9.15 a.m. until 3.45 p.m., and the registries at other places are open for business from 9.30 a.m. until 1.00 p.m., and from 2.00 p.m. until 4.00 p.m. 20

The plaintiff pleads his cause of action as follows: 25

1. On or about the 12th day of October, 1972 in consideration of D.G. Hogan Pty. Limited at the request of the Defendants agreeing to lend certain moneys to Civic Private Hotel Pty. Limited (hereinafter called the "Principal Debtor") the Defendants entered into a Deed of Guarantee by which the Defendants guaranteed D.G. Hogan Pty. Limited against all loss of principal interest or other moneys secured by Memorandum of Mortgage M945586 between the principal debtor and D.G. Hogan Pty. Limited and all costs and charges and expenses incurred by reason of any default on the part of the said principal debtor. 30

2. By Memorandum of Transfer of Mortgage dated the 18th day 35



Statement of Liquidated  
Claim

of October, 1973 D.G. Hogan Pty. Limited transferred all its right title and interest in the said memorandum of Mortgage referred to in paragraph 1 to the Plaintiff. 5

3. By Deed of Assignment made between D.G. Hogan Pty. Limited and the Plaintiff, D.G. Hogan Pty. Limited transferred all its right title and interest in the said Deed of Guarantee referred to in paragraph 1 to the Plaintiff.

4. The said principal debtor has defaulted under the said Memorandum of Mortgage and the arrears of interest due and owing by it to the Plaintiff as at the 12th May 1976 were \$8,583.31. 10

5. The Defendants have failed to comply with the Plaintiff's demand to pay to it the sum of \$8,583.31. 15

AND THE PLAINTIFF CLAIMS THE SUM OF \$8,583.31

IN THE DISTRICT COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
AT SYDNEY )

No. 033198 of 1976

BETWEEN

TRADE CREDITS LIMITED

Plaintiff 5

AND

VICTOR JOSEPH BURNES  
and  
PAULINE BURNES

Defendants

NOTICE OF GROUNDS OF DEFENCE 10  
OF SECOND DEFENDANT

1. The second defendant PAULINE BURNES admits the contents of paragraphs 1 and 2 of the plaintiff's Statement of Claim.

2. The second defendant does not admit the contents of paragraphs 3 and 4 of the said Statement of Claim. 15

3. The second defendant says that the Deed of Assignment referred to in paragraph 3 of the said Statement of Claim was made on the 25th March, 1976, and notices of the purported assignment were given by letters dated the 25th March, 1976 addressed by the plaintiff's solicitors herein to each of the defendants. 20

4. The second defendant says that by Memorandum Varying Mortgage P609316 dated the 25th November, 1975 between Civic Private Hotel Pty. Limited (referred to as the "principal debtor" in the said Statement of Claim) as Mortgagor and the plaintiff herein as Mortgagee, the said Memorandum of Mortgage M945586 referred to in the said Statement of Claim was materially varied without the consent of the second defendant. 25  
The material variation consisted of an extension of the term

Grounds of Defence of  
Second Defendant

of the said mortgage by a period of twelve (12) months to the  
12th October, 1976 and an increase of the rate of interest pay-  
able under the said mortgage to sixteen (16) per centum per 5  
annum computed from the 12th October, 1975.

5. The second defendant says that such material variation of  
the said mortgage, without her consent, discharged her from all  
liability whatsoever under the Deed of Guarantee referred to in  
the said Statement of Claim by reason of prejudice caused to 10  
her thereby.

DATED this 23rd day of September, 1976.

J.P. Gallagher-----  
John Peter Gallagher  
Solicitor for the Secondnamed 15  
Defendant Pauline Burnes

AFFIDAVIT VERIFYING NOTICE OF GROUNDS  
OF DEFENCE OF SECOND DEFENDANT

1. I am the secondnamed defendant.  
2. The Notice of Grounds of Defence herein is true in sub- 20  
stance and in fact.

SWORN at Sydney this 23rd )  
day of September, 1976, before me: ) P.A. Burnes

Gail Warton JP 25  
A Justice of the Peace

IN THE DISTRICT COURT )  
 )  
OF NEW SOUTH WALES ) No. 33198 of 1976  
 )  
CIVIL JURISDICTION )

BEFORE HIS HONOUR JUDGE GODFREY-SMITH  
FRIDAY, 3rd February, 1978.

5

TRADE CREDITS v. BURNES

MR. MOSS appeared for the plaintiff.  
MR. FLANNERY appeared for the defendant.

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((1) Deed of Guarantee, dated 12th October, 1972, between D.G. Hogan Pty. Limited of the one part and first and second defendants of the other; (2) Memorandum of mortgage registered number 945586 between Civic Private Hotel Pty. Limited and D.G. Hogan Pty. Limited, dated 12th October, 1972; (3) Deed of Assignment, dated 25th March, 1976. D.G. Hogan Pty. Limited to Trade Credits Pty. Limited; (4) Assignment of Mortgage evidenced by Memorandum of the part of the Memorandum of Mortgage just referred to; (5) Memorandum varying mortgage executed on 25th November, 1975, between Civic Private Hotel Pty. Limited as mortgagor and Trade Credits Limited. All documents tendered, admitted by consent and marked Exhibit "A".)

DARCY RAYMOND WEIR  
Sworn and examined:

MR. MOSS: Q. Would you tell the court your full name, address and occupation? A. Darcy Raymond Weir, collection officer, Trade Credits Limited, 80 Gannon Road, Cronulla.

Q. You said you are collection officer for the plaintiff company? A. Yes.

Q. How long have you held that position? A. Five and a half years.

Q. And briefly, would you tell the court what duties that comprises? A. To make sure that all accounts are kept up to date and payments are made in time in relation to mortgage loan accounts.

Q. Does that position involve records of the plaintiff company or checking of records of the plaintiff company? A. Yes, it does.

- Q. In particular, when the plaintiff company lends money, are records kept? A. Yes.
- Q. Relating to the loans? A. Yes.
- Q. And relating to repayments payable in respect of each loan? A. Yes. 5
- Q. And are those records under your supervision? A. That is correct.
- Q. Since you have occupied this position of collection manager, has that been the case? A. Yes. 10
- Q. And briefly, do the records consist substantially of cards relating to particular borrowers? A. That is right, every account has its own card.
- Q. And the cards contain brief details of the terms of the loan? A. Yes, the terms of the loan, amount loaned, interest rate and the amount of interest charged. 15
- Q. And do the contents of the cards also reflect repayments made in respect of a given loan? A. Yes.
- Q. Have you brought with you ledger card relating to the Civic Private Hotel Pty. Limited and relating to a guarantee by Victor Joseph Burnes and Pauline Burnes? A. Yes. 20
- Q. Will you produce that document, that is the one you are holding in your hand at the moment, is that a computerised document? A. This is a copy of our computer ledger card, yes.
- Q. Does that document relate to mortgage number M945586? A. That is correct. 25
- Q. And the sum of \$100,000 loaned to the Civic Private Hotel Pty. Limited? A. Yes.
- Q. Have you any other documents with you relating to that loan, any other cards or documents? A. I have the history cards which are kept separate from the computer cards of all correspondence received and any letters we may have sent. 30
- Q. Have you got history cards together with the computer records that you have just referred to? A. Yes.
- Q. You tell his Honour, by reference to those documents, you are able to tell the court what repayments have been made in respect of the loan initially of \$100,000, is that right? A. Yes. 35
- Q. Do the records I have just mentioned, that is the computer

record and the history card, does that also make reference to a variation of the mortgage I have mentioned to you in about November 1975? A. Yes, it does.

Q. From the records that you have just described, Mr. Weir, are you able to tell the court what amount of interest, if any, was outstanding at May, 1976? A. Yes, as at 12th May, 1976, an amount of interest of \$8,583.31 was outstanding. 5

Q. Does that comprise interest on the \$100,000 referred to at the new rate of 16 percent per annum for those months? 10  
A. Yes.

Q. Just so there is no doubt that sum is entirely made up of interest of that period at the new rate of 16 percent per annum? A. Yes.

Q. In your capacity as collection manager, are you familiar with interest rates current in New South Wales from time to time in respect of a loan of money? A. I am. 15

Q. What I am asking you is that I think you told me you are and have been in your capacity as collection officer aware of current situations from time to time? A. Yes. 20

Q. As at November 1975, on a loan in the order of \$100,000 to your knowledge was 16 percent per annum within then current rates of interest? A. It was within current rates of interest at that time.

(By consent, computer records and history cards, tendered, admitted and marked Exhibit "B".) 25

Q. You have told us what the interest outstanding was as at May 1976, are you able to say that no payments have subsequently been made as to interest? A. No payments have been made. We have received the rent from the property. It has been credited to the account. 30

Q. No payments have been made by either the mortgagee or guarantor as to interest? A. No.

Q. And, of course, the principal sum remains outstanding? 35  
A. Yes.

CROSS-EXAMINATION:

MR. FLANNERY: Q. Is this correct, that the calculation of interest is made in this way, seven times \$1,330.33 minus \$750? A. Sorry, the calculations of the \$8,000 I think it is \$1,333.33. 40

D.R. Weir, xx

HIS HONOUR: Q. \$1,333.33? A. Yes, multiplied by seven  
minus \$750 in credit.

Q. The period which you took was the period between the  
date of the Memorandum of Mortgage took effect and the date of 5  
the issue of the Statement of Claim? A. Yes, seven months  
approximately.

Q. The first defendant, Victor Joseph Burnes, has been the  
subject of a judgment of Trade Credits? A. Yes.

Q. And Mr. Burnes has not been able to be located? A. Yes. 10

Q. Do you understand that there has been a dissolution of  
marriage between Mr. and Mrs. Burnes? (Objected to - question  
withdrawn.)

Q. Do you know that Mrs. Burnes received, as a director of  
this company, before this Memorandum of Mortgage took effect - 15  
(Objected to.)

(Witness retired.)

MR. MOSS: That is the evidence from the plaintiff.

(Counsel addressed.)

HIS HONOUR: This is a very interesting case. It has been 20  
extremely well argued by both counsel and I am much indebted  
to them for their help. I am going to claim a verdict for the  
defendant for the second defendant in this case. I will re-  
duce my reasons in writing and publish them on a date to be  
notified. I wish to put them in a reasonably acceptable and 25  
sufficient form, but I am satisfied that broadly the variation  
in the mortgage did not constitute an advance and is not  
caught under indulgence or consideration, compounding or re-  
leasing under Cl. 18.

DEED OF GUARANTEE

VJB THIS DEED made the 12th day of October One thousand nine hun- 5  
PAB dred and seventy-two BETWEEN D.G. HOGAN PTY. LIMITED of care  
of 6-8 Mona Vale Road, Pymble in the State of New South Wales.

(hereinafter called "the Lender") of the one part A N D VICTOR  
JOSEPH BURNS of 2 Bower Street, Manly in the State of New South  
Wales, Company Director and PAULINE ANNE BURNS of the same 10  
address his wife.

(hereinafter called "the Guarantor") of the other part WHEREAS  
the Lender at the request of the Guarantor has agreed to per-  
VJB mit ~~XXXXXXXXXX~~ CIVIC PRIVATE HOTEL PTY. LIMITED a company duly  
PAB incorporated in accordance with the laws of the State of New 15  
South Wales and having its registered office at 9 Springfield  
Avenue, Potts Point in the said State.

(hereinafter referred to as "the Borrower") to repay the sum of  
ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) being the balance of 20  
purchase moneys remaining unpaid by the borrower to the lender  
pursuant to contract for sale made between D.G. Hogan Pty.  
Limited as vendor and Civic Private Hotel Limited as purchaser  
and dated 12th day of July 1972 in respect of land contained  
in Certificate of Title Volume 10378 Folio 24 (hereinafter  
called "the principal sum") which said sum together with inter- 25  
VJB ested thereon is to be repaid in accordance with the terms  
PAB covenants and conditions contained in the documents described  
in the Schedule hereto AND WHEREAS the Lender has agreed to  
advance to the Borrower the said principal sum upon condition  
inter alia that the Guarantor enters into and executes these 30  
presents AND WHEREAS prior to the execution hereof the Guarantor  
has inspected the documents relating to the loan described  
in the Schedule hereto and has approved of the contents there-  
of NOW THIS DEED WITNESSETH that in consideration of the said  
principal sum agreed to be advanced by the Lender to the 35  
Borrower upon the terms and in the manner hereinbefore recited  
the Guarantor DOETH HEREBY GUARANTEE to the Lender and to its  
successors and assigns the repayment by the Borrower to the  
Lender of the whole of the said principal moneys and payment of 40  
all interest to accrue due under and upon the terms and in the  
manner set out in the documents appearing in the schedule  
hereto or under any documents expressed therein to be collateral  
thereto and also the observance and performance by the Borrower  
of the terms covenants and conditions contained in any such 45  
document and also the observance and performance by any party  
described as the Mortgagor under any document set out in the  
Schedule hereto or under any document expressed therein to be  
collateral thereto NOW IT IS HEREBY AGREED BY AND BETWEEN THE  
PARTIES HERETO AS FOLLOWS:-



Exhibit "A" - Original  
Deed of Guarantee

1. THAT this Guarantee shall be a continuing guarantee and shall not be considered as wholly or partially discharged by the payment at any time hereafter of any of the moneys hereby secured or by any settlement on account or by any other matter or thing whatsoever. 5

2. THAT this Guarantee shall be a principal obligation and shall not be treated as ancillary or collateral to any other obligation howsoever created or arising to the intent that this Guarantee shall be enforceable unless the same shall have been satisfied according to the terms hereof notwithstanding that any other obligation whatever arising between the Lender and the Borrower shall be in whole or in part unenforceable whether by reason of any Statute (including any Statute of Limitation) or for any other reason whatsoever. 10  
15

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3. THAT until the Lender shall have received in full all moneys due from the Borrower the Guarantor shall be bound by these presents and in the event of the Borrower becoming bankrupt or entering into any Scheme of Arrangement in favour of creditors or being a Company entering into liquidation either voluntarily or involuntarily the Guarantor shall not be entitled to prove or claim against the Official Receiver or Liquidator in competition with the Lender so as to diminish any dividend or any payment which the Lender may receive and any such claim by the Lender shall not prejudice or affect the right of the Lender to recover from the Guarantor the money hereby secured to the full amount of the limit of this Guarantee. 20  
25  
30

4. THAT this Guarantee is to continue binding upon the Guarantor notwithstanding the death or insolvency or liquidation of the Borrower and notwithstanding any change or alteration in the Lender or in the Guarantor.

5. THE Guarantor shall from time to time pay to the Lender the interest to accrue due on the principal sum and any other moneys which may bear interest under the terms of the loan so often as the Borrower shall fail to pay the same or any part or parts thereof in accordance with the provisions of any document relating to the making of the advance. 35  
40

6. THE Guarantor will pay to the Lender the principal sum and all other moneys which may be or become payable to the Lender if and whenever the Borrower shall fail to pay the same or any part thereof at the time or times when such moneys shall be or become payable. 45

Exhibit "A" - Original  
Deed of Guarantee

7. THE Guarantor HEREBY FURTHER GUARANTEES to the Lender the observance and performance by the Borrower of the terms covenants and conditions on the part of the Borrower (or any Mortgagor) contained or implied in the documents referred to in the Schedule hereto and by the Borrower to be performed or fulfilled and will upon demand pay to the Lender the amount of any loss or damage which the Lender may suffer by reason of the non-performance or non-observance of any such terms covenants or conditions in any such document contained. 5 10

8. THE Guarantor shall not be entitled to the benefit of any security or securities now or hereafter held or taken or otherwise acquired by the Lender or to the benefit of any dividend composition or payment received by the Lender from the Borrower or its successors or assigns or any person or persons or company liable as aforesaid upon any negotiable or other security so as to affect the liability of the Guarantor under this Guarantee or to prove for or claim demand or receive any such dividend composition or payment as aforesaid until the Lender shall have received the full amount due by the Borrower to the Lender. 15 20

9. THIS Guarantee shall not affect or be affected by any other or future securities now or hereafter held or taken by the Lender or by the loss by the Lender of any collateral or other security or securities or by the Lender having to recover by realising or enforcing any security or otherwise any sums due from the Borrower or any person or persons or company as aforesaid or by any delay or mistake on the part of the Lender. 25

10. IT is hereby expressly agreed and declared that the provisions of the Moratorium Act, 1932, as amended shall be excluded from and shall not extend or apply to this Guarantee or any extension or variation thereof and that nothing herein contained shall extinguish restrict postpone or otherwise affect any of the powers rights remedies and discretions of the Lender. 30 35

11. THE Guarantor's obligations hereunder to the Lender shall be enforceable at any time upon demand being made by the Lender after the Borrower (or any Mortgagor) shall have defaulted 40

V.J. Burnes P.A. Burnes 40

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in the performance or non-observance of any of the terms covenants or conditions on its part contained in any security or other document taken by the Lender and in any way relating to the advance to be made by the Lender to the Borrower hereunder. The Guarantor shall be liable to pay all moneys which 45

Exhibit "A" - Original  
Deed of Guarantee

may at any time hereafter be owing to the Lender by the Borrower either as principal moneys, interest or otherwise including all moneys which the Lender may hereafter become liable to pay for or on account of the Borrower or other liability incurred for or on behalf of the Borrower and all costs charges and expenses which may be incurred by the Lender (including costs as between Solicitor and client in or about any actual or attempted exercise or enforcement of any power right or remedy conferred on the Lender) or which the Lender may incur owing to default in payment of any money intended to be secured by this Guarantee.

