Judgment 8 of 1978

IN THE PRIVY COUNCIL No. 43 of 1977

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES, COMMON LAW DIVISION (COMMERCIAL LIST)

A BETWEEN:

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED (Plaintiff)
Appellant

- and -

PATRICK INTERMARINE ACCEPTANCES LIMITED (IN LIQUIDATION)

and GAVIN JOHN HOSKING (Defendants)
Respondents

B CASE FOR THE RESPONDENTS, PATRICK INTERMARINE ACCEPTANCES LIMITED (IN LIQUIDATION) and GAVIN JOHN HOSKING

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INTRODUCTION

1. This is an appeal from a judgment of the Supreme Court of New South Wales, delivered on 9th August 1976 by Mr.Justice C Sheppard sitting in the Common Law Division (Commercial List) of the Court. p.253

2. In the proceedings the appellant was plaintiff and the defendants were First Leasing and Finance Limited, First National Bank of Boston, State Electricity Commission of D Victoria, and the respondents, Patrick Intermarine Acceptances Limited and Gavin John Hosking (the liquidator of the last mentioned company).

3. In the proceedings the plaintiff sought relief by way of declarations and orders against the respondents as well as E against First Leasing and Finance Limited (hereinafter called "First Leasing") and First National Bank of Boston (hereinafter called "Boston Bank"). p.5

THE FACTS

4. The proceedings arose out of a transaction which occurred F in August 1973 pursuant to which the appellant on 16th August 1973 at the request of the respondent Patrick Intermarine p.100

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p.100 Acceptances Limited (hereinafter called "PIAL") issued an irrevocable letter of credit in favour of the State Electricity Commission of Victoria (hereinafter called "SECV") in the sum of $1,500,000 to secure a loan made on that date in that amount by SECV to PIAL. On the same date the amount of that loan was on lent by PIAL to First Leasing and that loan was secured by an irrevocable letter of credit which had previously been issued on p.96 14th August 1969 by Boston Bank at the request of First Leasing and which, for the purposes of the present transaction, was extended by Boston Bank so that it would remain in force up to and including 14th August 1975 and under which the beneficiary was p.101 specified as PIAL.

5. The arrangements between the parties which led up to the transaction the subject of the proceedings had their genesis in three transactions which were entered into between the parties in 1969. At that time the appellant, an Australian Bank, carried on the business of banking within Australia and had as one of its customers the stockbroking firm of Patrick & Company which, on 1st August, 1970, changed its name to Patrick Partners (hereinafter p73 Ll. 20-27 called "Patricks"). As well as carrying on the normal business of stockbrokers Patricks also carried on business as a merchant banker which involved the borrowing and lending of money. At all material times First Leasing was a company incorporated in the State of Victoria carrying on business within Australia as a p51 L4. financier. It was associated with Boston Bank which held a p89 Ll. 40-51 substantial proportion of its capital and which itself carried on p90 Ll. 1-2 the business of banking in the United States of America and elsewhere.

p90 L.10. 6. In the year 1969 First Leasing wished to borrow money for the purpose of its business and Patricks was prepared to lend it that money. Patricks had as the source of its funds SECV whichwas prepared to lend Patricks substantial sums of money upon the security of an irrevocable letter of credit issued by the appellant as Patrick's banker in favour of SECV. Equally, Patricks were prepared to on lend the funds borrowed by it from SECV to First Leasing upon the security of an irrevocable letter of credit issued by Boston Bank in favour of Patricks.

7. The first transaction was negotiated as between the appellant p.254 l.12 and Patricks by Mr. N.H. Blackett on behalf of the appellant and p 11 Ll. 4-11 Mr. T.W. Allen a member of the firm of Patricks. At all material times Mr. Blackett was the Assistant General Manager of the appellant and responsible for the supervision of the accounts maintained by Patricks with the appellant.

p11 Ll. 12-32
p.254 l.26 8. In March 1969 it was agreed by Mr. Blackett on behalf of the appellant and by Mr. Allen on behalf of Patricks that the appellant would issue in favour of SECV a letter of credit in p.254 l.28 return for the appellant receiving by way of security a letter of credit in its favour from Boston Bank. Mr. Blackett informed Mr. Allen that before the appellant would issue its letter of credit in favour of SECV it would require that the letter of credit from Boston Bank be established in its, the appellant's favour and that it would need to be in the nature of a "back to p11 L.28-32 back" letter of credit.

