IN THE SUPREME COURT OF QUEENSLAND No. 784 of 1977

FULL COURT

BEFORE:

The Chief Justice

Mr. Justice W.B. Campbell

Mr. Justice Matthews

BRISBANE, 10 DECEMBER 1979

BETWEEN:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (Plaintiff) Respondent

- and -

ASSOCIATED SECURITIES FINANCE LIMITED (Defendant) Appellant

JUDGMENT

THE CHIEF JUSTICE: In my opinion this appeal should be dismissed with costs. I agree with the reasons prepared by my brother Matthews.

MR. JUSTICE W.B. CAMPBELL: In my opinion the appeal should be dismissed with costs. I too agree with the reasons prepared by my brother Matthews.

MR. JUSTICE MATTHEWS: I publish my reasons.

THE CHIEF JUSTICE: The Court orders that the amount of $200 paid into Court as security for costs in the appeal be paid out to the solicitors for the respondent.

IN THE SUPREME COURT OF QUEENSLAND — No. 784 of 1977

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED — (Plaintiff) Respondent

V.

ASSOCIATED SECURITIES FINANCE LIMITED — Appellant

Wanstall C.J.

W.B. Campbell J.

Matthews J.

Judgment delivered by Matthews J. on the 10th December 1979 with the Chief Justice and W.B. Campbell J. concurring with those reasons.

"APPEAL IS DISMISSED WITH COSTS"

IN THE SUPREME COURT OF QUEENSLAND — No. 784 of 1977

BETWEEN:

AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED — (Plaintiff) Respondent

AND:

ASSOCIATED SECURITIES FINANCE LIMITED (Defendant) Appellant

JUDGMENT - MATTHEWS J.

Argument on this appeal and as presented at the trial to Connolly J., proceeded on the basis that it was necessary for the respondent to prove that the parties, by their agents, had made an oral agreement. This agreement centred upon the desire of the parties to save a company H.C. Marwood Holdings Pty. Ltd. (which traded under the name of Marwood Motors) from liquidation; the appellant as part of the agreement was, on security of first mortgage over property which persons interested in that company owned, to lend a sum of $95,000.00 to the company, and the essential part of the relevant oral agreement was that the appellant would have priority to the extent of $95,000.00 only as against a second mortgage over the same property which the respondent was proposing to take to secure an overdraft limit of $35,000.00 which it would grant to the company.

There is no doubt a wealth of evidence to support His Honour's findings of fact in respect of the oral term, or "common understanding of the parties" as His Honour referred to it. Such findings were made necessary by the way in which the action was conducted on behalf of the parties.

On the 15th February 1974, they had executed a deed (which bears date 26th February 1974 in the copy Ex. 9) which read:—

> "THIS DEED made the 26th day of February One thousand nine hundred and seventy-four BETWEEN AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED a company duly incorporated in the United Kingdom registered in Queensland as a foreign company and carrying on business at amongst other places 702 Sandgate Road "Clayfield Brisbane in the said State (hereinafter called 'the second mortgagee') of the

one part AND ASSOCIATED SECURITIES FINANCE LIMITED a company duly incorporated in the State of New South Wales registered in Queensland as a foreign company and carrying on business at 95 North Quay Brisbane aforesaid (hereinafter called 'the first mortgagee') of the other part WHEREAS HERBERT CARL MARWOOD (hereinafter called 'the mortgagor') is indebted to ASSOCIATED SECURITIES LIMITED inter alia under Bill of Mortgage No. D789748 in the sum of approximately TEN THOUSAND THREE HUNDRED AND SIXTY NINE DOLLARS ($10,369.00) AND WHEREAS the mortgagor is indebted to LOMBARD AUSTRALIA LIMITED under Bill of Mortgage no in the sum of approximately TWENTY FOUR THOUSAND ONE HUNDRED AND TWENTY NINE DOLLARS ($24,129.00) AND WHEREAS H.C. MARWOOD HOLDING PTY. LTD. (hereinafter called 'the debtor') is indebted to the second mortgagee in the sum of approximately FIFTY THOUSAND DOLLARS ($50,000.00) AND WHEREAS the second mortgagee is desirous of reducing its said debt to THIRTY FIVE THOUSAND DOLLARS ($35,000.00) and obtaining security therefor by way of a second mortgage over the parcels of land described in the schedule hereto AND WHEREAS to such end the second mortgagee has requested the first mortgagee to lend and advance moneys to the mortgagor to enable the mortgagor to reduce the debt of the debtor to the second mortgagee to THIRTY FIVE THOUSAND DOLLARS ($35,000.00) AND WHEREAS the first mortgagee has agreed to lend and advance moneys, to the mortgagor to enable the mortgagor to discharge its indebtedness to ASSOCIATED SECURITIES LIMITED under its existing said Bill of Mortgage to LOMBARD AUSTRALIA LIMITED under its existing said Bill of Mortgage and reduce the indebtedness of the debtor to the second mortgagee to the sum of THIRTY FIVE THOUSAND DOLLARS ($35,000.00) upon the condition inter alia that the second mortgagee enters into these presents WITNESSETH and the parties hereto do hereby covenant with each other as follows:

1. The first mortgagee shall lend and advance to the mortgagor the sum of NINETY FIVE THOUSAND DOLLARS ($95,000.00) to enable the mortgagor to discharge its indebtedness to ASSOCIATED SECURITIES LIMITED and LOMBARD AUSTRALIA LIMITED and reduce the indebtedness of the debtor to the second mortgagee to the sum of THIRTY FIVE THOUSAND DOLLARS ($35,000.00) upon the security of a first Bill of Mortgage over the three parcels of land described in the schedule hereto;

2. The second mortgagee shall obtain from the mortgagor a registerable Bill of Mortgage in form acceptable to the second mortgagee to secure overdraft facilities in favour of the debtor to the limit of THIRTY FIVE THOUSAND DOLLARS ($35,000.00);

3. The first mortgagee shall consent to the registration of a second Bill of Mortgage by the mortgagor in favour of the second mortgagee in accordance with paragraph 2 hereof and produce at the Office of the Registrar of Titles the relevant Certificate of Title to enable such second Bill of Mortgage to be registered.

4. The second mortgagee shall not frustrate or attempt to frustrate the registration of a first Bill of Mortgage over the parcels of land described in the schedule hereto executed by the mortgagor in favour of the mortgagee.

5. The second mortgagee shall not lend and advance to the debtor any further sum or sums of money in excess of the overdraft facility limit of THIRTY FIVE THOUSAND DOLLARS ($33,000.00) hereinbefore referred to and shall not by equitable mortgagee's Caveat or otherwise attempt to encumber the parcels of land described in the schedule hereto during the continuance of the first Bill of Mortgage."

I have set out the terms of the deed because from it relevant facts emerge; but the common understanding to which I have referred was reached in the course of conversations, particularly one on the 22nd January 1974, between an agent of the respondent and one who was treated, quite rightly, in my opinion, by His Honour as the agent of the appellant. The deed was described by His Honour as being consistent with the contract of the parties as His Honour found it save, as His Honour said, "That it does not refer to the third mortgages and it does not provide in terms that the first mortgages were to have priority over the plaintiff's mortgages to the extent of $95,000.00 and no more". In this passage the reference to mortgages is made because in each case two mortgages were taken, one from each of the persons who owned the relevant land. The

reference to third mortgages is made because on the 15th February 1974 when the appellant presented the deed to the respondent it also delivered a letter (ex. 15) which read as follows:—

> "We confirm our authority to allow the Australia and New Zealand Banking Group Limited to register a second Mortgage behind our First Mortgage in relation to the following properties:
>
> 1. Register Book Volume 3121 Folio 126, County of Stanley, Parish of Enoggera being Subdivision 1 of Allotment 5 on Plan Catalogue 18381 and containing 12.8 perches.
>
> 2. Register Book Volume 3546, Folio 31, County of Stanley, Parish of North Brisbane being Resub-divisions 1 and 2 of Subdivisions 1 and 2 of Resubdivision 2 and of Subdivisions 1 and 2 of Resubdivision 1 of Subdivisions 11 and 12 and of Resubdivision B of Subdivision 13 of Eastern Suburban Allotment 33 on Registered Plan 99694 containing 30.4 perches.
>
> 3. Register Book Volume 4382 Folio 65, County of Stanley, Parish of Enoggera being Subdivisions 1 and 2 of Resubdivision 2 and Subdivisions 2 and 3 and Resubdivisions 3 and 4 of Subdivision 3 of Portion 149 containing 1 rood, 4.4 perches.
>
> As was agreed, it is expressly understood that the Australia and New Zealand Banking Group Limited will limit their second Mortgage to a maximum, amount of $35,000.00. Any variation to this figure must be negotiated with the First Mortgagee and their prior approval in writing obtained.
>
> It is also especially understood that the Australia and New Zealand Banking Group Limited agrees that Associated Securities Finance Limited intend taking a collateral Third Mortgage over the abovementioned "properties in order to secure floor plan advances made from time to time to the Mortgagor, its assigns subsidiaries existing or to be formed in the future."