12. ANY notice to be given or demand to be made upon any party hereunder shall be deemed to be duly given or made if the same be in writing and signed personally or in the case of a Company by the Manager Secretary Solicitor or any Director for the time being of the party giving such notice and if the same be delivered personally or left at or sent through the post in a prepaid envelope addressed to the other party at his residential address or place of business last known to the person signing such notice of demand or in the case of a company at its registered office and such service shall be in all respects valid and effectual notwithstanding that at the date of such service any party shall be bankrupt or insolvent or in the course of liquidation or wound up and notwithstanding any other matter or event whatsoever AND any such notice or demand if sent through the post as aforesaid shall be deemed to have been received by the party to which it is addressed at the time when the envelope containing the same would in the ordinary course of post have been delivered.

13. THE liability of the Guarantor shall not be affected by any collateral rights or obligations which may exist between them or any one or more of them and the Borrower nor shall the same be affected by any variation or avoidance of any such contractual rights.

14. IT is hereby expressly provided that any further advance or advances which may be made by the Lender to the Borrower shall be included in this Guarantee unless the Guarantor shall have given to the Lender notice in writing delivered personally or sent by prepaid registered post to the Lender at its registered office clearly stating that no further advances shall be covered under the terms of this Guarantee and in such event any advance made by the Lender to the Borrower after the date upon which such notice was received by the Lender shall not be deemed to be included in this Guarantee provided that nothing herein contained shall in any way affect the liability of the Guarantor in respect of any moneys advanced by the Lender prior to the receipt of such notice or moneys advanced by the Lender after receipt of such notice where the Lender had before

Exhibit "A" - Original  
Deed of Guarantee

receipt of such notice made all necessary arrangements for the advance to be made, or in respect of any other matter herein contained.

5

15. NOTWITHSTANDING anything herein contained or contained in any document referred to in the Schedule hereto or in any other document relating to the making of the advance and notwithstanding that the whole or any part of the moneys due and owing by the Borrower to the Lender are or may be irrecoverable from the Borrower by the Lender (whether by reason of any legal limitation disability or incapacity of or affecting the Borrower or by reason of any other fact or circumstance whatsoever and whether the transaction or any of them relating to such moneys have been void ab initio or have been subsequently avoided and whether or not any of the matters or facts relating thereto have

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V.J. Burnes  
P.A. Burnes

-4-

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been or ought to have been within the knowledge of the Lender) whereby such moneys or any part thereof are not recoverable from the Guarantor by the Lender on the footing of a guarantee then and in such case the Guarantor hereby as a separate and additional liability under this instrument indemnifies the Lender in respect of such moneys and as principal debtor agrees with the Lender to pay to the Lender when demanded in writing by the Lender from the Guarantor a sum equal to the amount of such moneys and the terms of this instrument shall mutatis mutandis apply as far as possible to this indemnity PROVIDED ALWAYS that the total amount payable by the Guarantor shall not exceed the total amount to which he would otherwise have been liable under this instrument if the said moneys were recoverable by the Lender from the Borrower.

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16. FOR the consideration aforesaid the Guarantor hereby and for its administrators and permitted assigns covenants and agrees with the Lender its successors and assigns that in the event of any payment which might be made by the Borrower to the Lender being or becoming avoided by any statutory provision or otherwise the liability of the Guarantor hereunder shall be deemed not to have been discharged in respect of such payments and in the event of any such payments becoming so avoided then it is hereby expressly agreed and declared that the parties hereto shall forthwith be restored to the rights which each respectively would have had if such payments had not been made.

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17. THIS security is intended to be collateral with the documents set out in the Schedule hereto and default under any

Exhibit "A" - Original  
Deed of Guarantee

one or more of such securities or under this security shall be a default under the other and in case of any default the Lender shall be entitled (but shall not be bound) to exercise its rights under these presents and or under such other collateral document or documents without prejudice to its rights under the other. 5

18. THE Lender may at any time and from time to time without the consent of the Guarantor grant to the Borrower or any one or more of them if more than one or to any person who may be jointly indebted with the Borrower to the Lender at any time any other indulgence or consideration and may compound with or release the Borrower or any of them if more than one or any such person or may assent to any assignment to Trustees for the benefit of creditors or any scheme or Deed of Arrangement and whether with or without sequestration of the estate or (in the case of a corporation) the winding up of the Borrower or the appointing of a Receiver or official Manager or any of them if more than one or any such person and may release or discharge or otherwise deal with any property whether real or personal comprised in any such security without discharging or affecting the liability of the Guarantor under this Guarantee. 10  
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19. IT is hereby expressly agreed that the liability of the Guarantor hereunder shall remain in full force and effect notwithstanding that the Lender shall have received all moneys owing to it by the Borrower and shall have executed a release or discharge in favour of the Borrower and or the Guarantor if for some reason whether statutory or otherwise the Lender shall be required to repay to the Borrower or to any other person or Company the whole or any part of the moneys which it shall have received and in respect of which the said discharge or release was given. 25  
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20. THAT a statement in writing purporting to be made from the records of the Lender and signed personally or by any Director, Manager or Accountant of the Lender of the amount of the moneys hereby secured at the date mentioned in such statement shall be prima facie evidence of the amount of such moneys and of the other matters therein set out without it being necessary to produce any records and verify the same. 35  
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V.J. Burnes  
P.A. Burnes

21. THAT except to the extent that such interpretation shall  
be excluded by or be repugnant to the context whenever used 5  
herein the word Guarantor when only one Guarantor is party  
hereto shall mean and include the Guarantor his heirs executors  
and administrators or in the case of a Company its assigns and  
when two or more Guarantors are parties hereto shall mean and  
include the Guarantors and each or any of them their and any of 10  
their heirs executors and administrators or assigns and the  
word Lender shall mean and include the Lender and its assigns  
the word Borrower shall include Borrowers where there are more  
Borrowers than one and the word Person shall include a corpora-  
tion words importing the singular number or plural number 15  
shall include the plural number and singular number respectively  
and words importing the masculine gender shall include the  
feminine gender and words importing the neuter gender shall  
include the feminine and/or masculine gender and vice versa AND  
when two or more Guarantors are parties hereto this Guarantee 20  
and the obligations and agreements on their part herein contain-  
ed shall bind them and any two or greater number of them  
jointly and each of them severally.

22. THAT this instrument shall be construed in accordance 25  
with the laws for the time being of the State of New South  
Wales and the Guarantor hereby submits to the jurisdiction of  
the courts of the said State.

23. THE Lender shall be entitled to retain possession of this  
Deed notwithstanding that the obligations of the Guarantor to  
the Lender hereunder shall be satisfied. 30

THE SCHEDULE HEREINBEFORE REFERRED TO

Memorandum of Mortgage of even date herewith made between the  
Borrower of the one part and the Lender of the other part.

IN WITNESS WHEREOF the parties have hereunto subscribed  
their hands and seals on the day and year first hereinbefore 35  
written.

SIGNED in my presence by the said )  
VICTOR JOSEPH BURNS and PAULINE ) V.J. Burnes  
ANNE BURNS ) P.A. Burnes  
who ~~is~~/are personally known to me ) 40

Frank L. Collins JP

Exhibit "A" - Original  
Deed of Guarantee

The within written Guarantee was executed by the withinnamed  
VICTOR JOSEPH BURNS and PAULINE ANNE BURNS  
and on or before ~~his~~/their execution of the same ~~he~~/they  
stated to me that ~~he~~/they knew the effect of and approved of  
the insertion in the said Guarantee of the covenants to pay  
the


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-6-

principal and interest moneys secured hereunder AND I CERTIFY  
that I am not the Solicitor or Conveyancer for the Mortgagee.

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Signature of Solicitor:

  
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Address:

141 Elizabeth St.  
Sydney  
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MEMORANDUM OF MORTGAGE

REAL PROPERTY ACT, 1900

(To be lodged in duplicate)

OFFICE USE ONLY

Office use only box with 'S' in a smaller box below it.

Typewriting and hand-writing should be clear, legible and in permanent black non-erasing ink. No alterations should be made by erasure, the words corrected must be ruled through and verified by signature or initials in the margin.

(a) Full name, address and occupation of the mortgagor.

(a) CIVIC PRIVATE HOTEL PTY. LIMITED a company dly incorporated in accordance with the laws of the State of New South Wales and having its registered office at 9 Springfield Avenue, Potts Point in the said State. hereinafter referred to as the MORTGAGOR

(b) If a less estate, strike out "in fee simple" and add appropriate estate.

being registered proprietor of an estate in fee simple (b)

(c) A short note will suffice. If an encumbrance is not yet registered particulars sufficient for identification must be furnished.

(c) in the land hereinafter described, subject to the following encumbrances and interests  
Reservations and conditions, if any, contained in the Crown Grant.

(d) Strike out if inappropriate and add name of debtor.

in consideration of ONE HUNDRED THOUSAND DOLLARS (\$100,000.00) being the balance of purchase money remaining unpaid by the mortgagor to the mortgagee under contract for sale dated 17th July 1969 in respect of mortgaged land (hereinafter called the principal sum, the receipt of which is hereby acknowledged) left to the mortgagor at the request of the mortgagor which amount is hereby secured

of Victor Joseph Burns and Pauline Anne Burns by

(e) Full name, address and occupation of mortgagee; if more than one state whether joint tenants or tenants in common. Unless otherwise stated, tenants in common will be presumed to hold in equal shares.

(e) D. G. HOGAN PTY. LIMITED hereinafter referred to as the MORTGAGEE

for the purpose of securing to the mortgagee the payment in manner hereinafter mentioned of the said principal sum and interest thereon, hereby mortgages to the mortgagee all such his estate and interest in the land described in the following schedule (hereinafter called the mortgaged land)

(f) Insert lot and plan number, portion &c. See also sections 327 and 327AA Local Government Act, 1919.

Table with 5 columns: Reference to title (Volume, Folio), Whole or Part, Description of land if part only, County, Parish. Row 1: 10378, 24, WHOLE, CUMBERLAND, ALEXANDRIA

AND FOR THE CONSIDERATION AFORESAID the mortgagor covenants with the mortgagee as follows:

Firstly—That the mortgagor will pay to the mortgagee the principal sum, or so much thereof as shall remain unpaid on the 12th day of OCTOBER 1975.

Secondly—That the mortgagor will pay interest on the principal sum or on so much thereof as for the time being shall remain unpaid and upon any judgment or order in which this or the preceding covenant may become merged, at the rate of nine and one half per centum per annum as follows, namely—By equal monthly payments on the 12th day of each and every year in each and every year until the principal sum shall be fully paid and satisfied, the first of such payments computed from the 12th day of OCTOBER 1972, to be made on the 12th day of NOVEMBER next: Provided always, and it is hereby agreed and declared, that if the mortgagor shall on every day on which interest is hereinafter made payable under this security or within fourteen days after each of such days respectively, pay to the mortgagee interest on the principal sum or on so much thereof as shall for the time being remain unpaid at the rate of nine per centum per annum, and shall also duly observe and perform all and every the covenants on the mortgagor's part herein contained or implied then the mortgagee shall accept interest on the said principal sum or on so much thereof as shall for the time being remain unpaid at the rate of nine per centum per annum in lieu of nine and one half per centum per annum for every month for which such interest shall be paid to the mortgagee within

Handwritten initials and signatures: A.B./R.S. and a signature.

(g) This and the following clauses which are frequently used are inserted for the convenience of those desiring to adopt them.

Thirdly—That the mortgagor will insure and keep insured against loss or damage by fire all buildings now or hereafter erected on the said mortgaged land in the name of the mortgagee for indemnity of the mortgagee or of the mortgagee and the mortgagor in the full insurable value in some insurance office approved by the mortgagee, and that in the event of the loss the mortgagee alone shall have power to settle and compromise any claim against any insurance company (without being responsible for any loss occasioned thereby) and the sum received on account of such insurance shall be applicable either in or towards repair or rebuilding or in or towards repayment of the mortgage debt at the option of the mortgagee, and that the mortgagor will hand the policy or policies evidencing such insurance and all receipts for moneys paid and other usual evidence of insurance to the mortgagee immediately upon the issue thereof. If at any time the mortgagor is entitled to the benefit of an insurance on the buildings for the time being comprised in this memorandum of mortgage which is not effected or maintained in pursuance of his obligation aforesaid then all moneys received by virtue of such insurance shall if the mortgagee so requires be applied at the option of the mortgagee either in making good the damage or loss in respect of which the same shall have been received or be paid to the mortgagee and be applied by the mortgagee in or towards repayment of the mortgage debt.

Fourthly—That the mortgagor will during the continuance of this security, whether the mortgagee shall or shall not have entered upon and taken possession of the said mortgaged land make such repairs as may be necessary for keeping the buildings now or hereafter to be erected on the mortgaged land in good and tenable repair, order and condition, and in particular will whenever the mortgagee considers it necessary paint in a proper and workmanlike manner to the satisfaction of the mortgagee such parts of the mortgaged premises as are usually painted and will on being required by the mortgagee so to do forthwith amend every defect in the repair and condition thereof, and will forthwith carry out all work that may be ordered by any Board of Health or any competent public, local, shire or municipal authority in respect thereof, and pay all rates, taxes, charges, outgoings, and assessments (including any land or property tax) that may now or at any time be or become payable or become chargeable or be assessed or become due upon or in respect of the said mortgaged land or any part thereof, under or in pursuance of the provisions of any Act or Ordinance of the Commonwealth of Australia or the State of New South Wales, or any regulations thereunder now in force or that may come into operation during the continuance of this security, and will at all times indemnify and keep indemnified the mortgagee from the payment of such rates, charges, outgoings, and assessments, and every or any part thereof, and from all claims and demands in respect thereof, and that the mortgagee shall at all reasonable times during the continuance of this security be at liberty with or without surveyors or others to enter into and upon the mortgaged land and view and inspect the state of repair of the buildings and improvements thereon.

RULE UP ALL BLANKS



Fifthly—That in case the mortgagor shall at any time fail to keep the said buildings so insured and in good and tenantable repair order and condition, or to carry out all work that may be ordered by any Board of Health or any competent public, local, state or municipal authority in respect thereof or of the mortgaged land or any part thereof, or to pay such rates, taxes, charges, outgoings, and assessments as aforesaid or any part thereof it shall be lawful for but not obligatory upon the mortgagee to effect and maintain such insurance repairs and order and to do such work and to pay such rates, taxes, charges, outgoings, and assessments or part thereof as the case may be and all moneys or payments so expended or made shall be repayable by the mortgagor upon demand and be deemed principal moneys covered by this security and shall carry interest until such repayment at the rate of ~~nine and one~~ **nine and one** ( ~~9 1/2~~ **9 1/2** ) per centum per annum.