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9. On 28th March 1969 Boston Bank issued its Letter of Credit No. S-10971 in favour of Patricks and expressed to be for the account of First Leasing. This letter of credit was forwarded by Patricks to the appellant. On 9th April 1969 the appellant issued a letter of credit in favour of SECV in the sum of $500,000. Before the appellant would issue a letter of credit it required the appellant to complete and sign a form of requisition which was a standard printed bank form. The letter of credit dated 9th April 1969 was not issued by the appellant until such a form of requisition had been completed and signed by Patricks. This requisition form contemplated that the credit would be used in connection with transactions involving the sale and purchase of goods particularly where those transactions involved goods being imported or exported. The form of requisition utilised by the appellant as well as the form of the letters of credit actually issued by the appellant clearly contemplated such transaction. As at March 1969 it was not common in Australia to use letters of credit for the purposes for which the letter of credit was issued by the appellant in favour of SECV on 9th April 1969, that is, for the purpose of securing a loan to be made by SECV to Patricks. Although irrevocable letters of credit were and are commonly used in Australia in connection with transactions involving the sale and purchase of goods in which context the expressions "back to back" letters of credit and "matching" letters of credit have a well settled meaning both in legal and banking circles, their use to the knowledge of the appellant in 1969 for the purpose hereinbefore referred to was uncommon and not within the particular experience of Mr. Blackett who negotiated the subject transaction on behalf of the appellant.

p.157
p 159
p.160
p.94
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p.160
p 48 Ll. 8-15

10. Although Mr. Blackett had originally contemplated that the letter of credit to be issued by Boston Bank would be in favour of the appellant, the letter of credit in fact issued by Boston Bank was in favour of Patricks. In this regard, His Honour found that that letter of credit was not in the form which the appellant expected to take because the beneficiary was Patricks and not the appellant. Due to this fact there was added to the standard printed paragraphs of the form of requisition required by the appellant to be signed by Patricks prior to the issue by the appellant of its letter of credit in favour of SECV, a further paragraph J which was in the following terms :-

p 11 Ll. 29-31
p 45 Ll. 20-26
p.157
p 256 Ll. 20-23
p 256 Ll. 23-26
p.256 ll.20-30

"J. We undertake that in the event of drawing/s being made under this credit, we will immediately lodge with the Bank a draft and accompanying documents in terms of First National Bank of Boston, Boston, Letter of Credit No. S10971 for an amount not less than that required to meet the drawing/s under the credit requested in this requisition".

p 256 Ll. 27-31
p.94

This paragraph was added to the requisition form although the evidence did not make it clear whether it was added at the suggestion of Patricks or at the behest of the appellant. In either case, neither Mr. Blackett nor any other relevant

p 47 Ll. 6-13
p 75 Ll. 21-40
p 46 Ll. 2-7
p 50 Ll. 17-23

RECORD

officer of the appellant consulted either the appellant's external or internal solicitors either with a view to obtaining advice generally in relation to the proposed transaction (bearing in mind its unusual nature and the uncommon use to be made of irrevocable letters of credit) or with respect to the meaning or effect of the addition to the form of requisition of paragraph J for the purpose of ensuring that the appellant would be secured in the event of it being called upon by SECV to honour its obligations under the letter of credit proposed to be issued by it in favour of SECV.

p.94

11. Similar transactions of loan were entered into between the relevant parties in May and August 1969. In each case, the loan made by SECV to Patricks was secured by letter of credit issued by the appellant in favour of SECV and, similarly, the onlending of the relevant funds by Patricks to First Leasing was secured by an irrevocable letter of credit issued by Boston Bank in favour of Patricks. Again, in relation to each transaction, the appellant agreed to establish the necessary letter of credit in favour of SECV against what it termed a "back to back" letter of credit from Boston Bank and again, in each case, a form of requisition (including Paragraph J) was signed by Patricks at the request of the appellant prior to the issue by the latter of its letter of credit.

p.167
pp.96, 99
pp166, 167, 168
pp186, 187
pp189, 190
p.97
p47 Ll. 23-27
p175 Ll. 42-45
p97

12. On or about 1st August 1970, PIAL took over from Patricks the business previously carried on by it as a merchant banker. That business included the borrowing and lending of money as well as the transactions hereinbefore referred to entered into by Patricks with First Leasing and SECV. On 15th October 1971, PIAL opened an account with the appellant. In July 1973 the appellant agreed with PIAL to extend its letter of credit facility which it had theretofore granted to Patricks to similar transactions proposed to be entered into by PIAL. One of those transactions was the obtaining of a loan by PIAL from SECV of $1,500,000 and the onlending of that sum to First Leasing. This extension of the letter of credit facility was approved by the appellant on or about 10th August 1973 and thereafter on 16th August 1973 PIAL borrowed the sum of $1,500,000 from SECV which was secured by Letter of Credit No. LD1436 issued by the appellant in favour of SECV. On the same day PIAL on lent the sum of $1,500,000 to First Leasing. To secure this loan Boston Bank extended its Letter of Credit No. S-11085 issued in favour of Patricks on 15th August 1969 so that it would remain in force up to and including 15th August 1975 and further varied that letter of credit by naming PIAL beneficiary in lieu of Patricks. Prior to the issue on 15th August 1973 by the appellant of Letter of Credit No. LD 1436, the appellant's standard printed requisition form was signed on behalf of PIAL and that form of requisition included paragraph J. In accordance with the requisition the letter of credit issued by the appellant in favour of SECV provided that drafts drawn under the credit must be accompanied by a statement by SECV certifying that the draft amount represented the unpaid principal amount of the fixed loan to 14th August 1975 made by SECV to PIAL and that payment of the loan had been demanded and not received. PIAL was unable to repay the moneys which it owed to SECV on the due date (14th August 1975)

p12 Ll. 18-19
p26 Ll. 14-35
p26 Ll. 40-44
p.14
p.238
pp.100, 234
p236
pp101, 235
p.96
p.101
p.100
p.98