On the same day the respondent took mortgages to secure the $95,000.00 to which I have referred and the mortgages contained by clause 19 of them provided:—

> " The land and premises hereby mortgaged shall be and remain a security for and stand charged with the payment to the mortgagee and shall not be in anywise redeemed or redeemable until payment to the mortgagee of not only the principal sum but also interest and all such other sums of money as shall from time to time be owing by the mortgagor to the mortgagee on any account whatsoever and whether the payment thereof shall be otherwise secured or not and notwithstanding that the time for payment of such moneys or of some part or parts thereof shall not have arrived. These presents and all securities collateral herewith shall be deemed a running and continuing security or continuing securities and notwithstanding that at any time no moneys may be owing by the mortgagor to the mortgagee and notwithstanding any settlement of account or any other matter or thing whatsoever these presents shall remain in full force and effect until a final discharge thereof shall have been executed by the mortgagee."

This clause became relevant because at the time, and thereafter, the appellant was owed considerable sums in excess of the $95,000.00 lent by it, and claimed, pursuant to its mortgages, to be entitled when the company did go into liquidation, to sell for its own benefit the lands which comprised its security, because it was owed in excess of the value of those lands. In other words, it did not accept that its mortgages had priority to the extent of but $95,000.00 as against the second mortgages of the respondent.

If it be accepted that the deed did not provide for this limited priority for the appellant's first mortgages, it is necessary to consider on what basis the oral term of 22nd January 1974 could be admitted to qualify the right which otherwise accrued in favour of the appellant from the terms of the first mortgages considered as security for debts other than and by way of addition to the $95,000.00. Unfortunately, in this behalf, there was apparently, some

misunderstanding between His Honour and counsel for the appellant for it is asserted by Mr. McPherson Q.C. who appeared for the appellant (and in this he is supported by counsel for the respondent) that it was not conceded by him that the rules against the admission of parol evidence would not be offended by the reception of oral evidence that the first mortgages would have priority over the respondent's mortgages, limited to the sum of $95,000.00.

I have referred to clause 19 in the mortgages which purports to extend the scope of the security afforded by them and accept for present purposes that the clause does indeed do this.

To deal with the matter I have attempted to summarise arguments for and against the admission of the relevant oral evidence. Generally stated of course, the rule is that parol testimony cannot be received to contradict, vary, add to or subtract from the terms of a written contract or the terms in which parties have deliberately agreed to record a part of the contract. The evidence in question was not admissible to aid construction of the deed although it would be admissible in a suit for rectification (Cambridge Credit Corporation Ltd. -v- Lombard Australia Ltd. (1976-77) 136 C.L.R. 608) and there is a presumption that where the parties have reduced to writing what has been the subject of prior negotiations the writing contains the whole agreement. This presumption may be displaced by strong evidence in that behalf but if a term has been reduced to writing even though the contract be partly oral and partly in writing, parol evidence will not be admitted to vary or contradict the written term (Hoyts Proprietary Limited -v- Spencer (1919) 27. C.L.R. 133 per Isaacs J. at p. 144). The respondent relies on a passage in Cheshire and Fifoot Law of Contract 3rd Aust. Edn. p. 119 which, in referring to the presumption which I have already mentioned, says of it "but this presumption though strong is not irrebuttable. In each case the court must decide whether the parties have or have not reduced their agreement to the precise terms of an all embracing written

formula. If they have, oral evidence will not be admitted to vary or contradict it; if they have not, the writing is but part of the contract and must be set side by side with the complementary oral terms." With respect, the submission for the respondent based on these words neglects the difficulty which arises in a case such as the instant one in which the oral term is to be used to vary or subtract from the written term in the deed.