Sixthly—That in addition to all costs and expenses which the mortgagor may be liable at law or in equity to pay in respect of this security or otherwise in relation thereto the mortgagor will upon demand pay all costs and expenses including costs as between solicitor and client incurred by the mortgagee in consequence or on account of any default on the part of the mortgagor hereunder or incurred by the mortgagee for the preservation of or in any manner in reference to this security, all of which costs and expenses shall from the time of payment or expenditure thereof respectively until repaid to the mortgagee by the mortgagor be deemed principal moneys covered by this security, and shall carry interest at the rate mentioned in the last preceding paragraph.

Seventhy—That upon default being made in payment at the respective times and in the manner hereinbefore mentioned of the principal sum or any part thereof, or of the interest thereon or any part thereof, or upon default being made in the observance or performance of any of the covenants herein contained or implied by the Real Property Act, 1900, or the Conveyancing Act, 1919, the mortgagee shall (notwithstanding any omission, neglect or waiver of the right to exercise all or any of such powers on any former occasion) be at liberty to exercise all or any of the powers of a mortgagee under the said Acts immediately upon or at any time after default as hereinbefore mentioned, without the necessity of giving the mortgagor any notice whatsoever required by the said Acts or otherwise. And that if at any time default shall be made in the due payment of the interest on any of the days when the same respectively shall become payable or within the time thereafter hereinbefore mentioned, or if the power of sale given to the mortgagee under either of the said Acts shall become exercisable, then the principal sum shall immediately become due and the mortgagor will thereafter pay the same on demand.

Eighthly—That upon sale or lease as aforesaid the mortgaged land or any part thereof may be sold or leased together with other property in mortgage from the mortgagor to the mortgagee, whether (if land) under the Real Property Act, 1900, or not, by one contract and one price or at one rent or in any other manner that the mortgagee may deem expedient. Provided that the mortgagee shall fairly and equitably apportion all costs expenses purchase moneys and rents between the several subjects of the sale or lease, but a failure to make such apportionment shall not affect the purchaser or lessee or the title to the land sold or leased.

Ninthly—That upon sale the mortgagee shall be at liberty to allow a purchaser any time for payment of the whole or any part of the purchase money with or without interest and either with or without taking security therefor.

Tenthly—That except with the written consent of the mortgagee the mortgagor will not apply for or obtain from the Crown or from any statutory authority any money or material or otherwise do or suffer to be done anything whereby any charge or liability shall or might be imposed on the mortgaged property or any part thereof in priority to or in derogation of this security.

Eleventhly—That in applying the purchase money towards satisfaction of the moneys for the time being owing on the security hereof the mortgagor shall be credited only with so much of the said moneys available for that purpose as shall be received in cash by the mortgagee, such credit to date from the time of such receipt and all purchase money left outstanding on credit or otherwise shall until actually received by the mortgagee in cash, be deemed a continuing unsatisfied part of the principal money hereby secured, and carry interest accordingly, provided that any interest paid by the purchaser shall be set off *pro tanto* against the interest hereby secured and the mortgagee shall be in no way liable for any such outstanding moneys or for any loss occasioned by the exercise of such power of sale.

Twelfthly—That the mortgagee shall, so long as any moneys shall remain owing on this security, have and retain possession of the Crown grant or certificate of title to the said mortgaged land and of any certificate of title to be hereafter issued in substitution thereof, whether to a purchaser of the equity of redemption or otherwise.

Thirteenthly—That all powers, rights, and remedies implied in favour of or conferred upon mortgagees by the Conveyancing Act, 1919, or the Real Property Act, 1900, shall be in enlargement and not in curtailment of the powers, rights and remedies conferred by these presents, and that sub-sections 5, 6, 7 and 8 of section 106 of the Conveyancing Act, 1919, shall not apply to a lease by the mortgagee hereunder, and also that the mortgagor shall not be entitled to exercise the power of leasing, conferred by that section without the previous written consent of the mortgagee.

Fourteenthly—That service of any notice required or authorised by these presents may be effected in the manner permitted by section 170 of the Conveyancing Act, 1919.

Fifteenthly—That every covenant expressed or implied in these presents and by which more persons than one covenant shall unless the contrary intention is expressed, bind such persons, and every two or greater number of them jointly and each of them severally, and every reference in these presents to the Real Property Act, 1900, or the Conveyancing Act, 1919, shall be construed as including every Act amending or in substitution for the Act referred to.

Sixteenthly—(b) That the Mortgagor will not transfer to enter into any agreement with a view to transferring the mortgaged land during the subsistence of this present mortgage.

(b) Here add, if intended, any further covenants. If the space provided is insufficient, additional sheets of the same size and quality of paper as this form should be used. A binding margin of 1 1/2 inches and other margins of not less than 1/2 inch should be preserved. Each additional sheet must be signed by the parties and the attesting witnesses.

Seventeenthly--That if default is made in the payment upon the due date of any sum payable to the Mortgagee hereunder the Mortgagor will pay interest upon such sum (and upon any judgment or order in which this covenant may become merged) from the date of default until such sum is paid at the rate of nine and one-half (9 1/2) per centum per annum.

~~It is expressly agreed and declared that the Mortgagor will not during the continuance of this security let into possession of the mortgaged premises any person except with the written consent of the Mortgagee and in any event shall not so do without first obtaining a Certificate of Exclusion under the Landlord and Tenant (Amendment) Act 1946-1954.~~

~~Nineteenthly That the mortgagor will not encumber the subject property by way of any subsequent mortgage or charge without having first obtained the written consent of the Mortgagee.~~

Twentiethly--It is hereby agreed by the Mortgagor that the provisions of the Moratorium Act or any regulation thereunder amendments thereto or substitutions therefor are excluded herefrom.

Twenty-firstly--In addition to the repayment of principal and interest as herein provided the Mortgagor shall pay to the Mortgagee upon demand (which demand may be made by the Mortgagee upon default by the Mortgagor in the payment of principal and interest as hereinbefore provided or in the observing of any of the terms covenants and conditions herein contained either expressed or implied on the Mortgagor's part) all monies now or hereafter to become owing to the Mortgagee by the Mortgagor by reason of the Mortgagee advancing the principal sum or part thereof hereunder or by reason of any matter relating to the security taken by the Mortgagor and also all monies which the Mortgagee shall pay or become liable to pay for or incidental to the preparation hereof or to investigating or perfecting or defending the title to the mortgaged premises or attempting to exercise any right or remedy of the Mortgagee hereunder or on account of or arising out of the default by the Mortgagor in performing or observing any of the covenants or agreements on the part of the Mortgagor herein contained AND the Mortgagee shall be entitled to charge interest at the rate of nine and one half per centum (9 1/2%) per annum on all such monies which the Mortgagee shall pay arising therefrom.

*[Signature]* B. J. Burns

ADDITIONAL COVENANTS BY THE MORTGAGORS INCORPORATED IN MEMORANDUM OF MORTGAGE DATED THE 12<sup>TH</sup> DAY OF APRIL 1972.

FROM CIVIC PRIVATE HOTEL PTY. LIMITED TO D. G. HOGAN PTY. LIMITED

Twenty **secondly** In addition to the rights conferred upon the Mortgagee should default be made under this Mortgage or any collateral security the Mortgagee may upon such default appoint a Receiver or Receiver and Manager of the herein mortgaged premises and such Receiver or Receiver and Manager in addition to all the powers conferred on him by the Conveyancing Act, 1919, shall have the following powers:—

- (a) Power at any time without any further demand or notice to take possession of the mortgaged premises or any part thereof and for that purpose to take any proceedings in the name of the Mortgagor or otherwise as it may deem expedient.
- (b) Power to demand and recover and give effectual receipts for all moneys due and owing to the Mortgagor with respect to the mortgaged premises and for that purpose to commence prosecute defend compromise and/or abandon all such actions suits and proceedings in the name either of the Mortgagor or Mortgagee as to the Receiver or Receiver and Manager may seem proper.
- (c) Power at any time to sell or concur in selling or otherwise dispose of the whole or any part of the mortgaged premises at any time by public auction or private contract at such price or prices and upon such terms and conditions and in such manner in all respects as the Receiver or Receiver and Manager may deem expedient.
- (d) Power in the name and on behalf of the Mortgagor to enter into such Agreements and to do all such acts instruments deeds insurance and things as may be necessary or proper for the protection or preservation of the mortgaged premises or in the opinion of the Receiver or Receiver and Manager may be necessary or proper for the purpose of carrying out any of the powers hereby conferred upon such Receiver or Receiver and Manager or for giving complete effect to the provisions hereof.

Twenty **thirdly** Every Receiver or Receiver and Manager appointed as aforesaid shall pay and apply all moneys received by him or them:—

- (a) Firstly, in discharge of all outgoings payable under the provisions of any Act in priority to the moneys hereby secured.
- (b) Secondly, in payment of all costs charges expenses and outgoings of every nature whatsoever incurred in or about the taking possession of the mortgaged premises and in connection with any sale as aforesaid and in or about the exercise or attempted exercise of any of the powers conferred upon the said Receiver or Receiver and Manager at a rate to be fixed by the Mortgagee not exceeding Ten Dollars (\$10.00) per centum per annum on the gross amount of all moneys received by him or them.
- (c) Thirdly, in payment of all sums payable by way of premium upon the insurance or upon keeping insured any of the mortgaged premises being of an insurable nature.
- (d) Fourthly, in payment of all the residue of such moneys to the Mortgagee.

Twenty **fourthly** Every Receiver or Receiver and Manager appointed as aforesaid may be removed by the Mortgagee and a new Receiver or Receiver and Manager may be appointed from time to time. And it is FURTHER PROVIDED that every Receiver or Receiver and Manager appointed hereunder shall be deemed to be the Agent of the Mortgagor and the Mortgagor shall be solely responsible for the Acts and default of such Receiver or Receiver and Manager.

Twenty **fifthly** The Charge created by the within presents shall confer upon the Mortgagee priority over any Second or subsequent security over the mortgaged premises for all moneys expressed or intended to be secured by the within presents notwithstanding that the whole or any part of the moneys secured may be advanced or readvanced after the date hereof or after the date of any second or subsequent security and the Mortgagor shall be entitled accordingly to borrow from the Mortgagee on the security and the within presents shall be and remain in force as a continuing security and Charge having priority over any Second or subsequent security to the extent hereinbefore mentioned until a discharge hereof shall have been executed by the Mortgagee notwithstanding that any sum or sums may from time to time be paid to the credit of any account or accounts of the Mortgagor with the Mortgagee and notwithstanding that such account or accounts may at any time be or appear to be in credit and notwithstanding any statement of account or any other matter or thing whatsoever and in the same manner as if sums of money had been advanced by the Mortgagee prior to the date of any money secured by a second or subsequent security AND FURTHER that the within presents and the Mortgagee's rights hereunder shall not be discharged postponed or in any way prejudiced by any second or subsequent security nor by anything contained therein nor by the operation of the rules known as the Rule in Hopkinson v. Rolt or the Rule in Clayton's Case.

Twenty **sixthly** The Mortgagor shall at all times punctually perform and observe all and singular the covenants conditions and agreements on the part of the Mortgagor for the time being to be performed and observed contained or implied in any mortgage or charge which may be registered against the title of the mortgaged premises or any part thereof in priority to this Mortgage and in particular will punctually pay the principal moneys and interest due thereunder as and when the same shall fall due AND in the event of default by the Mortgagor under any such prior mortgage or charge then such default shall be deemed a default hereunder thereby entitling the Mortgagee to call up the whole of the balance of the principal moneys and interest due hereunder and to exercise such of its powers hereunder as it may see fit AND IT IS FURTHER PROVIDED that without limiting any of the powers aforesaid that in the event of any proceeding or step being taken to exercise or enforce any powers or remedies conferred by any such prior mortgage or charge then the Mortgagee may redeem such prior mortgage or charge or procure the transfer thereof to itself and may settle and pass the accounts of the first Mortgagee and any accounts so settled and passed shall be binding and conclusive on the Mortgagor and all the principal moneys interest charges expenses and costs (including costs as between solicitor and client) of and incidental to such redemption or transfer shall be paid by the Mortgagor to the Mortgagee on demand together with interest at the rate charged on the principal sum advanced under this mortgage from the time or respective times of the same having been paid or incurred and until payment and the mortgaged premises shall stand charged with the amount so paid with interest as aforesaid and shall be deemed principal moneys secured hereunder.

*[Handwritten signatures]*  
D. G. Hogan  
[Signature]

ADDITIONAL CONVENANTS BY THE MORTGAGOR INCORPORATED IN MEMORANDUM OF MORTGAGE DATED THE \_\_\_\_\_ DAY OF \_\_\_\_\_ 197 2.

FROM CIVIC PRIVATE HOTEL PTY. LIMITED TO D. G. HOGAN PTY. LIMITED

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**Twenty-seventhly** The principal sum interest and other monies (if any) shall at the option of the mortgagee become immediately due and payable if the Mortgagor shall during the continuance of this security assign transfer demise or part with possession of or grant any license affecting the demised premises or part thereof or execute any other security over the same without the consent in writing of the mortgagee first having been obtained. Provided however that the mortgagee shall not be bound to give any consent to any assignment or transfer or to any demise or part with possession of or grant of any license affecting the demised premises or part thereof or to any other security over the same if the mortgagee is satisfied that the mortgagor is a solvent and creditworthy person and that the mortgagee is not thereby prejudiced in any way. **Twenty-eighthly** By way of augmentation of the powers conferred on the mortgagee under the Conveyancing Act, 1919 and the Real Property Act, 1900 the mortgagor hereby authorises and empowers the mortgagee to grant such leases tenancies licenses rights or privileges of any kind in respect of the whole or any part of the mortgaged premises upon such conditions and for such term as the mortgagee may in its absolute discretion think fit including the granting of any option for renewal or for purchase of the fee simple. Provided however that if any such lease tenancy license right or privilege is granted or exercised by the mortgagee and if it shall arise only on and after default by the mortgagor hereunder.

**Twenty-ninthly** It is hereby expressly agreed and declared that the said mortgaged property shall be deemed to include all stoves, grates, baths, bath heaters, hotwater services, coppers, washing machines, tubs, electric light fittings, refrigerators, power fittings, machinery, tanks and all other fixtures and fittings now or hereupon the said mortgaged property and whether of a permanent or temporary nature and including all prime cost items and chattels and that none of such property shall be removed by the mortgagor without the previous consent in writing of the mortgagee.

**Thirtiethly** And the mortgagor hereby irrevocably appoints the mortgagee his attorney with full power on the Mortgagor's behalf immediately on or at any time after any default as aforesaid and without giving any person any notice whatever to enter into possession and management of the mortgaged land and to exercise all power of distress and ejection and to lease the whole or any part of the mortgaged property either with or without option of purchase for such period or periods upon such terms and conditions as the mortgagee shall think fit without any eviction or interruption by the mortgagor or any person whomsoever and to accept surrender and make concessions to or compromise with tenants upon terms or gratuitously and otherwise with respect to such tenancies to have all the powers of an absolute owner and further in the mortgagee's absolute discretion to make such claims and take such proceedings as the mortgagor would be entitled to make in relation to the property hereby secured.

**Thirty-firstly** That upon default by the Mortgagor hereunder and notwithstanding that the Mortgagee may or may not have entered into possession of the mortgaged lands the mortgagee shall be at liberty to appoint any person or Company as the Agent of the Mortgagor for the collection of rents and profits of the said mortgaged lands and such agent shall be entitled to deduct the usual Agent's commission from such rents and profits together with all Stamp Duty and expenses reasonably incurred in the exercise of such powers and such commission and expenses shall be a charge upon the rents and profits to be so collected and the receipt of the Mortgagee or any agent of the Mortgagor appointed as aforesaid shall be a good and sufficient discharge to any Lessee or tenant for rent paid AND it is further provided that the Mortgagee may at any time after default by the Mortgagor hereunder by itself or any employee act as the Agent of the Mortgagor for the collection of all rents and profits and in such event the Mortgagee shall unless it shall be to its prejudice or disadvantage under any Law or Act of Parliament in force at such time be entitled to deduct therefrom all such commission and expenses as hereinbefore provided AND it is hereby expressly agreed that the powers of the Mortgagee hereunder may be exercised without the necessity of first giving notice to the Mortgagor or to any other person and the Mortgagor shall not in any way be personally liable for any action which may be brought and arising out of the acting as or appointing of any such Agent of the Mortgagor and nothing herein contained shall effect any other power or right of the Mortgagee by Law or under this Mortgage.