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whereupon SECV drew upon the appellant pursuant to the letter of credit and the appellant was compelled to pay to it the sum of $1,500,000. The respondent, Favin John Hosking, a partner of Price, Waterhouse & Co., Chartered Accountants, had, on 26th July 1975, been appointed provisional liquidator of PIAL, it being insolvent and that company was wound up and the respondent Hosking appointed liquidator on 15th December, 1975. p5 L.22-23

THE NATURE OF THE PROCEEDINGS

13. The appellant commenced the present proceedings on 7th August 1975, 8 days prior to the date upon which First Leasing was bound to repay to PIAL the sum of $1,500,000 borrowed by it from PIAL on 15th August 1973 and which was secured by Boston Bank's Letter of Credit No. S-11085. First Leasing had been and was at all material times ready, willing and able to make payment to PIAL of the said sum of $1,500,000 on the date due for repayment, 14th August 1975. The appellant sought declarations and orders the effect of which would be, if made, that First Leasing would pay to the appellant the sum of $1,500,000 owed by it to PIAL or, alternatively, the respondent Hosking would, as provisional liquidator of PIAL, be bound to pay the said sum to the appellant when received by him from First Leasing. p.96 p5 L1.28-51

THE FINDINGS OF FACT

14. The learned primary judge found the following, amongs other, facts:

(a) That the letters of credit issued by the appellant and Boston Bank were neither "matching" nor "back to back" in the sense in which the relevant senior officers of the appellant understood those expressions nor in the sense of the well settled meaning which the expression "back to back" letters of credit had both in legal and banking circles in relation to letters of credit utilised in transactions concerning the sale and purchase of goods; p.260 L1. 26-33 11.31-33

(b) That the reason for the conclusion referred to in (a) was that the beneficiaries of the letters of credit issued by Boston Bank were either Patricks or PIAL and not the appellant; p260 L1. 33-36 p.260 11.34-36

(c) That it was important to Patricks, and later PIAL, that it had security from First Leasing for the loan which was being made to that company and, as a consequence, the letters of credit issued by Boston Bank were intentionally issued in favour of Patricks, and later PIAL. It was the intended effect of the documents that Patricks and PIAL would, in the event of default by First Leasing, immediately have the ability to draw upon Boston Bank pursuant to the letters of credit issued by it; p 260 L1. 41-49 p.260 11.41-43 p.260 11.46-49

(d) That the problem that arose in the present proceedings was one which arose directly out of the consequences of the insolvency of PIAL, a possibility which no party had ever contemplated; p260 L1.50-51

RECORD

p260 L.51
p261 Ll. 1-2

(e) That the documentation entered into by the parties was designed to take care of the situation which would arise if First Leasing, for some reason, defaulted and nobody turned his or its mind to the possibility of financial failure on the part of PIAL;

p261 Ll. 8-11

(f) That what the parties had in mind when they entered into the various transactions was the possible failure by First Leasing to repay PIAL and the consequential failure of PIAL to meet its obligations to SECV arising only as a result of the failure of First Leasing to pay its indebtedness to PIAL;

p261 Ll. 11-13

(g) That it would be only in the events set forth in sub-paragraph (f) that the documents referred to in Boston Bank's letters of credit could or would come into existence for the purpose of the operation of paragraph J of the appellant's requisition form;

p261 Li. 14-17

(h) That there was no default or failure on the part of First Leasing to pay its indebtedness to PIAL as at all material times it was ready, willing and able to discharge that indebtedness.

THE SUBMISSIONS OF THE APPELLANT BEFORE SHEPPARD J.

p259 Ll. 29-50

p.35 l.26

15. The appellant contended in the course of its submissions before the learned primary judge that in reality PIAL acted in the subject transactions only as a broker or agent and not as a principal.

p.259 l.42 l.50

The contention was rejected by the learned judge and is not pursued before your Lordships' Board.

p261 Ll.27-31

16. The appellant made a number of submissions to the learned primary judge in support of its contention that it was entitled to receive from First Leasing or, alternatively, from the respondent, Hosking, the amount of First Leasing's indebtedness to PIAL. It first contended that a contractual relationship existed between the appellant on the one hand and PIAL, First Leasing and Boston Bank on the other whereby PIAL, First Leasing and Boston Bank were

p.261 ll.28-29

contractually bound to the appellant to act in concert to procure a drawing by PIAL on Boston Bank's letter of credit in such a manner as would procure the payment of the indebtedness of First Leasing or the amount payable pursuant to Boston Bank's letter of credit

p263 Ll.13-16
p.263 l.15 l.16

to the appellant or into PIAL's account maintained with the appellant. His Honour rejected this contention holding that the appellant accepted as sufficient for its purposes a letter of credit in which PIAL was the beneficiary which could only be drawn upon by PIAL if First Leasing defaulted in its obligations to

p263 Ll.16-21.