Even alleged as a collateral contract or condition, (which in this case it is not) the relevant oral term is not admissible to defeat a written agreement Roberts -v- Calvert (1937) S.R. Qld. 12. Support for the respondent is sought in Gillespie Brothers & Co. -v- Cheyne Eggar & Co. (1896) 2 Q.B. 59 in which Lord Russell of Killowen C.J. said:—

> "In the first place, although when the parties arrive at a definite written contract the implication or presumption is very strong that such contract is intended to contain all the terms of their bargain, it is a presumption only, and it is open to either of the parties to allege that there was, in addition to what appears in the written agreement, an antecedent express stipulation not intended by the parties to be excluded, but intended to continue in force with the express written agreement."

But His Lordship's remarks cannot, with respect, be taken to mean that evidence of such an express stipulation is admissible if it varies or adds to a term or terms of the written contract (see Hoyts Theatres etc. (supra)). In Jacobs -v- Batavia and General Plantations Trust, Ltd. (1924) 1 Ch. 287 at p. 296 P.O. Lawrence J in referring to admissible verbal agreements said this:—

> "In Morgan v. Griffith L.R. 6 Ex. 70 and Erskine v. Adeane L.R. 8 Ch. 856 it was held that evidence was, however, admissible to prove a verbal collateral agreement made in consideration of one of the parties, executing a deed under seal, provided that such verbal agreement did not add to, vary or contradict the terms of the deed itself. These cases are sometimes said to form an exception to the rule referred to, but in truth they

> are outside the mischief aimed at and are not in conflict with the rule. The foundation on which the decisions in those cases rests is that the verbal agreement is strictly collateral to the written instrument in the sense that it is independent of and does not in any way add to, vary or contradict any of the terms contained in such instrument."

By the action as framed the respondent claimed alternative declarations all designed to limit the rights of the appellant pursuant to Its first mortgages so as to exclude the operation of cl. 19 to which I have referred. His Honour made a declaration whereby the appellant's first mortgages were given but limited priority over the respondent's second mortgages and in respect of that declaration the argument for the appellant may be summarised by quoting ground 5 of its notice of appeal -

> "That the learned Primary Judge erred in failing to find that the various mortgage documents executed on the fifteenth day of February, 1974, together "with the deed executed on or about the same date (exhibit 9), together with the letter from the defendant to the plaintiff dated the fifteenth day of February 1974 (exhibit 15) constituted the entire agreement between the plaintiff and the defendant;"

If I were satisfied that the assertions of the appellant as set out in this ground of appeal were correct, I think that the appellant would be entitled to succeed on the appeal because the conversations between the agents of the respective parties would not be, in my view, admissible to answer the propositions inherent in that ground of appeal, but in my opinion it is unnecessary to resort to these conversations to arrive at the same conclusion as was reached by His Honour. The mortgages were not, so far as their terms were concerned, part of the contract between the appellant and the respondent and upon the proper construction of the deed itself and particularly cl. 1 of it, I think that the limited extent to which the appellant's first mortgages would have priority is made plain, and on this view there is no occasion for application of the parol evidence rule. To arrive at this

conclusion it is necessary to look at some further facts as were found by His Honour and which were not disputed on the appeal because those facts as background to the deed may be used to throw light upon the construction of it. They seem to me to be of importance. At all material times both parties were concerned about the solvency of the company and either of them could have taken steps to bring about the collapse of it. The respondent knew of the first mortgage which then existed in respect of a debt to a company associated with the appellant and the appellant knew of other securities which existed and particularly of a mortgage held by the respondent. The three properties which made up the relevant security had been valued to the knowledge of the parties in the sum of $130,000.00 and this, of course, was the sum of the $95,000.00 which was to be lent by the appellant and the $35,000.00 which could be advanced by the respondent and indeed explains how one, at least of those sums was decided upon.

Bearing these matters in mind, it seems to me that when the parties agreed by their deed that, the appellant should take security for $95,000.00 they were both accepting that it would take security for that sum and no more, and in entering into mortgages in the form of the subject mortgages the appellant acted in breach of the covenant.

For these reasons I think that the appeal should be dismissed.