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**Thirty-secondly** The Mortgagor shall not without the prior written consent of the Mortgagee wholly or partly demolish or structurally alter any improvements erected on the mortgaged premises (whether or not such demolition or alteration shall be for the purposes of re-building or otherwise) or renovate add to or interfere with any of the buildings now or hereafter erected on the said land whereby the insurance thereon may become prejudiced or invalidated AND will also from time to time give the Mortgagee notice in the event of the Mortgaged premises becoming vacant. Provided however that the mortgagee shall not unreasonably withhold its consent to any such demolition or alterations.

**Thirty-thirdly** It is hereby expressly agreed by the parties hereto that any notices or statements to be given to or any demands to be made upon the Mortgagor by or on behalf of the Mortgagee hereunder shall be deemed to be duly given or made if the same be in writing and signed by the Managing Director, General Manager, Manager or Secretary for the time being of the Mortgagee and if the same be left or sent through the post in a pre-paid envelope or wrapper addressed to the Mortgagor at the usual place of business last known as such to the person signing such notice or demand or be affixed to some part of the land or premises occupied by the Mortgagor for the purpose of its business or be advertised in the Commonwealth or New South Wales Government Gazette and any mode of service shall in all respects be valid and effectual notwithstanding that at the date of such service the Mortgagor may be in course of liquidation or wound up and notwithstanding any matter or event whatsoever and any such notice or demand if sent through the post as aforesaid shall be deemed to be received by the Mortgagor as at the time when the envelope or wrapper containing such notice would in the ordinary course of post have been delivered.

*B. J. Burns*  
*[Signature]* *[Signature]*

ADDITIONAL COVENANTS BY THE MORTGAGOR INCORPORATED IN MEMORANDUM OF MORTGAGE DATED THE 17<sup>th</sup> DAY OF October 1972 FROM CIVIC PRIVATE HOTEL PTY. LIMITED TO D. G. HOGAN PTY. LIMITED

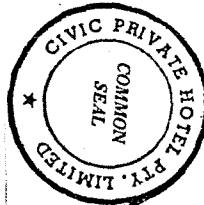
Thirty-fourthly--Notwithstanding anything herein to the contrary provided the Mortgagor hereby covenants and agrees with the Mortgagee that the principal sum interest and other monies (if any) owing hereunder shall at the option of the Mortgagee immediately become due and payable to the Mortgagee on the happening of any one or more of the following events failure or any delay by the Mortgagee in giving notice that it requires the whole of the principal sum interest and other monies remaining unpaid to be paid to it shall in no way be taken as a waiver fetter or restriction of any of its rights to recover the whole of such monies or to exercise all or any of its rights hereunder:-

- (a) The appointment of a receiver over the assets of the Mortgagor.
- (b) The issue of a petition to wind up the Mortgagor.
- (c) The calling of a meeting of creditors for the purpose of section 181 of the Companies Act, 1961.
- (d) The appointment of an official manager of the business of the Mortgagor within the provisions of Part IX of the Companies Act, 1961.
- (e) Should there be any sale transfer or other disposition whatsoever of shares in the capital of the Mortgagor or any issue or allotment of any new shares in the capital of the Mortgagor or should there happen any matter or thing whatsoever the effect of which is to transfer whether directly or indirectly to any person or corporation other than Victor Joseph Burns and Pauline Anne Burns the effective management and control of the Mortgagor.

Thirty-fifthly--The Mortgagor hereby covenants that the principal sum has been advanced at the express request and by the direction of Victor Joseph Burns and Pauline Anne Burns (hereinafter referred to as "the Guarantors") and it is hereby agreed that this Mortgage shall be collateral to Deed of Guarantee of even date herewith made between the Mortgagee of the one part and the Guarantors of the other part and default under the within presents shall constitute a default under the other thereby entitling the Mortgagee to immediately call up the principal monies outstanding hereunder together with interest thereon and such monies shall be recoverable by the Mortgagee exercising its rights under the within presents or under the said Deed of Guarantee either separately or concurrently without prejudice to the Mortgagee's rights under the within presents or under the said Deed of Guarantee.

Thirty-sixthly--Should all terms covenants and conditions on the Mortgagor's part herein contained have been complied with up to the date thereof the Mortgagor shall have the right at its expense to reduce the principal sum then remaining unpaid in multiples of five thousand dollars (\$5,000.00) upon the giving of three (3) months notice in writing to the mortgagee of its intention so to do and interest on the sum or sums so paid shall cease as and from the expiration of the term of such notice or notices.

*B. J. Burns*  
*Secretary*



*L. J. Martin*

Annexure to Memorandum of Mortgage No. M945586

*Jainkumar*




Registrar General

No. P 609316 MEMORANDUM under Section 91  
 Conveyancing Act 1919. Entered 20<sup>th</sup> February 1976

*Cancelled  
 of 9.5.6398  
 15-11-1978*

*Jainkumar*

REGISTRAR GENERAL



Note, that cancellation dated 15.11.78 did not exist at the time of Trial.

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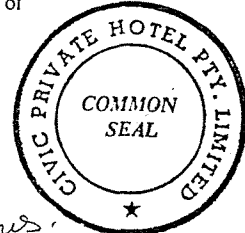
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And the mortgagor hereby irrevocably appoints the mortgagee the attorney of the mortgagor immediately on or at any time after any breach or default by the mortgagor hereunder to exercise in the name of the mortgagor all rights, powers and remedies of the mortgagee expressed or implied hereunder to receive any moneys payable to the mortgagor in respect of the mortgaged property whether in respect of insurance compensation or otherwise and to do all things required to be done by the mortgagor hereunder and to execute all documents and to do all things necessary in regard to any such matters.

made at Sydney this 12<sup>th</sup> day of October 1972.

~~and in accordance with the mortgage conditions~~  
~~expressed in clause 10 of the mortgage~~  
THE COMMON SEAL of CIVIC  
PRIVATE HOTEL PTY. LIMITED  
as hereunto duly affixed  
pursuant to a resolution of  
directors and in the presence  
of: [Signature]  
[Signature]  
SECRETARY  
~~Address of office~~



[Signature]  
Mortgagor

~~and in accordance with the mortgage conditions~~  
~~expressed in clause 10 of the mortgage~~  
THE COMMON SEAL of D.G. HOGAN  
PTY. LIMITED was hereunto  
duly affixed pursuant to a  
resolution of directors and  
in the presence of:  
[Signature]  
~~Address of office~~

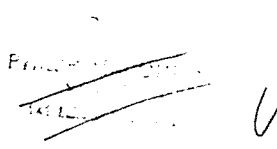
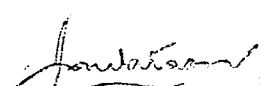
Accepted and certified correct for the purposes of the Real Property Act, 1900.

[Signature]  
Mortgagee

and that I am the Solicitor for the Mortgagee whose signature cannot be obtained without difficulty and delay.

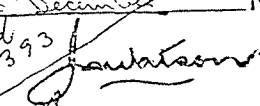
U 4563.93

FOR SET-TITLE ONLY

DEPARTMENTAL USE ONLY		TO BE COMPLETED BY LODGING PARTY	
MORTGAGE M 945586		Lodged by	
		Address:	
		Phone No.:	
		Documents lodged herewith	
1. _____			
2. _____			
3. _____			
4. _____			
5. _____			
Checked	REGISTERED	Received Documents	Receiving Clerk
Passed	25.10.1972		
Signed	 Registrar General		

Commonwealth Trading Bank of Australia is  
 now the registered proprietor of the within mortgage.

See TRANSFER No. N6779 dated 7<sup>th</sup> November 1972  
 Entered 5<sup>th</sup> December 1972

  
 REGISTRAR GENERAL

*Cancelled 9.9.56393 15.11.1978*

AUTHORITY FOR USE OF INSTRUMENT OF TITLE(m)

Authority is hereby given for the use of \_\_\_\_\_  
 (insert reference to certificates, grants or dealings) lodged  
 in connection with \_\_\_\_\_ (insert number of plan or dealing) for the  
 registration of this dealing and for delivery to \_\_\_\_\_

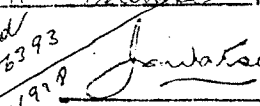
(BLOCK LETTERS)

Signature \_\_\_\_\_  
 Name (BLOCK LETTERS) \_\_\_\_\_

(m) Unless the instrument of title has been lodged by the person lodging the dealing or its use has been authorised previously, the authority must be furnished by the person otherwise entitled to delivery of the certificate of title, grant &c.

D. G. Hegam Pty limited is  
 now the registered proprietor of the within mortgage.

See TRANSFER No. N561464 dated 3<sup>rd</sup> October 1973  
 Entered 11<sup>th</sup> December 1973

  
 REGISTRAR GENERAL

*Cancelled 9.9.56393 15.11.1978*

MEMORANDUM AS TO NON-REVOCATION OF POWER OF ATTORNEY  
 (To be signed at the time of executing the within dealing)


The undersigned states that he has no notice of the revocation of the Power of Attorney registered No. \_\_\_\_\_  
 Miscellaneous Register under the authority of which he has just executed the within dealing.

Signed at \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

Signature of attorney \_\_\_\_\_  
 Signature of witness \_\_\_\_\_

Trade Credits limited is  
 now the registered proprietor of the within mortgage.

See TRANSFER No. N561465 dated 18<sup>th</sup> October 1973  
 Entered 11<sup>th</sup> December 1973

  
 REGISTRAR GENERAL

*Cancelled 9.9.56393 15.11.1978*

CERTIFICATE OF J.P., &c., TAKING DECLARATION OF ATTESTING WITNESS(m)

I certify that \_\_\_\_\_  
 the attesting witness to this dealing, appeared before me at \_\_\_\_\_  
 the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
 and declared that he personally knew \_\_\_\_\_  
 \_\_\_\_\_  
 the person signing the same, and whose signature thereto he has attested, and that the name purporting to be such signature of the said \_\_\_\_\_  
 \_\_\_\_\_  
 is his own handwriting and that he was of sound mind and freely and voluntarily signed the same.

Signature \_\_\_\_\_  
 Name (BLOCK LETTERS) \_\_\_\_\_  
 Qualification \_\_\_\_\_

(n) Not required when dealing attested accordance with n (i); in other cases to signed by one of persons referred to note (i).

FOR FURTHER ENDORSEMENTS SEE ANNEXURE

*[Handwritten notes and signatures]*

Note, that all cancellations dated 15.11.78 did not exist at the time of Trial 25.

Exhibit "B" - Transfer No. N561465

NEW SOUTH WALES 50 - 50  
NEW SOUTH WALES



# MEMORANDUM VARYING MORTGAGE

REAL PROPERTY ACT, 1900  
CONVEYANCING ACT, 1919, SECTION 91

(To be lodged in duplicate)

OFFICE USE ONLY

	\$	

A separate memorandum must be used for each mortgage affected.

Typewriting and handwriting should be clear, legible and in permanent black non-copying ink. No alterations should be made by erasure; the words rejected must be ruled through and verified by signature or initials in the margin.

- (a) Present mortgagor.
- (b) Present mortgagee.
- (c) Delete inappropriate words or paragraphs.

Mortgage No. M945586

(a) From CIVIC PRIVATE HOTEL PTY. LIMITED

(b) To TRADE CREDITS LIMITED

(c) The rate of interest payable under the mortgage above referred to is hereby increased to sixteen (16) per centum per annum computed from the 12th day of October, 1975 (subject to reduction to per centum per annum upon payment within days of the dates provided for payment of interest by such mortgage).

(c) The principal sum intended to be secured by the mortgage above referred to is hereby increased to reduced

(c) The term or currency of the mortgage above referred to is hereby ~~shortened~~ ~~extended~~ to the 12th day of October, 19 75

Signed at Sydney the TWENTY-FIFTH day of NOVEMBER, 19 75,

and we hereby certify that this instrument is correct for the purposes of the Real Property Act, 1900.

(d) This instrument must be signed by all persons intended to be bound thereby.

Further proof of execution will not normally be required if signed or acknowledged before any of the following persons, not being a party to the dealing, to whom the mortgagor/mortgagee is known.

Where executed in New South Wales—bank manager, barrister, clerk of petty sessions, commissioned officer in the Defence Force of the Commonwealth of Australia, commissioner for taking affidavits, headmaster of a school, judge, justice of the peace, magistrate, mayor or other chief officer of any local government corporation, medical practitioner, member of parliament of the Commonwealth or of a State, member of the police force of the Commonwealth or of a State or a Territory, minister of religion, notary public, postmaster, solicitor, town or shire clerk or other executive officer administering local government;

Where executed in any part of the Commonwealth of Australia or its Territories or in any part of the British Commonwealth—any of the persons referred to above, and in addition, an Australian or British Consular Officer exercising his functions in the part, Governor, Government Resident, Chief Secretary or Registrar of Titles of the part;

Where executed in foreign country—an Australian or British Consular Officer exercising his functions in that country, commissioned officer in the Defence Force of the Commonwealth of Australia, commissioner for taking affidavits, judge, justice of the peace, magistrate, mayor or other chief officer of any local government corporation, officer in charge of a police station, notary public, town or shire clerk or other executive officer administering local government.

(d) Signed in my presence by the mortgagor who is ~~THE COMMON SEAL of CIVIC PRIVATE HOTEL PTY. LIMITED was hereunto duly affixed in the presence of:~~

~~THE COMMON SEAL of CIVIC PRIVATE HOTEL PTY. LIMITED was hereunto duly affixed in the presence of:~~

*B. J. Bunn*  
Director  
*F. J. ...*  
Secretary

FNCB-Waltons Finance Limited as Mortgagee under Mortgage number N755459 consents hereto

THE COMMON SEAL of FNCB-WALTONS FINANCE LIMITED was affixed hereto with the authority of the Directors and in the presence of:

*M. Cooney*  
Director  
*S. ...*  
Secretary

(d) Signed in my presence by the mortgagee who is personally known to me

Signature of witness

Name of witness (BLOCK LETTERS)

Qualification of witness

AND I HEREBY DECLARE that at the time of the execution by me of this instrument I have no notice of the revocation of the Power of Attorney dated 17th January 1972 from TRADE CREDITS LIMITED to me registered in the Miscellaneous Register No. 127474 under the authority of which I have executed the said instrument.

SIGNED in my presence for and on behalf of TRADE CREDITS LIMITED by Maurice William Jacob its duly constituted Attorney who is personally known to me:

*M. W. Jacob*  
Mortgagee

RIPPLE UP ALL BLANKS



DEPARTMENTAL USE ONLY  
 VARIATION OF MORTGAGE P 609316

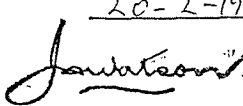

TO BE COMPLETED BY LODGING PARTY

Lodged by \_\_\_\_\_  
 Address: \_\_\_\_\_  
 Phone No.: \_\_\_\_\_

Documents lodged herewith

1. \_\_\_\_\_  
 2. \_\_\_\_\_  
 3. \_\_\_\_\_  
 4. \_\_\_\_\_  
 5. \_\_\_\_\_

Checked REGISTERED  
 Passed  
 Signed

20-2-1976  
  
  
 Registrar General

Received Documents \_\_\_\_\_ Receiving Clerk \_\_\_\_\_

AUTHORITY FOR USE OF INSTRUMENT OF TITLE(e)

Authority is hereby given for the use of \_\_\_\_\_  
 \_\_\_\_\_ lodged  
 (insert reference to certificates, grants or dealings)  
 in connection with \_\_\_\_\_ for the  
 (insert number of plan or dealing)  
 registration of this dealing and for delivery to \_\_\_\_\_

\_\_\_\_\_  
 (BLOCK LETTERS)

\_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Name (BLOCK LETTERS)

(e) Unless the instrument of title has been lodged by the person lodging the dealing, or its use has been authorized previously, the authority must be furnished by the person otherwise entitled to delivery of the certificate of title, grant &c.

