HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND CALLINAN JJ

PAN FOODS COMPANY IMPORTERS
& DISTRIBUTORS PTY LTD & ORS APPELLANTS

AND

AUSTRALIA AND NEW ZEALAND BANKING
GROUP LIMITED & ORS RESPONDENTS

Pan Foods Company Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Limited [2000] HCA 20
13 April 2000
M25/1999

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation:

H C Berkeley QC with M J Colbran QC and K P Hanscombe for the appellants (instructed by GSM Lawyers)

J H Karkar QC and W A Harris for the respondents (instructed by Freehill Hollingdale & Page)

CATCHWORDS

Pan Foods Company Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Limited

Mortgage – Construction of terms – Mortgage agreement provided that event of default occurred if bank formed opinion that circumstances had arisen which had material adverse effect on business, assets and financial condition of borrower and ability of borrower to perform its obligations to the bank – Formation of requisite opinion – Declaration that moneys owing were immediately due and payable – Notice demanding payment – Validity of notice.

Mortgage – Debenture – Default – Power in mortgage to appoint receiver after moneys became payable – Validity of appointment – Mortgage and loan agreements each specifying circumstances in which moneys became payable – No inconsistency between mortgage and loan agreements.

1 GLEESON CJ, McHUGH AND HAYNE JJ. The central issue in this appeal is whether the respondent bank was entitled to appoint a receiver and manager to the assets and undertaking of the first appellant ("Pan Foods").

2 The facts, including the relevant provisions of the General Conditions, and of the debenture, are set out in the judgment of Callinan J.

3 Although the arguments of the parties, in this Court and in the Supreme Court of Victoria, addressed numerous questions said to have been thrown up by the documents in force at various times, we agree with Callinan J that the appeal can be determined, relatively simply, upon the basis adopted by Winneke P in the Court of Appeal.

4 An Event of Default, within the meaning of 10.1(j) of the General Conditions, occurred. When Pan Foods' facilities came up for review in 1994, an investigating accountant was appointed to report to the bank. It became obvious that Pan Foods was incurring large losses. The bank officer in charge of the account told his superiors that the company was performing "disastrously". The accountant expressed the opinion that, if the bank enforced its security, there would be a substantial shortfall. The evidence makes it plain that circumstances had arisen which, in the opinion of the bank, had a material adverse effect on the business, assets, and financial condition of Pan Foods and on its ability to perform its obligations to the bank. It was submitted that there was no specific evidence of the formation of such an opinion. In truth, on the information before the bank, no other opinion was reasonably available, and what was said and done by the officers of the bank makes it clear that they held such an opinion.

5 That entitled the bank, under General Condition 11.1(e) to declare (ie to communicate to its customer an expression of its will) that the moneys owing by the customer were immediately due and payable. It did this by giving a notice demanding payment.

6 The notice was given under General Condition 15.3. The notice was in writing, and was delivered by Mr Bew, who was an Authorised Representative. Having regard to the terms of 15.3, the fact that it was signed by the bank's solicitor, rather than Mr Bew, was immaterial.

7 That having been done, the bank was entitled, by virtue of cl 19 of the debenture, to appoint a receiver. It did so. The language of cl 19 is clear. The power to appoint a receiver arose "[a]t any time after the moneys … secured (became) payable." No intermediate step was required.

8 Some confusion seems to have arisen in argument because there were other provisions pursuant to which the bank might also have been, or considered itself, entitled to act. This is not unusual. Lenders may wear both belt and braces. When the bank appointed a receiver, it was entitled to rely on all powers which

enabled it to do so. The facts of the case, and the terms of the notice given, fitted within contractual provisions empowering the bank to appoint a receiver. The appointment was effective.

9 The appeal should be dismissed with costs.

10 KIRBY J. This appeal from orders of the Court of Appeal of Victoria[1] illustrates the principle to be applied in the construction of commercial documents comprising agreements for loan. As the reasons of the other members of this Court demonstrate, the documents in question in the appeal are those agreed to by a large banking corporation ("the Bank") in relation to the extension of substantial financial credit to the other party, a commercial corporation ("the company") engaged in business with a view to profit for its shareholders. Although the Bank took personal guarantees from, and mortgages over lands belonging to, the directors of the company, it is the loan documents that are in question in the appeal, not the personal guarantees.

The construction of commercial agreements

11 The special rule which the law has applied to the construction of contracts of suretyship has a peculiar historical basis. The surety has traditionally been a specially favoured debtor[2]. Contractual stipulations imposing legal liabilities on sureties have long been construed *strictissimi juris*[3]. Many a surety has escaped apparent legal obligations by invoking this rule of construction – often without being able to point to the slightest substantive merit. Initially, this approach of the English law was derived from cases of personal, family and other uncompensated guarantees. In the United States of America, it was at first followed. However, by the latter half of the nineteenth century the courts of that country, with appropriate rationality, began to devise a more discerning principle for the new commercial forms of suretyship to which the market economy had given rise[4]. The United States Supreme Court sanctioned this development of the law in *Chapman v Hoage, Deputy Commissioner, District of Columbia Compensation District*[5]. It is now well established in the United States.