PIAL. His Honour so found notwithstanding the fact that the operation of paragraph J of the requisition form was conditioned upon default, not by First Leasing, but by PIAL to which was to be added the fact that PIAL had itself a real reason for wanting

p.263 ll.17-18

as security for the advance it was making to First Leasing a letter of credit in its favour in the absence of which its loan to First Leasing of $1,500,000 would be totally unsecured. No appeal is brought to your Lordships' Board against the rejection of this contention involving, as it does, a finding in favour of First Leasing and the Boston Bank.

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17. His Honour further rejected a submission on behalf of the appellant to the effect that there was an obligation on the part of First Leasing owed to the appellant to repay its indebtedness to PIAL into an account maintained by PIAL with the appellant and an obligation on the part of PIAL, again owed to the appellant, to accept such appayment as a discharge of the obligation owed to it by First Leasing. The rejection of this contention, involving as it does a finding in favour of First Leasing, is also not the subject of any submission before your Lordships' Board. p.264 ll. 3-8; ll.6-7 35

18. Before the primary judge the appellant further submitted that it had a proprietary interest in the sum of $1,500,000 owing by First Leasing to PIAL with the consequence that when that sum was repaid to PIAL by First Leasing, the former was in turn bound to pay it to the appellant. The basis for this submission was that the transaction between PIAL and the appellant proceeded on the assumption that a particular sum of money or fund was to be borrowed by PIAL from SECV and, in turn, lent by PIAL to First Leasing. That fund, so it was submitted, still existed, not in identifiable cash, but in the form of the moneys which First Leasing was ready, willing and able to repay to PAIL in discharge of its indebtedness. It was thus contended that the arrangement between the appellant and PIAL was such that the appellant had a proprietary or equitable interest in that fund. p 264 ll. 47-48 p.264 ll.47-51 p.265 ll.1-4 p 265 ll. 3-9

(a) by reason of the law relating to subrogation;

(b) by reason of the existence of a trust pursuant to which the moneys, when paid to PIAL, would be held on trust by it for the appellant; or

(c) by reason of the existence of an equitable assignment of the debt from PIAL to the appellant by way of charge.

19. In support of reason (a) above the appellant contended that the fund represented a security to which the appellant was entitled to have recourse pursuant to the doctrine of subrogation and it relied upon the decision of the House of Lords in Duncan Fox & Co. v. North & South Wales Bank (1880) L.R.6 App.Cas.1, that of Wynn-Parry J. in In re Miller, Gibb & Co. Limited (1957) 1 W.L.R. 703; (1957) 2 All E.R.266 and that of the Court of Appeal in Castellain v. Preston (1883) L.R. 11 Q.B.D. 380. The second of these decisions was also relied upon by the appellant in support of reason (b) above. The appellant relied upon the provisions of paragraphs C and J of the requisition form signed on behalf of PIAL prior to the issue on 16th August 1973 of Letter of Credit No. LD1436 in support of reason (c). In further support of these reasons and, in particular, of the contention that paragraph J of the requisition form constituted an equitable assignment to the appellant, by way of charge, of the indebtedness of First Leasing to PIAL, reliance was placed upon a number of cases of which in In re Warren (1938) 1 Ch.725 and In re Kent & Sussex Sawmills (1947) 1 Ch. 177 were examples. All these contentions were rejected by his Honour. p.265 ll.10-51 p.266 ll.1-22 p.267 ll.43-51 p.268 ll.30-47 pp 265-268

RECORD

20. The appellant finally contended that the respondents were bound, under the rule in Ex parte James: re Condon (1874) L.R. 9 Ch.609, to pay to the appellant the whole of the amount of
p270 l 10-15 $1,500,000 and interest to be paid by First Leasing to PIAL notwithstanding the fact that PIAL was insolvent and in liquidation. A
His Honour held that this rule had a limited operation and usually was only applicable where the liquidator or trustee in bankruptcy, as an officer of the Court, had been guilty of some
p.270 l.17 dishonourable or discreditable conduct, which was not alleged and of which there was no evidence in the present case. Accordingly, B
his Honour rejected this contention.

SUBMISSIONS OF THE RESPONDENTS ON THE APPEAL

21. The appellant's primary submission is that it had a proprietary or equitable interest in the fund comprising the debt owed by First Leasing to PIAL. This submission was supported firstly, by C
reference to the decision of the House of Lords in Duncan, Fox (supra), secondly, by reliance upon the provisions of paragraph C of the requisition form and, thirdly, by reference to the provisions of paragraph J of the requisition form.