*RK*

MEMORANDUM AS TO NON-REVOCATION OF POWER OF ATTORNEY  
 (To be signed at the time of executing the within dealing)

The undersigned states that he has no notice of the revocation of the Power of Attorney registered No. \_\_\_\_\_  
 Miscellaneous Register under the authority of which he has just executed the within dealing.

Signed at \_\_\_\_\_  
 the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_

\_\_\_\_\_  
 Signature of attorney

\_\_\_\_\_  
 Signature of witness

CERTIFICATE OF J.P., &c., TAKING DECLARATION OF ATTESTING WITNESS(f)

I certify that \_\_\_\_\_  
 the attesting witness to this dealing, appeared before me at \_\_\_\_\_  
 the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_  
 and declared that he personally knew \_\_\_\_\_  
 \_\_\_\_\_  
 the person signing the same, and whose signature thereto he has attested, and that the name purporting to be such signature of the said \_\_\_\_\_  
 \_\_\_\_\_  
 is his own handwriting and that he was of sound mind and freely and voluntarily signed the same.

\_\_\_\_\_  
 Signature

\_\_\_\_\_  
 Name (BLOCK LETTERS)

\_\_\_\_\_  
 Qualification

(f) Not required where dealing attested in accordance with note (d); in other cases to be signed by one of the persons referred to in note (d).

\$6

THIS DEED OF ASSIGNMENT made the 25th day of March One thousand  
nine hundred and seventy-six BETWEEN D.G. HOGAN PTY. LIMITED 5  
c/- 6-8 Mona Vale Road, Pymble in the State of New South Wales  
(hereinafter called "the Assignor") of the one part AND TRADE  
CREDITS LIMITED a Company duly incorporated in the State of New  
South Wales and having its registered office at 160 Clarence  
Street, Sydney in the said State (hereinafter called "the 10  
Assignee") of the other part WHEREAS:

A. By mortgage dated the 12th day of October, 1972 duly re-  
gistered number M945586 Civic Private Hotel Pty. Limited a  
Company duly incorporated in the State of New South Wales and  
having its registered office at 9 Springfield Avenue, Potts 15  
Point in the said State (hereinafter called "Civic") secured  
to the Assignor repayment of the sum of One hundred thousand  
dollars (\$100,000.00) therein described upon the terms and con-  
ditions therein set forth.

B. The said mortgage was given by Civic at the request of 20  
Victor Joseph Burnes and Pauline Anne Burnes (therein and  
hereinafter referred to as "the Guarantors").

C. By Deed of Guarantee made the 12th day of October, 1972  
(hereinafter referred to as "the Guarantee") the Guarantors  
duly guaranteed to the Assignor repayment of the said sum of 25  
One hundred thousand dollars (\$100,000.00) and interest thereon  
as provided in the said mortgage upon the terms and conditions  
set forth in the Guarantee.

Exhibit "D" - Deed of  
Assignment

D. By Memorandum of Transfer dated 18th day of October, 1973 and duly registered number N561465 the Assignor transferred and assigned to the Assignee the whole of the right title and interest of the Assignee in the mortgage and agreed to assign to the Assignee the whole of the Assignee's right title and interest in and to the guarantee. 5

E. The said mortgage and the guarantee were expressed to be collateral each to the other. 10

NOW THIS DEED WITNESSETH and it is hereby mutually agreed by and between the parties hereto as follows:

25403A

-2-

1. In consideration of the premises and of the agreements herein contained and the further consideration of the sum of One dollars (\$1.00) paid by the Assignee to the Assignor and the receipt thereof is hereby acknowledged the Assignor as beneficial owner for itself its successors and assigns hereby assigns unto the Assignee the whole of the right title benefit and interest of the Assignor and also all the estate of right whatsoever of the Assignor in or under the Guarantee TOGETHER WITH the right to demand performance or issue for and enforce the same either in the name of the Assignor or the Assignee and to hold the same unto the Assignee absolutely. 15 20 25

2. In the event of Civic or the Guarantors making default under the said mortgage or the guarantee respectively or under

Exhibit "D" - Deed of Assignment

any document or security expressed to be collateral thereof then the Assignee shall be entitled without demand to exercise its powers under the guarantee as if the whole of the terms and conditions thereof were set out in full herein and the Assignor hereby expressly covenants and agrees that it will not take any action or do any of the obligations and liabilities of the Guarantors or either of them under the Guarantee nor will it give any notice of any nature to the Guarantors or either of them thereunder without the consent of the Assignee first having been obtained. 5 10

3. The Assignor shall pay all or any costs and stamp duty that may be incurred in and about the preparation and execution of the within presents. 15

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals on the day and year first hereinbefore written.

THE COMMON SEAL of D.G. HOGAN ) D.G. Hogan Dir.  
)  
PTY. LIMITED was hereunto affixed) M.E. Hogan Sec. (L.S.)  
)  
in the presence of: ) 20

THE COMMON SEAL of TRADE CREDITS )  
)  
LIMITED was hereunto affixed in )  
)  
the presence of: . )

12 27514

LOAN LEDGER

CONTRACT NO. 1232

INSURANCE CO. OF  
 COY. XXXXXJJA:XXXXX  
 PEARL-ASSURANCE CO., LTD.  
 POLICY No. SF/8291  
 F20/2%0  
 DUE DATE 12/10/74

SECURITIES: a) Assignment of Mortgagees Interest  
 in Registered Mortgage No. M945586 given by  
 Civic Private Hotel Pty. Limited (Mortgagor)  
 to D. B. Egan Pty. Limited (Mortgagee) securing  
 SECURITY ENVELOPE NO. P.M. & CO. SEC. CONT.

NAME: CIVIC PRIVATE HOTEL PTY. LIMITED  
 9 Springfield Avenue,  
 POTTS POINT, 2011.  
 TEL. NO. 322-3222

DATE	REFERENCE NO.	DEBIT	CREDIT	BALANCE	PROOF
		118.000.00		118.000.00	\$70,000.00
OCT 12 73	43.677			118.000.00	*
NOV 12 73	776		750.00	117.250.00	*
DEC 12 73	1.167		750.00	116.500.00	*
JAN 12 74	1.435		750.00	115.750.00	*
FEB 12 74	2.182		1.500.00	114.250.00	*
MAR 12 74	2.514		750.00	113.500.00	*
APR 12 74	2.890		750.00	112.750.00	*
MAY 12 74	3.312		750.00	112.000.00	*
JUN 12 74	3.677		750.00	111.250.00	*
JUL 12 74	4.022		750.00	110.500.00	*
AUG 12 74	4.401		750.00	109.750.00	*
SEP 12 74	4.743		750.00	109.000.00	*
OCT 12 74			750.00	108.250.00	*
NOV 12 74			750.00	107.500.00	*
DEC 12 74			750.00	106.750.00	*
JAN 12 75	149		750.00	106.000.00	*
FEB 12 75	5346		750.00	105.250.00	*
MAR 12 75			750.00	104.500.00	*
APR 12 75			750.00	103.750.00	*
MAY 12 75			750.00	103.000.00	*
JUN 12 75			750.00	102.250.00	*
JUL 12 75			750.00	101.500.00	*
AUG 12 75			750.00	100.750.00	*
SEP 12 75			750.00	100.000.00	*
OCT 12 75			750.00	99.250.00	*

23 ON CONVERSION TO NEW SYSTEM - SEE BELOW  
 WEEKLY INSTALLMENTS @ 750.00 \$ 118,000.00  
 1/ Final 12th November 1973.

BY monthly instalments of interest only \$ 25,500.00  
 at the rate of 9% p.a. and principal & balance \$ 92,500.00  
 of interest at end of 2 years.  
 CHARGES IN ADVANCE \$ 25,500.00  
 CHARGES TRUE RATE \$ 92,500.00  
 Interest Rate: 13.78% per annum true

CALCULATIONS CHECKED BY  
 10% p.a. from 12.10.75 for 12 months AND/OR  
 Contract Dated 12th October 1973.

SEC. CONT. an advance of \$100,000.00 for 2 years @ 9% (payable monthly)  
 over property at 166 Victoria Street, Kings Cross.  
 b) Deed of Guarantee of Victor Joseph & Pauline Anne BURNS.  
 29.11.74 Letter to Bank of New South Wales St. James Branch consenting  
 to registration of 3rd mortgage.

CONTRA. \$  
 CHEQUE NO. PAYABLE TO \$  
 43677 BANK OF N.S.W. FOR BANK \$  
 CHEQUE IN FAVOUR OF \$  
 PHILIP MALOUF & CO. \$ 92,500.00  
 \$  
 \$ 92,500.00

CONTRA APPROVED BY: *[Signature]*

Penalty Rate Months  
 Minimum Interest Months  
 Period Applicable: Months  
 Other

INT RATE 13.291080  
 CALC MLY  
 PAYABLE MLY  
 REG 750.00  
 FIN 100750.00  
 MAT 1211075  
 RESERVED ALL OVER 750.00  
 ARRS  
 DEF  
 PEN.  
 PRINC BAL 06002.52  
 RES. BAL 3502.52  
 70315.80  
 3815.80  
 P.M. 1063.31

THE RATE IN THIS TRANSACTION IS 1.10758965% PER MONTH. VALUE AS AT 12/11/74 WILL BE \$91,692.64.  
 ON CONVERSION BALANCE SHOULD BE TAKEN UP AT THAT FIGURE PLUS ARRS (IF ANY) AND \$3,192.64  
 THEN IS RESERVED INTEREST. AFTER THAT, ALL INTEREST OVER \$750.00 PER MONTH SHOULD BE RESERVED.

WEEKLY INSTALMENTS @  
MONTHLY

\$

1st DUE \_\_\_\_\_  
BY \_\_\_\_\_

CHARGES IN ADVANCE..... \$

CHARGES TRUE RATE..... \$

\$

CONTRA. \$

CHEQUE No. PAYABLE TO

\$

\$

\$

\$

\$

\$

\$

PAYMENT AND/OR  
CONTRA APPROVED BY.....

	Date	Total	RT	Other	Part
24.9.75 Letter to borrower advising expiry of 12.10.75 re. pay-out or extend 6 months at 16% p.a. (A1)					
29.10.75 Mr. Burns has discussed this with Mr. Martin (P.M. & CO.) and Mr. Martin has now instructions to proceed and prepare variation.					
25.11.75 Memorandum Varying Mortgage executed by borrower to extend term for 12 months from 12.10.75 to 12.10.76 at 16% per annum.					
25.11.75 H 750. - <del>XB</del>	12/11	1333.33	583.33		
2.12.75 LEB			583.33		
14.1.76 Letter received from Mr Burns advising he is unable to pay any further instalments and also stated property now listed for sale. Mr Jacob to contact Mr Burns and make suitable arrangement.	12/12	1333.33	1416.65	1916.65	
19.1.76 Mr. Burnes in my office today and states he is unable to pay anything more at all. He is to give me a full statement of his affairs within 2 days and also give me copy of correspondence placing the property to auction with L.J. Hookers at a reserve price of \$110,000.00.					
21.1.76 Statement of Affairs received today and also copy of letter instructing Laing & Simmons to place property at auction immediately and stating reserve price is expected to be in the vicinity of \$110,000.00.					
(3581733)	12/11	1333.33	3249.99	3249.99	
29.1.76; Check with Laing and Simmons in 10 days to obtain details of Auction and also suggested reserve.					
11.2.76; Rang Mr. Laing who advised documents sent down for the 24/3/76 at their rooms in Australia Square. At this stage there had been moderate Interest in the property but as full advertisement will not start until 3 weeks before Auction, Mr. Laing was reasonably happy.					
26.3.76	12/12	1333.33	4553.32	4553.32	
31.3.76; Mr. Jacob advised there were no bids at Auction and as such he had now made arrangements with Borrower to call into the office and discuss account	12/13	1333.33	5916.65	5916.65	
3/5/76	12/14	1333.33	7249.98	7249.98	

	Interest	Total	R.I.	Other	Particulars
	1333.33	7247.43	7247.43		
21/6/76: Requested Philip Malouf & Company issue Statement of Claim for Possession of Property and recovery of Debt from Directors and Guarantors of the Borrowing Company.		2583.31	2583.31		
21/6/76: Statement of Liquidated Claim re V.J. Burns from Philip Malouf & Company to A.M.C. Investigations.					
2/7/76: Affidavit under Part 40 Rule 11 re Possession signed and returned to Philip Malouf & Company.	12/6	1333.33	916.64	916.64	
8.7.76 ABLES cars \$30			9946.60	9946.60	
29/7/76: Philip Malouf & Company advised Judgement granted on the 22nd July, 1976 and we are now awaiting Eviction date from the Sheriff.	12/7	1333.33	11279.97	11279.97	
17/8/76: Affidavit of Gordon Parry signed and returned to Philip Malouf & Company.					
18.8.76 PAID CAR RENT \$290.50	12/8	1333.33	12403.80	12613.30	290.50 PAID
9.2.76 Mr. ... of this office, signed for possession ... to be collected ... from ... Mr. Jack Campbell.			12522.20	12232.30	
12.3.76 Requested Mr. Tucker inspect property and advise what renovations and repairs are required ... us to obtain a sale price in excess of \$115,000.					
23.3.76			12492.30	12202.30	
26/8/76 Affidavit of Mr. Jacob confirming debt as at 12 May '76 signed and returned to Philip Malouf & Co.					
1-9-76 PAID ELECTRICITY A/C \$353.92			12806.70	644.60	ELECTRICITY
" PAID LAUNDRY A/C \$9.26			12855.96	653.68	LAUNDRY
14-9-76 PAID LAUNDRY A/C \$17.09			12873.05	670.77	LAUNDRY
23-9-76 PAID M.W.S. O.B. \$3050.40			15923.45	3721.17	M/RATE
" PAID GAS Bill 4/70 7.8.76 \$233.42			16156.87	3954.59	GAS
" PAID TRADE REFUSE A/C UP TO 1-9-76 \$42.12			16199.01	3996.71	CARROUSEL
" PAID LAUNDRY A/C UP TO 7-9-76 \$8.56			16207.57	4005.27	LAUNDRY
" PAID C/RATES \$1232.89			17440.46	5238.16	C/RATES
5-10-76 PAID LAUNDRY A/C UP TO 14-9-76 \$3.28			17443.74	5241.44	LAUNDRY
6-10-76 PAID CAR \$160	12/9	1333.33	18737.07	5401.44	CAR
26-10-76 PAID LAUNDRY A/C UP TO 5-10-76 \$21.57	12/10	1333.33	20291.97	5423.01	LAUNDRY
1-11-76 Received \$154.00 laundry rent			20107.91	14664.40	
10-11-76 Received \$119.00 laundry rent			19988.91	14565.90	
15-11-76 Received \$210.00 laundry rent			19778.91	14355.90	
20-11-76 Received \$239.00 laundry rent			19539.91	14116.90	
26-11-76 Received \$295.00 laundry rent			19244.91	13821.90	
1-12-76 Received \$259.00 laundry rent			18985.91	13572.90	
23-10-76 Received \$130.00 laundry rent			18855.91	13323.90	
" PAID LAUNDRY A/C UP TO 12-10-76 \$4.26			18951.17	5427.27	LAUNDRY
31/11/76 Received \$141.00 laundry rent			18810.17	13332.90	



