*Privy Council Appeal No. 29 of 1980*

**Pauline Burnes** - - - - - - - - - *Appellant*

*v.*

**Trade Credits Limited** - - - - - - - - *Respondent*

FROM

## THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

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# JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH MARCH 1981

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*Present at the Hearing:*

LORD DIPLOCK
LORD SIMON OF GLAISDALE
LORD EDMUND-DAVIES
LORD KEITH OF KINKEL
LORD SCARMAN

[*Delivered by* LORD KEITH OF KINKEL]

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This appeal is concerned with the proper construction of certain provisions in a deed of guarantee. On 12th July 1972 a company called D. G. Hogan Pty. Ltd. (" Hogan ") contracted to sell certain land to Civic Private Hotel Pty. Ltd. (" the hotel company "). It was agreed that the sum of $100,000, part of the purchase price, should remain outstanding, being secured by a mortgage on the subjects of sale. So the hotel company on 12th October 1972 executed in favour of Hogan a Memorandum of Mortgage securing payment of $100,000, with interest at the rate of 9% per annum until payment, payable monthly, the principal sum being repayable on 12th October 1975. On the same date the appellant and her then husband, who were associated with the hotel company, executed in favour of Hogan a Deed of Guarantee of the debt. On 18th October 1973 Hogan assigned the mortgage to the respondent in this appeal. The due date for payment of the mortgage debt passed without such payment being made by the hotel company, and on 25th November 1975 it and the respondent entered into a Memorandum of Variation of the Mortgage. This provided that the rate of interest payable under the mortgage should be increased from 9% to 16% per annum as from 12th October 1975, and that the term of the mortgage should be extended to 12th October 1976. The appellant was not asked to and did not consent to this variation. Finally, on 25th March 1976 Hogan assigned to the respondent the benefit of the guarantee by the appellant and her husband.

It appears that the hotel company defaulted in the payment of interest under the mortgage as varied, and on 16th June 1976 the respondent commenced proceedings against the appellant and her husband in the

District Court at Sydney, claiming payment by them as guarantors of the sum of $8,583·31 by way of interest then due and unpaid by the hotel company. Default judgment was entered against the appellant's husband, but on 3rd February 1978 Judge Godfrey-Smith entered judgment for the appellant. He held that the variation of the terms of the mortgage, which was agreed to be a material one, had been entered into without the consent of the appellant as guarantor, that on a proper construction of the relevant conditions of the guarantee the variation was not such as might consistently therewith be entered into without her consent, and that accordingly its effect was to discharge the appellant's liability under the guarantee. The respondent appealed to the Supreme Court of New South Wales, and by Order dated 7th August 1979 the Court of Appeal (Street C.J., Samuels and Mahoney JJ.A.) set aside the order of Judge Godfrey-Smith and entered judgment against the present appellant for the sum of $8,583·31. Against that judgment the appellant now appeals to Her Majesty in Council.

It is common ground between the parties that the variation of the term of the mortgage effected by the Memorandum dated 25th November 1975 was a material one, and, if not authorised by some provision of the guarantee, of such a nature as to bring about the legal result of discharging the whole of the appellant's obligations thereunder. The provision of the guarantee upon which the respondent principally relies as having authorised the variation is clause 14. This provides, so far as material:

> "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 . . . . ."

The main argument for the respondent, which was accepted by the Court of Appeal, was that the transaction embodied in the Memorandum dated 25th November 1975 amounted in substance to a "further advance" within the meaning of this provision. It was pointed out that Clause 1 of the Guarantee provided that it was to be a continuing one, while Clause 5 contained reference to the guarantors' obligation to pay interest, in the event of failure by the borrower, not only on the principal sum but also on "any other moneys which may bear interest under the terms of the loan", and Clause 11 mentioned "any security or other document taken by the Lender". The position was the same, so it was maintained, as if the original principal sum had been repaid and re-advanced to the borrower.

In accepting this argument Mahoney J.A., whose opinion was concurred in by the other members of the Court of Appeal, said

> "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 been available to him. According to ordinary parlance, it would be proper to describe that money as having been 'advanced' for a further term."

In their Lordships' opinion that view is erroneous and the argument for the respondent is unsound. While the meaning of the word "advance" may be shaded somewhat by the context, it normally means the furnishing of money for some specified purpose. The furnishing need not necessarily be by way of loan, but clearly that is what was in contemplation here.

When Clause 14 refers to "a further advance" it appears to their Lordships to be referring to the furnishing of an additional principal sum. Where the term for repayment of the original principal sum is extended, it is true to say that that sum remains advanced for a further term, but it is a distortion of language to say that a further advance has been made. In reaching the conclusion which their Lordships have quoted Mahoney J.A. referred to a considerable number of decided cases. Their Lordships have examined these, but have not found any of them to support his conclusion, or indeed to be of any assistance at all for present purposes.

In considering the true substance and effect of the Memorandum dated 25th November 1975, it is important to keep in view the provisions of the first and second clauses of the mortgage. These are—

> "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 (9) per centum per annum as follows, namely—By equal monthly payments . . . . until the principal sum shall be fully paid and satisfied . . . . "

It is thus clearly agreed that the interest payable is to be at the rate of 9% per annum, however long the principal sum may be outstanding.

Under the Memorandum of 25th November 1975 it was agreed that the rate of interest was to be increased to 16% from 12th October 1975. That cannot be regarded as anything but an alteration of what was previously agreed, irrespective of the circumstance that at the same time the term of the mortgage was extended for one year. Their Lordships are unable to find anywhere in the provisions of the guarantee any indication of an intention that the guarantors should be required to undertake, without their specific consent, liability for such increased interest as mortgagor and mortgagee might subsequently agree upon.

The respondent relied upon the subsidiary argument that what was agreed by the Memorandum of 25th November 1975 was authorised by Clause 18 of the guarantee. This provided for the lender, without the consent of the guarantor, granting to the borrower time or "any other indulgence or consideration", without thereby affecting the liability of the guarantors. Their Lordships are of opinion that, while the agreement for the extension of the term of the mortgage might, if it stood alone, be authorised by this provision, the superadded agreement for an increased rate of interest goes beyond anything which was thereby contemplated. The granting of an indulgence to a debtor may have the effect of prejudicing the rights of the guarantor vis-à-vis the debtor, and accordingly, in the absence of a provision such as this one, it has the effect of releasing the guarantor from liability. The purpose and effect of the provision in question is merely to safeguard the creditor against that eventuality. It does not enable the debtor and creditor, by agreement between themselves, to require the guarantor to shoulder an added liability.

Their Lordships were referred upon this branch of the appeal to the Western Australia case of *Payton v. S.G. Brookes & Sons Pty. Ltd.* [1977] WAR 91. This decision, which might at first sight appear to be in point, turns out on closer examination not to be so. The granting of time to the debtor under a hire purchase agreement was there held to be covered by a provision similar to that presently under consideration, notwithstanding that the agreement entered into had the result of the debtor being required to pay additional sums by way of interest. That liability, however, arose

from a provision of the hire purchase agreement itself, regarding the payment of interest on overdue instalments, and did not flow directly from the later agreement granting time. The case is therefore distinguishable.

For these reasons their Lordships will humbly advise Her Majesty that the appeal should be allowed and the order of Judge Godfrey-Smith restored. The respondent will be liable for costs before this Board and in the Court of Appeal.

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# In the Privy Council

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**PAULINE BURNES**

*v.*

**TRADE CREDITS LIMITED**

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DELIVERED BY
LORD KEITH OF KINKEL

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