22. The respondents submit that the decision of the House of D
Lords in Duncan, Fox is inapplicable to the facts of the present case for the following, amongst other, reasons :

(a) That the principles upon which their Lordships relied were those which had been developed in relation to the law of suretyship; E

(b) That those principles were applicable and only applicable to the three classes of cases referred to by Lord Selborne at p.11 of the report;

(c) That the first two of these classes related to contracts for suretyship, stricto sensu, and therefore had no application F
to the present case;

(d) That the third class of case which His Lordship described as that where

> "there is a primary and a secondary reliability of two persons for one and the same debt, the debt being, between G
> the two, that of one of those persons only, so that the other, if he should be compelled to pay it, would be entitled to reimbursement from the person by whom (as between the two) it ought to have ben paid"

was directly applicable to the relationship between the endorser, H
acceptor and holder of a bill of exchange in that -

(i) the acceptor has the primary whereas the endorser has the secondary liability for the one and the same debt constituted by the bill of exchange;

(ii) the debt being, as between acceptor and endorser, that of I
the acceptor only, the endorser, if he should be compelled to pay it, is entitled to reimbursement from the acceptor

being the person by whom, as between endorser and acceptor, the debt ought to have been paid;

(e) That the acceptor/endorser relationship is akin to that of principal/surety in that:

A (i) the acceptor is akin to the debtor, being the party principally liable;

(ii) the holder is akin to the creditor; and

(iii) the endorser is in essence a surety for the payment to the holder/creditor of the bill;

B (f) That the principle of subrogation whereby a surety is subrogated to whatever rights the creditor may have against the debtor, including his right to have recourse to any securities held by the creditor over the property of the debtor to secure his debt, is also applicable to the third class of case to which Lord C Selborne referred and into which fell the rights of an endorser against an acceptor of a bill of exchange;

(g) That in the present case the principle would be applicable only insofar as the appellant (surety/endorser) is liable to pay SECV (creditor/holder) in which case it would be entitled D to seek reimbursement from PIAL (debtor/acceptor) and to have recourse to any security held by SECV (creditor/holder) to secure repayment by PIAL (debtor/acceptor);

(h) That in the present case no such securities were held by PIAL to which the appellant could have recourse in accordance with E the relevant principle, for it was SECV and not First Leasing who was in the analagous position of a creditor/holder; as a consequence First Leasing is not and cannot be included in the tripartite arrangement which is the underlying basis of the third class to which Lord Selborne refers. To put the matter F another way, the only two persons who have a primary and secondary liability for the one and the same debt (in this case, the debt due to SECV) is PIAL (who had the primary liability) and the appellant (who had the secondary liability) and, accordingly, First Leasing simply does not fit into this G relationship;

(i) That there is nothing in their Lordships' speeches which would warrant the extension of the subject principle other than in respect of the three classes of cases to which Lord Selborne refers at p.11 of the report.

H 23. The respondents further submit that altough the general principles of equity upon which the decision of their Lordships in Duncan, Fox (supra) is based and which are further referred to in the passage cited by his Honour in the present case from Sheldon on Subrogation (1882) at p.10, would entitle the I appellant to reimbursement from PIAL in respect of the amount paid by appellant to SECV pursuant to the former's letter of credit and otherwise to have the benefit of and recourse to any securities held by SECV, the chose in action or fund constituted by the indebtedness of First Leasing to PIAL does not itself

p 265 cl 43-51
p 266 cl 1-10

constitute a relevant form of security as it is not one to which SECV itself could have had recourse. The discharge by the appellant of the indebtedness of PIAL to SECV may well have operated not only as a discharge of PIAL's indebtedness to SECV but also as an assignment of that indebtedness to the appellant thereby subrogating the appellant to the position of SECV; but as the latter had no direct or indirect right to receive the moneys owing by First Leasing to PIAL, the appellant can stand in no higher position than the party in whose shoes it now stands.

24. The respondents further submit that the principle laid down in Castellain v. Preston (supra) and applied by Wynn-Parry J. in In re Miller, Gibb & Co. Limited (supra) has no application to the present case for the following amongst other, reasons :

(a) That Castellain v. Preston (supra) is not an illustration of the application of the doctrine of subrogation. It is really a case of double payment: British Traders Insurance Company Limited v. Monson (1964) 111 C.L.R. 86 at 94-95;

(b) That like Castellain v. Preston, In re Miller, Gibb & Co. Limited (supra) is also a case of double payment, for the company had in that case received from the Exports Credits Gurantee Department of the Board of Trade 90% of the purchase price and it later received the same amount through its bankers. Wynn-Parry J. held that the Department, as a result of the payment made by it to the company in 1953, became subrogated to the rights of the company and would have been entitled to require the company, if it had later received the relevant sum, to have repaid it. His Lordship went further than merely applying the doctrine of suborgation and held that the moneys to be received by the company were impressed with a trust in favour of the Board of Trade. In the present case no question of double payment was involved and the position would only be analagous to that in In re Miller, Gibb & Co. Limited if SECV, after it had been paid out by the appellant, had received from PIAL or from any other source the amount of PIAL's indebtedness to it, in which case the amount so received would have been impressed with a trust in favour of the appellant;

(c) That although the appellant was entitled to look to PIAL for payment it was not, in the words of the learned trial judge

p.267 ll.34-37

> "in the absence of some contractual provision, entitled to have PIAL treated as a trustee of moneys it will receive in repayment of an indebtedness owed to PIAL in respect of an entirely separate, although commercially related, transaction";