	Interest	Total	R.I.	Other	Particulars
4.11.76 Leave until 12.2.77 re. expiry then ascertain result of legal action.		18810.17	13882.40	5427.21	
9.11.76 Paid bank \$222.00 being First Policy premium. <i>of - of</i>		14132.17		5242.22	INS
12.11.76 Received \$203.00 being rent allocated to interest.	12/11	1333.33	20262.50	14513.23	
22.11.76 PAID LAUNDRY <i>up to 9.11.76 \$15.48</i>			20277.98		5764.75 LAUNDRY
22.11.76 Received \$200.00 being rent allocated to interest.			20077.98	14313.23	
29.11.76 Received \$149.00 being rent allocated to interest.			20226.98	14164.23	
19.11.76 PAID LAUNDRY <i>up to 17.11.76 \$15.48</i>			2176.73		7521.75 P.M.C.
13.12.76 PAID LAUNDRY <i>up to 23.11.76 \$15.11</i>	12/11	1333.33	23056.37	15497.56	7556.81 LAUNDRY
15.12.76 ELECTRICITY <i>up to 16.11.76 \$322.74</i>			23376.71		7879.15 ELECTRICITY
9.12.76 Received \$170.00 being rent allocated to interest.			23546.71	15327.56	
14.12.76 Received \$104.00 being rent allocated to interest.			23650.71	15223.56	
23.11.76 PAID LAUNDRY <i>up to 30.11.76 \$7.09</i>			23109.80		7886.24 LAUNDRY
PAID TRADE REFUSE <i>up to 1.2.77 \$42.12</i>			23151.92		7928.36 TRADE REFUSE
24.12.76 PAID LAUNDRY <i>up to 21.12.76 \$23.13</i>			23385.05		7951.50 P.M.C.
4.1.77 Received \$309.35 being rent allocated to interest.			23694.40	14719.21	
6.1.77 Cheque rent \$23.13			23717.53	15023.56	
11.1.77 Received \$15 being rent allocated to interest.			23732.53	14624.21	
18.1.77 Cheque rent LAUNDRY <i>up to 22.12.76 \$5.60</i>			22666.14		841.93 LAUNDRY
15.1.77 Received \$125 being rent allocated to interest.			22791.14	14479.21	
25.1.77 Received \$71.00 being rent allocated to interest.	12/1	1333.33	23924.47	15323.56	
7.2.77 \$661.24 <i>up to SYDNEY COUNCIL</i>			23990.47	15761.47	
COUNCIL RATES.			24404.74		8703.27 S.C.C.
4.2.77 Received \$170.00 being rent allocated to interest.			24574.74	15591.47	
8.2.77 Received \$104.00 being rent allocated to interest.			24678.74	15487.47	
11.2.77 PAID GAS A/C <i>up to 9.11.76 \$121.72</i>			24800.46		8884.99 GAS.
14.2.77 Cheque rent.			24921.46	15242.14	
15.2.77 Received \$245.33 being rent allocated to int.			25166.79	15097.47	
24/2/77 Cheque to W. Widmann on 166 Victoria Street, \$21.50			25188.29		2906.49
31.2.77 Received \$134.00 being rent allocated to int.			25322.29	15108.14	
1.3.77 PAID LAUNDRY <i>up to 15.2.77 \$24.13</i>	12/2	1333.33	25455.62	16441.47	8930.62 LAUNDRY
3.3.77 Cheque rent			25580.62		
3.3.77 Cheque to City Council \$42.12 <i>for TRADE REFUSE</i>			25622.74		8972.74 TRADE REFUSE
13.3.77 Received \$138.16 being rent allocated to int.			25760.90	16303.31	
19.3.77 Received \$104.00 being rent allocated to int.			25864.90	16199.31	
19.3.77 PAID LAUNDRY <i>up to 1.3.77 \$11.98</i>	12/3	1333.33	26008.23	17932.64	8984.72 LAUNDRY
22.3.77 Cheque rent \$11.98			26120.21		
22/3/77: Letter received from City Health Department directing us to repair the Defective Sewerage Service. Rang Plumber 311-5000 who will attend to same.			26231.21	17409.64	
15.3.77 123 x 9			26354.21	17269.64	
22.3.77 Received \$140.00 being rent allocated to interest.			26494.21		
29.3.77 PAID LAUNDRY <i>up to 15.3.77 &amp; TOILET TISSUES \$25.24</i>			26749.45		9009.96 LAUNDRY
15.3.77 Received \$125.00 being rent allocated to int.			26874.45	17144.64	
5.4.77 Received \$93.03 being rent allocated to interest.			26967.48	17051.61	
29.3.77 149 - X B			27116.48	16902.61	

Date	Description	12/4	Interest	Total	R.I.	Other	Particular
19.4.77	PAID LAUNDRY A/C UP TO 7.4.77 \$1762		1333.33	27265.52	18235.94	9027.58	LAUNDRY
19.4.77	251.58 x B			27013.94	17924.36		
26.4.77	135.50 x B			26878.44	17842.86		
2.5.77	20 - x B			26858.44	17822.86		
13.5.77	PAID Electricity A/C \$54.76 up to 21.2.77	14/5	1332.33	28201.78	19162.19	9086.30	Electricity
19.5.77	PAID Laundry A/C up to 26.4.77 \$23.24			28225.02		9107.53	LAUNDRY
23.5.77	PAID GAS A/C up to 11.5.77 \$271.62			28541.38		9377.99	GAS A/C
26.5.77	PAID LAUNDRY A/C up to 17.5.77 \$29.10			28570.48		9408.51	LAUNDRY
31.5.77	PAID ELECTRICITY A/C up to 24.5.77 \$177.34			28747.82		9485.83	ELECTRICITY
2.6.77	PAID TRADE REFUSE A/C up to 30.4.77 \$62.12			28810.94		9527.75	TRADE REFUSE
4.5.77	164.41 x B rent			28975.35	18997.73		
16.5.77	101 - x B rent			28874.35	18896.73		
23.5.77	110 - x B rent			28984.35	18886.73		
31.5.77	71 - x B rent			29055.35	18715.73		
6.6.77	Received \$110.00 being rent allocated to interest			29165.35	18603.73		
14.6.77	75 - x B	12/6	1333.33	27898.68	19262.11		
20.6.77	129 - x B			29262.87	19733.11		
24.6.77	PAID LAUNDRY A/C TO 3.6.77 \$3.43			29266.30		9531.12	LAUNDRY
26.6.77	PAID Laundry A/C to 14/6/77 \$11.11			29277.41		9542.24	LAUNDRY
27.6.77	29 - x B			29248.41	19704.11		
4.7.77	PAID laundry 30/4 - 24/5 \$3.82			29252.23		9546.11	LAUNDRY
4.7.77	122.20 x B rent			29374.43	19521.25		
11.7.77	99 - x B			29473.43	19482.25		
13.7.77	100 - x B	12/7	1333.33	30264.30	20716.12		
25.7.77	42.75 x B			30221.55	20673.43		
2.8.77	PAID laundry A/C to 12/7/77 \$15.51			30237.06		9561.62	LAUNDRY
2.8.77	100 - x B			30137.06	20573.43		
10.8.77	PAID laundry A/C to 26/7 12.98			30150.04		9574.60	LAUNDRY
8.8.77	24 - x B			30126.04	20549.43		
15.8.77	PAID laundry A/C to 3.8.77 \$2.81			30128.85		9577.41	LAUNDRY
15.8.77	Advised Mr. John Nelson of W.A. Flick & Co. (212 4211) that we would accept a quote of \$250 to lay baits to eradicate rat infestation at property.						
16.8.77	Work done by W.A. Flick & Co today \$250 - sent.						
15.8.77	70 - x B	12/8	1333.33	31292.18	21212.76		
22.8.77	32 - x B			31360.18	21730.76		
26.8.77	Cheques for following: 1. City Treasurer (Trade Refuse Service 1/9/77 - 31/11/77 \$42.12) 2. KOG Maintenance Plumbing Co (Work done 22/7, 23/2, 21/3, 13/5 3/8 \$106) 3. AGL (Gas A/C 11/5/77 to 9/8/77 \$162.40)			31402.30		9619.53	Trade Refuse
29.8.77	Letter to Jack Campbell advising property to be managed by Messrs. Stevenson, Mackinnon & Company, Estate Agents. Allowed him one month Rent free accommodation so that he may make alternative arrangements. After expiration of same Rent to be paid on same basis as other tenants.			31508.30		9725.53	Plumbing
1.9.77	1. S.C.C. Electricity to 17/8/77 \$150.18 Peter Barry Group (Laundry to 23/8/77 \$14.22)			31676.20		9893.43	AGL
29.8.77	145 - x B			31826.32		10043.61	Elec.
				31740.60		10057.25	Laundry
				31615.60	21635.76		

Section	Name	Interest	Total	R.I.	Other	Particulars
16.9.77	PAID CANNARY A/c up to 23.8.77 \$3.31		3165.60	21635.76	10.57.53	
"	PAID ELECTRICAL REPAIRS \$70.50		3169.91		10.11.16	CANNARY
21.9.77	ibid Laundry A/c up to 6.9.77 \$5.46		31789.41		10.11.68	ELECTRICAL
26.9.77	Cheque for \$1384.24 payable to M-W-S & D.B. for 77-78 Water Rate		31774.97		10.29.18	LAUNDRY
17.10.77	<del>Paid Chq Laundry Account \$5.02 to 27.9.77</del> PETER BARRY GROUP	1,333.33	33,108.20	22969.08		
20.10.77	584.80 > B		34,492.44		11.5.35	W. Repts.
3.11.77	Chq. to THE PETER BARRY GROUP (Linen) A/c paid to 20.10.77 to the sum of \$5.08	1,333.33	35,240.97	2317.62		
21.11.77	Chq. to THE AUSTRALIAN GAS LIGHT COMPANY \$190.38		25,246.05		11.5.43	LAUNDRY
15.11.77	2,24.44 AB		35,436.43		11.7.87	GAS
9.12.77	Chq. to The Sydney County Council \$10,222 Paid		36,345.32	24,626.51		
9.12.77	Cheque for \$2,035.00 payable to Commissioner of Land Tax being for land tax years 1975-77		36,452.56		11.8.26.05	S.C.C.
13-12-77	20.11.77 406.84 being amount of No. F12.001/2.280.10.1.8.					
13.12.77	Chq. to Peter Barry Group \$4,556.27-10.17. 1st time		36,859.40		14.3.69	P. 10.1
4-1-78	Chq. to The Peter Barry Group \$503 for 28.5. 24.06.1977					
9.1.78	Letter to Mr. Endres (Broadlands) requesting information re. residential address of V.J. Burns					
6.1.78	Chq. to Peter Barry Group \$337. 1st time No. 2526.					
25-1-78	Property in Possession report completed.					
1.2.78	Chq. to Peter Barry \$7.55 Laundry					
17.1.78						

IN THE DISTRICT COURT )  
)  
OF NEW SOUTH WALES )  
)  
CIVIL JURISDICTION )

BEFORE HIS HONOUR JUDGE GODFREY-SMITH

SYDNEY: MONDAY, 3RD FEBRUARY, 1978

5

TRADE CREDITS LTD. V. BURNES AND ANOR

MR. MOSS appeared for the plaintiff.  
MR. FLANNERY appeared for the Defendant.

-----  
JUDGMENT

HIS HONOUR: In this case the plaintiff sues the two defen- 10  
dants for money owing under a deed of guarantee.

On 12th October, 1972, D.G. Hogan Pty. Ltd. (hereinafter  
called the lender) agreed to lend certain moneys to Civic  
Private Hotel Pty. Ltd. (hereinafter called the principal deb-  
tor) and in consideration of that, the defendants entered into 15  
a deed of guarantee on the same day guaranteeing the lender  
against all loss of principal, interest or other moneys in re-  
spect of the loan to the principal debtor.

On 18th October, 1973, the lender transferred all its  
rights against the principal debtor to the plaintiff. 20

By deed of assignment the lender transferred to the plain-  
tiff all its right, title and interest against the defendants  
under the guarantee. Thereafter, on 25th November, 1975, the  
plaintiff and the principal debtor agreed that the mortgage  
securing the principal debt should be varied by its term being 25  
extended for twelve months to 12th October, 1976, and the rate

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Judge Godfrey-Smith

of interest payable being increased from nine percent to sixteen percent from 12th October, 1975.

The principal debtor defaulted under the mortgage and as at 12th May, 1976, arrears of interest owed to the plaintiff amounted to \$8,583.31. 5

The plaintiff then brought this action against the two defendants and has obtained judgment against the first defendant. This hearing relates to the plaintiff's claim against the second defendant whose defence is that the variation of the terms of the mortgage constituted a material variation, and was made without her consent thereby discharging her from liability under the deed of guarantee. 10

It has been agreed between counsel for the parties that the variation was made and that it was made without consent. It has been further agreed that the only issue before me is whether or not the defendant's consent was necessary in order that her liability under the guarantee should continue; alternatively whether the variation without consent discharged the second defendant's liability under the guarantee. 15 20

The quantum of the plaintiff's claim is not in issue, nor is the authenticity of the relevant documents, namely the deed of guarantee, the memorandum of mortgage, the deed of assignment of guarantee, the endorsement of assignment of mortgage and the memorandum varying mortgage. Further, it is not disputed that variation of the mortgage was a material one. 25

I am much indebted to counsel on both sides in this case

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Judge Godfrey-Smith

for their careful preparation and skilful and efficient presentation of the arguments. It appears to me that each of them has done as much as could possibly be done on behalf of his client. 5

Counsel for the plaintiff referred to Parr Banking Co. Ltd. v. Yates (1898) 2 Q.B. Div. at p.466, where it was held that for a guarantee to be a continuing one means that its effect is extended beyond the first sum advanced to sums subsequently advanced so long as the guarantee is continued. This proposition was related to clause 1 of the guarantee wherein it was provided, inter alia, "this guarantee shall be a continuing one ...". 10

The plaintiff then relied upon clause 14 of the guarantee which provided as follows:- 15

"It is hereby expressly provided that any further advance or advances which may be made by the lender to the Borrower shall be included in this Guarantee unless the Guarantor shall have given to the Lender notice in writing delivered personally or sent by prepaid registered post to the Lender at its registered office clearly stating that no further advances shall be covered under the terms of this Guarantee and in such event any advance made by the Lender to the Borrower after the date upon which such notice was received by the Lender shall not be deemed to be included in this Guarantee provided that nothing herein contained shall in any way affect the liability of the Guarantor in respect of any moneys advanced by the Lender prior to the receipt of such notice or moneys advanced by the Lender after receipt of such notice where the Lender had before receipt of such notice made all necessary arrangements for the advance to be made, or in respect of any other matter herein contained." 20 25 30 35

It was argued that "any further advance or advances" embraces an extension of the mortgage in the instant case. Further,

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reliance was placed upon London Financial Association v. Kelk  
(1889) 26 Ch. Div. 107 at p.136 where it was held that money  
may be "advanced" without being lent and that "an advance"  
covers the giving of credit.

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I was also referred to Grahame v. Grahame (1887) 19 L.R.  
(Ireland) 249 at p.255, in which it was held, inter alia, that  
between bankers and customers, advances are made by allowing  
the customer's account to be overdrawn, with or without  
security, and that it is usual to make such advances on bills  
of exchange or promissory notes.

10

This authority went on to lay down the following signifi-  
cant proposition:-

"An advance takes place when a payment is made upon the  
cheque or other order of the customer and it must be  
equally an advance whether the funds to meet it are the  
proceeds of bills or notes so credited or where the bank  
pays out of its own proper money."

15

It was very forcefully argued for the plaintiff that con-  
struing clause 14 in its proper context (between lender and  
borrower) the term "further advance or advances" is wide  
enough to catch the subject variation of mortgage; that the  
variation of the mortgage had the effect of making a new and  
different loan; that accordingly, the necessity for the con-  
sent of the guarantor was excluded by the terms in clause 14.

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The plaintiff further argued that even if the need for  
guarantor's consent to variation was not excluded by clause 14,

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41. Judge Godfrey-Smith

it certainly was excluded by clause 18. The provisions of  
clause 18 are as follows:-

"The Lender may at any time and from time to time without 5  
the consent of the Guarantor grant to the Borrower or any  
one or more of them if more than one or to any person who  
may be jointly indebted with the Borrower to the Lender  
at any time any other indulgence or consideration and may  
compound with or release the Borrower or any of them if 10  
more than one or any such person or may assent to any  
assignment to Trustees for the benefit of creditors or  
any scheme or Deed of Arrangement and whether with or  
without sequestration of the estate or (in the case of a 15  
corporation) the winding up of the Borrower of the  
appointing of a Receiver or official Manager or any of  
them if more than one or any such person and may release  
or discharge or otherwise deal with any property whether  
real or personal comprised in any such security without  
discharging or affecting the liability of the Guarantor 20  
under this Guarantee."

It was argued that the variation in mortgage was an  
"indulgence or consideration" or other transaction caught by  
clause 18 as one which can be conducted by the lender without  
the consent of the guarantor and without affecting the guaran- 25  
tor's liability. For the defendant it was argued that the  
Parr Banking Co. Ltd. case (supra) distinguishes between fur-  
ther advances on the one hand, and interest on the other.

So far as clause 14 is concerned, I hold that it does not  
apply in favour of the plaintiff in this case. I do not con- 30  
sider that the extension of time for repayment of a loan of  
an advance constitutes a fresh advance. I consider there is a  
distinction between the giving of credit in a particular sum  
for a particular time on the one hand and the extending of the  
time for credit in the same sum on the other hand. By 35  
analogy, in chess one can "advance" a piece or withdraw it or



leave it advanced or further advance it; I do not think that leaving the piece advanced constitutes either an advance or a further advance.

5

It follows that I am against the plaintiff in the argument based on clause 14.

As to clause 18, counsel for the defendant has urged that I should construe this contra proferentem and I consider it proper so to do. He also urges that I should construe such phrases as "indulgence", "consideration", "compound with" or "release" as being phrases ejusdem generis and indicating a form of one way movement for the benefit of the borrower without direct immediate benefit to the lender. I consider these arguments to be sound. I hold that an arrangement whereby the lender grants an extension of time for repayment in consideration of a steep rise in interest rate not to be an "indulgence" or the like so as to come within the scope of clause 18.

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Accordingly, it is my view that neither clause 14 nor clause 18 of the deed of guarantee excuses the plaintiff from obtaining the consent of the guarantor to the arrangement whereby the guarantor's rate of liability for interest was nearly doubled in return for twelve months extension of the principal loan. It follows that in my view, the guarantor's consent to the variation of mortgage was necessary if the guarantor was to be liable under the guarantee in respect of the mortgage as varied.

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There will be a verdict for the defendant and judgment accordingly.

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES ) C.A. 58 of 1978  
 )  
COURT OF APPEAL ) District Court No: 33198 of 1976

5

BETWEEN: TRADE CREDITS LIMITED  
Plaintiff

AND: VICTOR JOSEPH BURNES AND  
PAULINE BURNES  
Defendants 10

NOTICE OF APPEAL

APPELLANT: TRADE CREDITS LIMITED

RESPONDENT: PAULINE BURNES

The proceedings appealed from (against the second named Defendant only, the Plaintiff having previously entered judgment against the first named Defendant) were heard in the District Court at Sydney on 3rd February, 1978, on which date judgment was pronounced in favour of the second named Defendant. Reasons for judgment were published on 14th February, 1978.

The Appellant appeals from the decision of Judge Godfrey-Smith. 20

GROUNDS:

- (i) That his Honour erred in holding that the provisions of a Deed of Guarantee dated 12th October, 1972 between D.G. Hogan Pty. Limited (whose rights thereunder were subsequently assigned to the Appellant) and the Defendants on its proper construction required the Plaintiff to obtain the consent of the Respondent in respect of a variation of Memorandum of Mortgage M.945586 (the 25

Notice of Appeal

observance of the provisions by the Mortgagor being in effect guaranteed by the Respondent) and that failure to do so discharged the Respondent from further liability in respect of the said Deed of Guarantee. 5

(ii) That his Honour erred in holding that the said variation of the Mortgage (effected 25th November, 1975) was a defence to the Plaintiff's claim against the Respondent if such variation was made without the knowledge or consent of the Respondent. 10

(iii) That his Honour ought to have held that the said Deed of Guarantee on its proper construction and upon the evidence adduced before his Honour required the Respondent to pay the interest claimed by the Appellant in its Statement of Claim. 15

(iv) That his Honour ought to have held that said Deed of Guarantee properly construed continued to bind the Respondent notwithstanding the variation made in respect of the said Mortgage on 25th November, 1975 was made without the knowledge or consent of the Respondent. 20

(v) That his Honour erred in holding that the effect of the said variation of Mortgage (namely to extend the term of the said Mortgage for a period of twelve (12) months and to increase the interest payable thereunder from 9% to 16% per annum) discharged the Respondent from all liability under the said Deed of Guarantee in the absence of evidence that the Respondent consented to the said variation of Mortgage. 25

Notice of Appeal

(vi) That his Honour should have held that the said Deed of Guarantee continued to bind the Respondent notwithstanding the said variation of Mortgage may have been made without the knowledge or consent of the Respondent. 5

(vii) That his Honour should have held that the said effect of the said variation of Mortgage constituted a "further advance" within the meaning of Clause 14 of the said Deed of Guarantee and/or was caught by the expression "any other indulgence or consideration and may compound with or release the borrower" in Clause 18 of the said Deed of Guarantee. 10

ORDER SOUGHT:

An Order that the Judgment for the Respondent be set aside and that judgment be entered for the Appellant together with costs including the costs of the Court below. 15

Appeal papers will be settled on 7th April 1978 at 12 noon in the Registry of the Court of Appeal.

TO the Respondent of 2 Bower Street, Manly.

Before you take any step in these proceedings you must enter an appearance in the Registry. 20

APPELLANT: Trade Credits Limited of 160 Clarence Street, Sydney.

SOLICITOR: CRAIG ANTHONY MALOUF of 141-143 Elizabeth Street Sydney (Tel: 61-8581) 25

APPELLANT'S ADDRESS

FOR SERVICE: c/- Messrs. Philip Malouf & Company, Solicitors  
141-143 Elizabeth Street, Sydney

Notice of Appeal

ADDRESS OF  
REGISTRY:

The Supreme Court, Queen's Square, Sydney.

C.A. Malouf  
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Plaintiff's Solicitor

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1.3.78

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

C.A. 58 of 1978

D.C. 33198 of 1976

5

CORAM: STREET, C.J.  
SAMUELS, J.A.  
MAHONEY, J.A.

15 JUNE, 1979.

TRADE CREDITS LIMITED v. BURNES & ANOR.

10

APPEAL FROM DISTRICT COURT - GUARANTEE IN RESPECT OF MORTGAGE  
DEBT - MORTGAGE VARIED TO INCREASE INTEREST RATE AND EXTEND  
TERM - GUARANTOR LIABLE - MEANING OF "ADVANCE", "FURTHER ADVANCE",  
"INDULGENCE".

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

C.A. 58 of 1978  
D.C. 33198 of 1976

5

CORAM: STREET, C.J.  
SAMUELS, J.A.  
MAHONEY, J.A.

15 JUNE, 1979.

TRADE CREDITS LIMITED v. BURNES & ANOR.

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JUDGMENT

STREET, C.J.: I agree in the judgment of Mahoney, J.A. and with the orders proposed.

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

C.A. 58 of 1978  
D.C. 33198 of 1976

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CORAM: STREET, C.J.  
SAMUELS, J.A.  
MAHONEY, J.A.

15 JUNE, 1979.

TRADE CREDITS LIMITED v. BURNES & ANOR.

10

JUDGMENT

SAMUELS, J.A.: I agree in the judgment of Mahoney, J.A. and with the orders proposed.



IN THE SUPREME COURT  
OF NEW SOUTH WALES  
COURT OF APPEAL

)  
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)

C.A. 58 of 1978  
D.C. 33198 of 1976

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CORAM: STREET, C.J.  
SAMUELS, J.A.  
MAHONEY, J.A.

15 JUNE, 1979.

TRADE CREDITS LIMITED v. BURNES & ANOR

10

JUDGMENT

MAHONEY, J.A.: The second defendant ("Mrs. Burnes") guaranteed the repayment of \$100,000 at the end of three years with interest at 9% per annum. Without her consent, the terms of the indebtedness were varied to increase the term for one year and the interest to 16%. Mrs. Burnes says that she did not consent to the indebtedness as so varied and consequently is not liable under her guarantee. A claim made against her in the District Court based upon the guarantee was dismissed and an appeal against that dismissal has been brought to this Court. In my opinion, the appeal should succeed.

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On 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. The unpaid balance of the purchase moneys under that contract was \$100,000.

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On 12th October, 1972, the debtor executed a Memorandum of Mortgage in favour of the original creditor to secure payment to it of that sum on 12th October, 1975, and interest thereon at 9% per annum payable monthly.

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51. Reasons for Judgment of his Honour, Mr. Justice Mahoney

On the same date, the defendants, being husband and wife and interested in the debtor, executed a Deed of Guarantee, being the guarantee now in question. 5

The mortgage was assigned from the original creditor during its term. On 18th October, 1973, it was assigned to the present plaintiff, Trade Credits Limited, and was registered in its name.

On 12th October, 1975, the mortgage fell due for payment but it was not paid. 10

On 25th November, 1975, an arrangement was made between the plaintiff and the debtor ("the subsequent transaction") as the result of which those parties entered into a Memorandum of Variation of the mortgage in accordance with s. 91 of the Conveyancing Act, 1919 (as amended). The Memorandum, dated 25th November, 1975, was duly registered. It provided that the rate of interest payable under the mortgage should be increased to 16% per annum computed from 12th October, 1975, and that the term or currency of the mortgage should be extended to 12th October, 1976. 15 20

On 25th March, 1976, the original creditor and the plaintiff entered into a deed whereby the original creditor assigned to the plaintiff the benefit of the guarantee.

On 16th June, 1976, the plaintiff commenced the present proceeding in the District Court, claiming to be entitled to recover from the two defendants interest then due under the mortgage and not paid by the debtor. The interest claimed 25

included both interest which fell due prior to 12th October, 1975, and interest thereafter.

In respect of this proceeding, certain matters should be noted. First, judgment has been entered against the male defendant. When and in what circumstances the judgment was entered has not been considered, nor does it appear clearly from the evidence before this Court. The proceeding has been conducted upon the basis that the entry of that judgment does not prejudice, or relevantly prejudice, the plaintiff's claim against Mrs. Burnes: see generally Turimetta Properties Pty. Ltd. v. Louis John Holdings Pty. Ltd., Court of Appeal, 11th December, 1978, not reported.

Next, no issue has been raised as to the effectiveness of the assignment of the guarantee. The proceeding has been conducted upon the basis that the plaintiff is entitled to the benefit of the guarantee and that (subject to the matters hereinafter referred to) Mrs. Burnes remains bound by it notwithstanding that the assignment took place after the date for repayment of the mortgage had passed.

Mrs. Burnes' case, as it was before the trial judge and before this Court, has involved two submissions: first, that the subsequent transaction operated to vary the original transaction and that that variation operated to release Mrs. Burnes from the whole of her obligations as guarantor; and, second, that if she remains liable as guarantor, her liability is measured by the terms of the mortgage document and the guarantee

as they were at the time of the original transaction and not as varied by the subsequent transaction. It is to these two submissions only that attention need be directed. 5

1. Was Mrs. Burnes released by the subsequent transaction?

It is settled law that any relevant variation of the terms of the obligation between a creditor and a principal debtor will discharge a guarantor from liability under his guarantee. Prima facie, a guarantor guarantees the principal debtor's performance of a particular obligation and the guarantor is not bound in relation to an obligation which is or becomes different: Ward v. National Bank of New Zealand (1883) 8 App. Cas. 755 at p.763 et seq. It is not necessary to consider whether and in what circumstances it must be shown that the variation was material or that it operated to the prejudice of the guarantor: see Holme v. Brunskill (1877) 3 Q.B.D. 495; Smith v. Wood (1929) 1 Ch. 14. The variation effected by the subsequent transaction was clearly material. Even if, as the plaintiff submitted, it be necessary to show overall prejudice to a guarantor, the rise in the interest rate clearly operated to create prejudice, in any sense here relevant. However, a guarantor may be held liable in respect of an obligation which is quite different from that to which originally the guarantee attached. As was pointed out by O'Connor J. in Commercial Bank of Australia Ltd. v. Colonial Finance Mortgage Investment & Guarantee Corporation Ltd., 4 C.L.R. 57 at p.69, parties may, in relation to guarantees as in relation to other transactions, 10 15 20 25

enter into such obligations as they see fit and it is therefore necessary to consider the form of the mortgage and the guarantee in the present case.

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The plaintiff submitted, in effect, that Mrs. Burnes remained liable as guarantor notwithstanding the change in the term of the mortgage and its rate of interest for two reasons: first, because the obligation which was guaranteed was in itself an obligation admitting of such changes in its content; and, second, that in any event the guarantee provided that it should continue in effect notwithstanding such variations.

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As to the first reason: In determining the operation of a guarantee, it is necessary to determine precisely what is the obligation the performance of which is guaranteed. That obligation may be one which is simple and definite, e.g., the payment of a sum certain on a fixed date. But it may also be one the content of which may change from time to time. There may be a guarantee of "whatever may be owing" from a course of dealing: Wood v. Priestner (1867) L.R. 2 Ex. 67, 282. Where a creditor proposes from time to time to supply the principal debtor with goods on credit, the guarantor may guarantee the indebtedness flowing ultimately from such a course of dealing: Matthews Thompson & Co. Ltd. v. Everson, 34 S.R. N.S.W. 114. The contract the performance of which is guaranteed may, by its terms, permit the variation of what is to be done to perform it and the content of that which is guaranteed will vary

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accordingly: Trade Indemnity Co. Ltd. v. Workington Harbour & Dock Board (1937) A.C. 1 at p.21. Where the creditor contemplates lending money to the principal debtor from time to time and on different terms, he may take a charge to secure the indebtedness arising from the ensuing series of transactions. The security given to a banker is often in this form: see Australian Encyclopaedia of Forms & Precedents, vol. 2, p.156 et seq. Where the terms of the obligation between the creditor and the principal debtor allow of the subsequent variation of particular obligations incurred by the debtor in the course of such dealings, it may be necessary to consider whether the variation of a particular obligation which has accrued and to which the obligation has attached, will release the guarantor: see, e.g., the passage from Rowlatt on Principal & Surety (2nd ed.) p. 115, referred to by Jordan C.J. in the Matthews Thompson case, supra, at p. 122.

The plaintiff's argument suggested that the obligation here guaranteed was of this general kind. The obligation guaranteed was evidenced by the terms of the Memorandum of Mortgage. Primarily that obligation was to pay \$100,000 on the covenanted date, 12th October, 1975, and to pay interest in the meantime at the rate of 9% per annum. The memorandum, according to the usual printed form, was expressed to be a security "for the purpose of securing to the mortgagee the payment in manner hereinafter mentioned of the said principal sum and interest thereon".

However, reference was made in argument to cl.25 of the mortgage which is in the following terms:

"Twenty-fifthly. The Charge created by the within presents shall confer upon the mortgagee priority over any second or subsequent security over the mortgaged premises for all moneys expressed or intended to be secured by the within presents notwithstanding that the whole or any part of the moneys secured may be advanced or readvanced after the date hereof or after the date of any second or subsequent security and the mortgagor shall be entitled accordingly to borrow from the mortgagee on the security and the within presents shall be and remain in force as a continuing security to the extent hereinbefore mentioned until a discharge thereon shall have been executed by the mortgagee notwithstanding that any sum or sums may from time to time be paid to the credit of any account or accounts of the mortgagor with the mortgagee and notwithstanding that such account or accounts may at any time be or appear to be in credit and notwithstanding any statement of account or any other matter or thing whatsoever and in the same manner as if sums of money had been advanced by the mortgagee prior to the date of any mortgage secured by a second or subsequent security and further that the within presents and the mortgagee's rights hereunder shall not be discharged postponed or in any way prejudiced by any second or subsequent security nor by anything contained therein nor by the operation of the rules known as the Rule in *Hopkinson v. Rolt* or the Rule in *Clayton's case*."