(d) That as the present case is not one involving double payment there is no basis upon which either the moneys received by PIAL from First Leasing in discharge of the latter's indebtedness to the former or the chose in action constituted by that indebtedness can be impressed with a trust in the appellant's favour.

p 98 25. The respondents submit that the provisions of paragraph C of the requisition form do not support the contention of the

appellant that it has a proprietary or equitable interest in the fund constituted by the debt owing by First Leasing to PIAL for the following, amongst other, reasons:

(a) That paragraphs C has no application to the subject transaction as its language clearly indicates that the letter of credit to be issued by the appellant pursuant to the requisition form will be issued in connection with a transaction involving the sale of goods;

(b) That the terms of paragraph C can only operate as to a transaction involving a sale of goods, and cannot be construed upon the basis that the word "loan" be substituted for the word "goods" and that the word "charge" be substituted for the word "pledge";

(c) That even if the word "loan" be substituted for the word "goods" such a construction will not avail the appellant unless the "loan" referred to is the loan by PIAL to First Leasing. Moreover, the only "loan" referred to in the requisition form is that mentioned in the early part of the form as "unpaid principal of loan made to" PIAL, and this refers not to the loan made by PIAL to First Leasing (upon which the appellant must rely) but to the loan made to PIAL by SECV;

(d) That to read not only the words "goods" and "pledge" in paragraph C as "loan" and "charge" respectively but also the word "loan" as referring not to the "loan" specifically mentioned in the requisition form but to a "loan" which is unspecified therein, namely, the loan from PIAL to First Leasing, would be tantamount to an unwarranted rewriting of the provision;

(e) That neither the decision of the House of Lords in Adamastos Shipping Co. v. Anglo-Saxon Petroleum Company, 1959, A.C.133, nor any other authority warrants or justifies such a construction simply for the purpose of rendering the provisions of a standard printed clause such as paragraph C applicable to a transaction which was not contemplated by its draftsman and which is entirely foreign to the words actually employed;

(f) That the appellant itself selected for the purpose of the subject transaction a standard printed form which was inappropriate for the purpose for which it was sought to use it and, accordingly, the appellant cannot now be seen to complain that its own lack of care should be corrected by a process of construction which would amount to a rewriting of the provision.

26. The respondents further submit that paragraph J of the requisition form does not support the appellant's said contention for the following, amongst other, reasons: p 98

(a) That the provisions of paragraph J in the requisition form are to be construed in the context of the terms and conditions of the contract between the appellant

and PIAL of which paragraph J forms part;

p99

(b) That the terms of that contract are to be found in the requisition form and in the letter of credit issued by the appellant to SECV on 15th August 1973 pursuant to the said requisition;

(c) That for the appellant to succeed it would be necessary for paragraph J to be construed as constituting an equitable assignment by PIAL to the appellant of First Leasing's indebtedness to PIAL, such equitable assignment being by way of charge;

p47 Ll. 6-13
p75 Ll. 21-41
p94
p48 Ll. 19-27
p130

(d) That paragraph J was inserted at the request of and as a requirement of the appellant and, as a matter of probability, was drafted by an officer of the appellant. In these circumstances the respondents rely on the contra proferentum: Burton v. English (1883) 12 Q.B.D.218 at 220; J. Fenwick & Co. Pty. Limited v. Federal Steam Navigation Co. Limited (1944) 44 S.R. (N.S.W.) 1 at 5; Upper Hunter County District Council v. Australian Chilling and Freezing Co. Limited (1968-1969) 118 C.L.R. 429 at 436-7;

(e) That the insertion of paragraph J was designed to bring together the letters of credit issued by both the appellant and Boston Bank so as to meet the contingency which might arise where First Leasing defaulted in the repayment of its loan from PIAL, thus depriving PIAL of an immediate source of funds to enable it to repay its indebtedness to SECV. In these circumstances the appellant would be called upon by SECV to pay under the terms of its letter of credit and would thus wish to be placed in a situation where it could immediately reimburse itself by ensuring that there was available to it for that purpose a secure source of funds, namely, the funds which would be payable by Boston Bank under its letter of credit operable only upon First Leasing's default.

(f) Alternatively, that a similar situation may have arisen where SECV required PIAL to repay the whole of the loan prior to the due date in circumstances which would then entitle PIAL to demand early repayment from First Leasing. Such a demand might temporarily embarrass First Leasing so that neither PIAL nor First Leasing would have been able to meet the demands respectively made upon them thus causing SECV to draw under its letter of credit from the appellant. In such an event paragraph J would ensure to the appellant that PIAL activated its letter of credit from Boston Bank;

(g) That paragraph J postulates not only non-payment by PIAL to SECV but also non-payment by First Leasing to PIAL: it assumes that PIAL has not repaid SECV because First Leasing has not repaid PIAL. In such circumstances the appellant would be concerned to ensure that the machinery for getting in from Boston Bank the amount of First Leasing's indebtedness to PIAL was, where the appellant itself had been obliged to PAY SECV under its own letter of credit, in

its hands and under its control as distinct from that of PIAL;

(h) That the appellant was the advising banker in relation to Boston Bank's letter of credit and in that capacity of agency would pay out under that letter of credit. In those circumstances the appellant would have recourse against Boston Bank as the issuing banker where, as its agent, it had honoured its principal's letter of credit. However, in order to have such a right of recourse the appellant would be bound to comply with all the conditions precedent contained in the letter of credit issued by Boston Bank. As a consequence thereof it would be important to the appellant to ensure not only that its customer, PIAL, had the machinery for recouping itself in the event of First Leasing defaulting but also that its rights as against Boston Bank were properly secured: cf. Gutteridge & McGrath, "The Law of Banker's Commercial Credits", 4th Ed. pp.65-66. It thus follows that it would be equally important to the appellant, where it was called upon to honour Boston Bank's letter of credit in the event of First Leasing defaulting, for it to have in its possession and power the relevant documentation which would thereupon entitle PIAL to draw down on Boston Bank's letter of credit; p66 ll. 13-33

(i) That it is to the foregoing circumstances that paragraph J was directed. It did not by its terms, nor could it by implication, be construed as having any application or relevance to the chose in action constituted by First Leasing's indebtedness to PIAL. Nor could it be construed as in any way constituting, either expressly or by necessary implication, an equitable assignment by PIAL of that indebtedness to the appellant by way of charge or otherwise. Certainly, paragraph J does not constitute an assignment by PIAL to the appellant of its interest as beneficiary under Boston Bank's letter of credit. For there to have been such an assignment it would have been necessary for the letter of credit to have complied with Article 46 of the Uniform Customs and Practice for Documentary Credits (1962 Revision), Boston Bank's letter of credit was expressly subject thereto. p73 ll. 13-15 & p76

27. The respondents further submit that the only "security" which the appellant sought from PIAL in respect of the subject transaction was the obtaining by PIAL from Boston Bank of a letter of credit in its, PIAL's, favour securing repayment to PIAL of the loan made by it to First Leasing. In other words, the appellant wished to ensure that in the event that it was called upon under the letter of credit issued by it in favour of SECV to pay the whole or any part of the indebtedness of PIAL to SECV, there would be a secure source of funds available to ensure repayment to PIAL of the indebtedness of First Leasing and that secure source was to be found in Boston Bank's "back to back" or "matching" letter of credit. However, such a "security" could avail the appellant only in the event that First Leasing failed to repay its indebtedness to PIAL on the due date or otherwise evinced an intention to default. As there was no such failure by First Leasing the conditions upon which either PIAL or the appellant could call upon Boston Bank under its letter of

credit did not arise. Accordingly, the appellant must find its "security" elsewhere than in Boston Bank's letter of credit. In particular, that "security" must be found in an assignment by PIAL to the appellant of the chose in action constituted by the indebtedness of First Leasing to PIAL. Unless such an assignment can be found in paragraph J then no evidence exists to support it. However, as already submitted, paragraph J is operative only in the event of default on the part of First Leasing, an event which has never occurred. It is submitted therefore that paragraph J does not nor was it ever intended to operate in respect of the fund constituted by the debt due by First Leasing to PIAL. The principles relating to equitable assignments which are found in the cases such as In re Warren (1938) 1 Ch.725 and In re Kent & Sussex Sawmills (1947) 1 Ch.177, illustrate that the Court construes with some strictness words in documents which are relied upon to constitute an equitable assignment by way of charge. The Court will not construe a provision in a document as constituting an assignment or an agreement to assign unless, inter alia, the provision relied upon reveals a manifest and unequivocal intention on the part of the parties thereto that such should be the effect of their bargain.

28. The appellant contends that his Honour ought to have held that PIAL and its liquidator, Gavin John Hosking, were bound, pursuant to the rule in Ex parte Jmaes: re Condon (1874) L.R.9 Ch. 609, to pay to the appellant the whole amount of $1,500,000 and interest paid or to be paid by First Leasing to PIAL notwithstanding the fact that PIAL was at all material times insolvent and in liquidation. The respondents submit that the said rule or principle has no application to the present case for the following, amongst other, reasons :

(a) That the cases where the so-called rule in Ex parte James has been applied by the courts are cases where there would be, either on the part of the bankrupt or the company in liquidation, or the trustee in bankruptcy or the liquidator, or both, as the case may be, some element of fraud, dishonesty or improper conduct; p.270 l.17

(b) That such element of fraud, dishonesty or improper conduct must be referable to the bankruptcy or liquidation so that it would be wrong or inequitable for the unsecured creditors of the bankrupt or company to reap the benefit therefrom;

(c) That the money or property acquired by the debtor or by his trustee in bankruptcy or liquidator must have been so acquired, whether by operation of law or otherwise, by "unworthy means" so that it would be dishonourable of the debtor or his trustee in bankruptcy or liquidator to utilise the money for the purpose of paying his or its unsecured creditors: In re Thellusson (1919) 2 K.B. 735 at 764;