This clause, in my opinion, seeks to do, inter alia, two things. It seeks to affect the position of the creditor vis-a-vis any subsequent chargee in the light of the principles discussed in Deeley v. Lloyds Bank Ltd. (1912) A.C. 756 and Mazner v. Clyde Securities Ltd. (1975) 2 N.S.W. L.R. 293. It also seeks to ensure that any subsequent transaction of the kind specified in the clause will, as to the performance of the obligations of the principal debtor, be secured by the charge granted by the mortgage. The plaintiff's argument suggests that the subsequent transaction here in question is one which

falls within cl.25; that therefore the performance of the mortgage as varied by the subsequent transaction is secured by the mortgage; and that the obligation the performance of which is guaranteed by the guarantee is, in effect, any obligation which is secured by the charge created by the mortgage. 5

It is not necessary to determine whether this is correct. The plaintiff's argument in this regard is that what took place in the subsequent transaction was an advance or a readvance. 10 To this I shall refer subsequently. It involves that the obligation arising from the subsequent transaction is one the performance of which is secured by the mortgage: this no doubt is so. But it is not clear that, upon the proper construction of the guarantee, every obligation the performance of which is 15 secured by the mortgage, is an obligation the performance of which is guaranteed by the guarantee. The guarantee, at least in terms, is not simply a guarantee of whatever obligations are from time to time secured by the mortgage. In view of the conclusion which I have formed as to the construction of the 20 guarantee, it is not necessary to express a concluded view upon this matter.

The second reason: A guarantee may continue effective notwithstanding that the obligation between the creditor and the principal debtor has been varied and may apply to obligations between them arising subsequent to the original obligation, if the guarantee so provides: see, e.g., the provisions in this regard in the Encyclopaedia of Forms and Precedents 25



(4th ed.) vol. 9, pp.788, 822. The plaintiff's submission is that the present guarantee so provides.

Prima facie the primary purpose of the guarantee was to guarantee the payment of the \$100,000 and interest as set out in the mortgage in its original form. The operative portion of the guarantee (as far as is here relevant) is in the following form:

"WHEREAS the lender at the request of the guarantor has agreed to permit (the debtor) ... to repay the sum of One hundred thousand dollars (\$100,000) being the balance of purchase moneys remaining unpaid by the borrower to the lender pursuant to contract for sale made between (the original creditor) as vendor and (the debtor) as purchaser and dated the twelfth day of July, 1972 in respect of land contained in Certificate of Title ... (hereinafter called "the principal sum") which said sum together with interest thereon is to be repaid in accordance with the terms covenants and conditions contained in the documents described in the Schedule hereto

AND WHEREAS the lender has agreed to advance to the borrower the said principal sum upon condition inter alia that the guarantor enters into and executes these presents

AND WHEREAS prior to the execution hereof the guarantor has inspected the documents relating to the loan described in the Schedule hereto and has approved the contents thereof

NOW THIS DEED WITNESSETH that in consideration of the said principal sum agreed to be advanced by the lender to the borrower on the terms and in the manner hereinbefore recited the guarantor DOTH HEREBY GUARANTEE to the lender and to its successors and assigns the repayment by the borrower to the lender of the whole of the said principal moneys and payment of all interest to accrue due under and upon the terms and in the manner set out in the documents appearing in the Schedule hereto or under any documents expressed therein to be collateral thereto and also the observance and performance by the borrower of the terms covenants and conditions contained in any such document and also the observance and performance by any party described as the mortgagor under any document set out in the Schedule hereto or under any document expressed therein to be collateral thereto ..."

The Schedule contained a reference only to the mortgage here in question.

The operative portion of the guarantee, in my opinion, 5  
guarantees the repayment of the \$100,000 together with interest  
in accordance with the terms of the mortgage in its original  
form; I do not think that it guarantees such repayment or pay-  
ment in accordance with the mortgage in any form being a subse-  
quent variation of its terms in that regard. The terms of the 10  
mortgage document in their original form, though they may con-  
template subsequent transactions and that the performance of  
them also be secured by the charge given by the mortgage, do  
not, I think, themselves provide for a variation of the origi-  
nal obligation to repay the \$100,000 or to pay the relevant 15  
interest.

However, the plaintiff submits that the extension of the  
guarantee to the performance of the obligations arising from  
the subsequent transaction is effected by clauses 1, 14 and 18  
of the guarantee. 20

Cl. 1 of the guarantee is in the following form:

"NOW IT IS HEREBY AGREED by and between the parties  
hereto as follows:

1. That this guarantee shall be a continuing guarantee  
and shall not be considered as wholly or partially dis- 25  
charged by the payment at any time hereafter of any of  
the moneys hereby secured or by any settlement on account  
or by any other matter or thing whatsoever."

The fact that the guarantee is a "continuing guarantee"  
was relied upon in argument as if it were of itself sufficient 30  
answer to Mrs. Burnes' submission that the guarantee had been

discharged by variation. I do not think that it has such an operation.

The words "continuing guarantee" are frequently used to indicate that the guarantee is not limited to one transaction but may extend to a series of transactions: Parr's Banking Co. Ltd. v. Yates (1892) 2 Q.B. 460 at p.466; See Halsbury's Laws of England, 4th ed., vol. 20, para. 162 and the cases there referred to. But in each case it remains to be determined, either from the express words of the guarantee or otherwise, what are the subsequent transactions to which the guarantee is to apply. If the operative words of a guarantee limit it to a particular obligation or transaction, the fact that elsewhere in the document that guarantee is called "a continuing guarantee" will not of itself extend the guarantor's obligation to other and unspecified transactions.

In the present case, cl. 1 is, in my opinion, to be read with cl.14 (which specifies subsequent transactions to which the guarantee may extend) and it is to be seen as indicating that the guarantee is not discharged by such matters as are referred to in cl.1.

Cl.14, as far as is here relevant, provides:

"14. It is hereby expressly provided that any further advance or advances which may be made by the lender to the borrower shall be included in this guarantee unless the guarantor shall have given to the lender notice in writing ... clearly stating that no further advances shall be covered under the terms of this guarantee and in such event ... ."

This clause, in terms, extends the guarantee to "any"

further advances. It may be that, as a matter of construction,  
it is to be limited to such advances as are secured by the  
mortgage. However, it is not necessary to express a concluded 5  
view upon that matter because the obligation arising from the  
subsequent transaction is so secured.

The plaintiff's submission is that, although the guarantee  
in respect of the original transaction would normally be dis-  
charged because of the variation effected by the subsequent 10  
transaction, cl. 14 applies the guarantee to the subsequent  
transaction, and the obligations as to principal and interest,  
because the subsequent transaction is "a further advance" with-  
in the clause.

The subsequent transaction, in form, purported merely to 15  
"extend" the term of the original mortgage and to "increase"  
the interest rate from 9% to 16% per annum. It did this, not-  
withstanding that the date for repayment had already passed  
and it did it by the statutory procedure established by s.91 of  
the Conveyancing Act. No question was raised as to the effec- 20  
tiveness of this procedure. If the transaction between the  
plaintiff and the debtor had taken the form of a new loan of  
\$100,000 at 16% per annum, repayable on 12th October, 1976,  
with the stipulation that that loan be used to repay the origi-  
nal indebtedness, I think that loan would have been a "further 25  
advance": cf. A.J.S. Bank v. Costello, 6 W.N. N.S.W. 94. The  
question is whether a variation rather than a discharge of the  
existing indebtedness is also an advance.

The term "advance" has been given a wide meaning. It has a meaning wider than "loan": London Finance Association v. Kelk (1884) 26 Ch.D. 107 at p.135; see also Armco (Australia) Pty. Ltd. v. Federal Commissioner of Taxation, 76 C.L.R. 584 at p.621 per Dixon J. In re Smith; Laurence v. Ritson (1918) 2 Ch. 405; an amount paid by guarantors under a guarantee was held to be "an advance" to the principal debtor. In Treadwell v. Hitchings (1925) N.Z.L.R. 519 at p.523, it was held to include a "furnishing" of money for a specified purpose. Counsel have not been able to refer the Court to any case in which consideration has been given to whether the variation of the term and the interest rate of an existing loan constitutes an advance. In Queensland Investment & Land Mortgage Co. Ltd. v. Hart (1895) 6 Q.L.J. 186, Griffith C.J. appears to have assumed that the renewal of a loan for a further term was an advance, but the matter was apparently not argued.

In my opinion, "further advance" as used in cl.14 should be held to include the subsequent transaction. I do not think that "advance" according to its ordinary meaning is limited to transactions under which money or goods are, as part of the particular transaction, handed over or delivered to the debtor. The term is, in my opinion, 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 available to him. According to ordinary parlance, it would be proper to describe that money as having been "advanced" for a further term.

If this be the extent of the term according to its ordinary meaning, I see nothing in the context of the guarantee to give it a more restricted meaning: Deputy Commissioner of Taxation for the State of New South Wales v. Zest Manufacturing Company Pty. Ltd., 79 C.L.R. 166 at pp.171-2. The subsequent transaction was a genuine extension of the period of the availability of the money and not a mere book-keeping entry: A.J.S. Bank v. Costello, 6 W.N. N.S.W. 94. There is, in my opinion, nothing in the guarantee that indicates an intention that, money being made available or furnished to the debtor, the guarantee's operations is to be affected by a difference in the form in which it is made available or furnished. I am conscious that the original transaction could be varied both to extend the term and increase the interest greatly; but the same result would flow from a separate and distinct advance used to repay the original indebtedness. I therefore accept that the subsequent transaction was a "further advance" within cl. 14 and Mrs. Burnes is bound accordingly.

Before leaving this aspect, one observation should be made. "Advance" and "further advance" are terms which occur in different areas of the law: they have occurred in revenue law: see Halsbury's Laws of England, 3rd ed., vol. 33, para. 579; they are used in relation to tacking: see, e.g., The Law of Property Act, 1925 (England) s. 94; Wolstenholme & Cherry, Conveyancing Statutes, 13th ed., vol. 1, p. 189 et seq.; and they appear in various forms of mortgages, particularly bank mortgages.

What is the effect of the extending of the term of an indebtedness secured by a charge in any of those areas of the law will require consideration. I do not see this decision as determining such cases. I do not, for example, see this case as determining the effect of such an extension upon the rights of a first chargee who grants the extension with notice of the existence of subsequent charges. 5

Cl. 18, as far as is relevant, provides: 10

"18. The lender may at any time from time to time without the consent of the guarantor grant to the borrower ... at any time any other indulgence or consideration and may compound with or release the borrower ... without discharging or affecting the liability of the guarantor under this guarantee." 15

The plaintiff submitted that there is an obvious typographical error in cl.18: it submitted that the words "at any" where secondly appearing were inserted in error and should be deleted and that after "time" thereafter the word "or" should be added. I do not think it necessary to determine that submission. Insofar as an extension of time was granted, that would be, in my opinion, an "indulgence" within cl.18: I think the word is wide enough to comprehend the granting of time: see Payton v. S.G. Brookes & Sons Pty. Ltd. (1977) 25  
W.A.R. 91.

However, Mrs. Burnes submitted that, whilst to extend the term of the mortgage might be to grant an indulgence, to do so at a greatly increased rate of interest was not. There may well be limits to the kinds of transactions which, though involving an extension of the term of the indebtedness, are 30

capable of coming within the term. Reference was made in  
argument to the possibility of long extensions upon onerous  
terms. To bind the guarantor, a subsequent transaction must be 5  
seen to be "within the general function" of the guarantee:  
Trade Indemnity Co. Ltd. v. Workington Harbour & Dock Board  
(1937) A.C. 1 at 21; and must also be, upon the particular  
facts, an "indulgence". To grant an extension of time for a  
price of this kind is, at least in normal circumstances, capable 10  
of being an indulgence. It is true that there is no evidence  
as to the circumstances in which the subsequent transaction  
took place. I think it is proper to infer, and it was not sug-  
gested to the contrary, that the extension of the term of the  
mortgage was to meet the needs of the debtor. Without delimit- 15  
ing "indulgence", it is, according to its ordinary meaning, in  
my opinion, wide enough to include an extension granted at a  
higher rate of interest.

2. The interest recoverable:

If the subsequent transaction be a "further advance" then 20  
the performance of the obligations arising from it is guaran-  
teed. Insofar as those obligations involve payment of interest  
at 16%, Mrs. Burnes' obligation extends to it. During argument,  
the parties indicated that, if Mrs. Burnes was liable under  
the guarantee, an opportunity should be given for calculation 25  
of the amount involved. In my opinion, therefore, the proceed-  
ings should be stood over to a date to be fixed and the parties  
should be directed to bring in short minutes of the orders to



Reasons for Judgment of his  
Honour, Mr. Justice Mahoney

be made to give effect to the views which have been expressed  
by this Court.

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

C.A. 58 of 1978  
D.C. 33198 of 1976

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TRADE CREDITS LIMITED

Plaintiff  
(Appellant)

VICTOR JOSEPH BURNES and  
PAULINE BURNES

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Defendants  
(Respondents)

SHORT MINUTES OF ORDERS

1. Appeal allowed.

2. Judgment of the District Court (Judge Godfrey Smith, 3rd February, 1978) in favour of the Defendants/Respondents set aside and in lieu thereof judgment for the plaintiff/appellant in the sum of \$8,583.31. 15

3. Defendants/Respondents to pay the costs of the Plaintiff/Appellant of the District Court proceedings and of this Appeal and to have a Certificate under the Suitors' Fund Act in respect of the costs of this Appeal. 20

DATED: 7th August, 1979.

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Counsel for the Plaintiff/  
Appellant

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Counsel for the Defendants/  
Respondents

68. Order of the Court of  
Appeal

IN THE SUPREME COURT )  
 )  
OF NEW SOUTH WALES )  
 )  
COURT OF APPEAL )

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL IN TERM NO. 58 OF 1978

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BETWEEN: PAULINE BURNES

Appellant

AND: TRADE CREDIT'S LIMITED

Respondent

ORDER FOR FINAL LEAVE TO APPEAL

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THE COURT ORDERS THAT:

1. Final Leave to Appeal to Her Majesty in Council from the Judgments of their Honours Chief Justice Mr. Justice Street, Mr. Justice Samuels and Mr. Justice Mahoney given and made herein on the 7th day of August, 1979 be granted to the Appellant Pauline Burnes.

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2. The sum of Fifty dollars (\$50.00) deposited with the Court by the said Appellant pursuant to the Order of the Court on the 13th day of August, 1979 as security for and towards the cost of the preparation of the Transcript Record of Proceedings for the purposes of the said Appeal together with any accrued interest (if any) thereon be paid out of the Court to the said Appellant.

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ORDERED 31 March, 1980  
ENTERED 14 April, 1980

By the Court 25  
J.A. Leslie (L.S.)  
Registrar.

IN THE PRIVY COUNCIL

No. of 1980

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

COURT OF APPEAL C.A. 58 OF 1978

BETWEEN:

PAULINE BURNES

5

Appellant

AND:

TRADE CREDITS LIMITED

Respondent

CERTIFICATE OF THE ACTING REGISTRAR OF THE COURT OF APPEAL  
OF THE SUPREME COURT OF NEW SOUTH WALES  
VERIFYING THE TRANSCRIPT RECORD OF PROCEEDINGS

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I, ALYSON WENDY ASHE, Acting Registrar of the Court of Appeal  
of the Supreme Court of New South Wales

DO HEREBY CERTIFY as follows:-

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That this transcript record contains a true copy of all  
such Orders, Judgments and documents as have relation to the  
matter of this Appeal and a copy of the reasons for the  
respective Judgments pronounced in the course of the proceed-  
ings out of which the Appeal arose.

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That the Respondent herein has received notice of the  
despatch of this transcript record to the Registrar of the  
Privy Council.

DATED at Sydney in the State of New South Wales this 26th  
day of June One thousand nine hundred and eighty.

25

Alyson Ashe

Acting Registrar of the Court of  
Appeal of the Supreme Court of  
New South Wales

70. Certificate of Registrar  
Verifying Transcript  
Record of Proceedings