(d) That the rule is to be applied only in exceptional cases, and not where, as in the present case, the liquidator of PIAL has not been personally concerned in the subject transactions. In the present case no element of fraud, dishonesty or improper

conduct was alleged by the appellant. Nor is there any evidence to support any imputation thereof;

(e) That the mere fact that the moneys due by First Leasing to PIAL would, but for the intervention of the insolvency and liquidation of PIAL, have, in the normal course of events, been utilised by PIAL to indemnify the appellant in respect of the moneys paid by it to SECV pursuant to its letter of credit is no reason for avoiding the normal consequence of such insolvency and liquidation in so far as those moneys now fall into the possession of the liquidator of PIAL, thereby increasing the assets available to the general unsecured creditors of that company: Downs Distributing Company Pty. Limited v. Associated Blue Star Stores Pty. Limited (In Liquidation) (1948) 76 C.L.R. 463 at 481-4;

(f) That the so-called rule in Ex parte James is, at the very most, only applicable to those cases where the money or property in question would never have been paid or transferred by the creditor to the bankrupt or insolvent company, or where the transaction would never have been entered into if the creditor or the party otherwise seeking to rely upon the rule had had knowledge of the impending bankruptcy or liquidation, as the case may be. As there was no question in August 1973 of any impending insolvency on the part of PIAL, the rule has no application to the present case;

(g) That (i) even if it had been the intention of the appellant and PIAL at the time the relevant transaction was entered into in August 1973 that moneys received by PIAL from First Leasing would be paid by PIAL either direct to SECV (in discharge of its debt) or to the appellant (where the latter had been called upon to pay SECV under its letter of credit) and

(ii) even though that intention may have been frustrated by the intervention of the liquidation of PIAL,

thus entitling the liquidator to receive the moneys due by First Leasing to PIAL for the benefit of the unsecured creditors such a consequence is common with respect to the position of any person to whom money is owed by a company and who unexpectedly finds himself in the position of an unsecured creditor in the winding up of that company in circumstances where, at the time when the original transaction was entered into between the creditor and the company, the insolvency of the latter was not within the contemplation of the former. The appellant is in no different position in the present case from the ordinary unsecured creditor referred to and cannot avail itself of the rule in Ex parte James simply because the intentions of the parties may have been frustrated by operation of law brought about by the supervening liquidation of PIAL;

(h) That the respondent Hosking, as liquidator of PIAL, seeks in the present case to receive from First Leasing the moneys admittedly due and owing by First Leasing to PIAL. In

RECORD

seeking to pay those moneys First Leasing is doing no more than honouring its contractual obligations arising out of the events that occurred in August 1973 and which have no nexus with the subsequent insolvency and consequent liquidation of PIAL;

p46 ll. 6-7
p50 ll. 17-23

(i) That in the present case the appellant did not see fit, despite its undoubted resources so to do, to seek legal advice either from within or without its own corporate structure. Nor did it otherwise see fit to take appropriate steps to secure its position. Further, despite the substantial contingent liability which the appellant undertook by issuing its letter of credit in favour of SECV at the request of PIAL, it charged and was paid by PIAL a commission for its services which, as was found by his Honour, was not minimal. In these circumstances, the respondents submit that the concluding words of Williams J. in Downs Distributing Company Pty. Limited v. Australian Blue Star Stores Pty. Limited (supra) at p.484 are apposite :

p47 ll. 48-49
p48 ll. 8-15

p49 ll. 23-51
p270 ll. 20-22
p50 ll. 1-7
p67 ll. 13-24

> "A person who sells his goods on credit without security has only himself to thank if he finds himself an unsecured creditor on the bankruptcy of his debtor: Re Gozzett (supra) If, as in the present case, he takes a security too late, he cannot complain of any hardship caused by the operation of the bankruptcy law: In re Hall (1907) 1 K.B.875; In re Wigzell (supra)".

(j) That for the foregoing reasons the appellant cannot now seek, where due to its own lack of care or foresight it is the author of its own misfortune, to rely upon the rule in Ex parte James.

29. The respondents respectfully submit that the appeal herein should be dismissed for the following, amongs other

R E A S O N S

(1) BECAUSE the appellant has no valid claim to or upon the fund constituted by the debt owed by First Leasing to PIAL whether by way of charge, equitable assignment or otherwise;

(2) BECAUSE the appellant does not have any proprietary or other interest in or claim to the said fund.

J.S. LOCKHART

M.H. TOBIAS

No. 43 of 1977

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES, COMMON LAW DIVISION (COMMERCIAL LIST)

BETWEEN :

THE COMMERCIAL BANKING COMPANY OF SYDNEY LIMITED (Plaintiff)

Appellant

- and -

PATRICK INTERMARINE ACCEPTANCES LIMITED (IN LIQUIDATION)

and GAVIN JOHN HOSKING (Defendants)

Respondents

CASE FOR THE RESPONDENTS, PATRICK INTERMARINE ACCEPTANCES LIMITED (IN LIQUIDATION) and GAVIN JOHN HOSKING

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