12 In Australia, the courts have continued to follow the old law, despite the fact that the foundation for it has largely changed[6]. A rule devised by judges to

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1 *Australia and New Zealand Banking Group Ltd v Pan Foods Company Importers and Distributors Pty Ltd* [1999] 1 VR 29.

2 Holdsworth, *A History of English Law*, 3rd ed (1945), vol 5 at 298.

3 *Rees v Berrington* (1795) 2 Ves Jun 540 at 543 [30 ER 765 at 767].

4 The way the change came about is described in Stearns and Elder, *The Law of Suretyship*, 5th ed (1951) at 89-92; Arnold, "The Compensated Surety", (1926) 26 *Columbia Law Review* 171; Jaeger, *Williston on Contracts*, 3rd ed (1957), vol 10 at §1213.

5 296 US 526 at 530-531 (1936) per Stone J for the Court.

6 eg *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 256.

relieve volunteers in a family situation against personal obligations that they have undertaken for relatives and friends, for no benefit or reward save blood or affection, was extended unquestioningly to commercial contracts of suretyship entered between business enterprises for hoped commercial gain. In the New South Wales Court of Appeal I rejected this misapplication of legal doctrine: *Tricontinental Corporation Ltd v HDFI Ltd*[7]. However, I was in a minority. The majority felt that the authority of this Court, including in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd*[8], required a continuance of the strict approach to surety contracts generally.

13 In *Tricontinental*, Samuels JA even appeared to express a broader proposition that conditions precedent in contractual obligations must always be strictly complied with[9]. With respect, I could never agree with such a sweeping generalisation. I remain of the view that I expressed in *Tricontinental*. Although that view has been criticised[10], I am "quite impenitent"[11]. The outcome in *Tricontinental*, by which commercial liability of $13.85 million was avoided because of a wholly technical and minor error in a demand on a compensated surety, stands as an indictment, in my respectful view, of the old law as applied in a business setting[12]. The mistake made in that case was irrelevant to the merits and inconsequential. No prejudice to the surety was proved[13]. Substantially, a notice required by the agreement between the parties was sent to the wrong address[14]. When the law has such disproportionate consequences, it deserves the strongest condemnation and confinement.

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7 (1990) 21 NSWLR 689 at 696-697.

8 (1987) 162 CLR 549 at 555-556.

9 (1990) 21 NSWLR 689 at 705.

10 Gava, "The Perils of Judicial Activism: the Contracts Jurisprudence of Justice Michael Kirby", (1999) 15 *Journal of Contract Law* 156 at 164-167. See also Ben-Shahar, "The Tentative Case Against Flexibility in Commercial Law", (1999) 66 *University of Chicago Law Review* 781; Charny, "The New Formalism in Contract", (1999) 66 *University of Chicago Law Review* 842.

11 The words used in *W N Hillas and Co Ltd v Arcos Ltd* (1931) 36 Com Cas 353 at 368 per Scrutton LJ.

12 (1990) 21 NSWLR 689 at 700.

13 (1990) 21 NSWLR 689 at 699-700.

14 (1990) 21 NSWLR 689 at 692.

14 This appeal is not the occasion for the reconsideration of all of the matters debated in *Tricontinental*. But it is an occasion to restrain any attempt to push the strict approach adopted in that case (and other cases) beyond contracts of suretyship into ordinary loan agreements between financiers and business enterprises operating for profit. Whatever might be the approach suitable to agreements between other parties for other purposes, those of the commercial kind must be approached "fairly and broadly, without being too astute or subtle in finding defects"[15].

15 When such an approach is applied to the loan agreement between the Bank and the company here, there can be but one outcome, in my view, to the construction of the clause of the General Conditions of the Bank (cl 11.1(e)) by which the Bank declared that the moneys owing by the company or its customer were immediately due and payable and the clause (cl 15.3) by which notice was then given to the company.

The contractual requirement to give notice to the customer

16 Take cl 15.3 as an illustration of the contentions in issue in this appeal. The full terms of cl 15 are set out in the reasons of Callinan J. The essential words state:

> "15.3 Unless otherwise stated for the purposes of any particular provisions in the Agreement, a notice from the Bank to the Customer must be given by an Authorised Representative, in writing…"

17 The relevant facts were undisputed. The officer of the Bank with responsibility for the company's account, Mr Bew, instructed the Bank's solicitors to prepare the necessary notice. On 15 June 1994, with the document which the solicitors had prepared, Mr Bew attended at the company's premises with a colleague who was also an officer of the Bank, working under him. They there met the company's directors. Of course, those persons knew who Mr Bew was, that he was from the Bank, and that he was on a mission sufficiently serious to occasion his personal attendance. He gave evidence (which was not rejected) that he told those present that "… in view of the circumstances or the changed

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15 *Hillas & Co Ltd v Arcos Ltd* [1932] All ER 494 at 503 per Lord Wright approved *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109-110; cf *Upper Hunter County District Council v Australian Chilling & Freezing Co Ltd* (1968) 118 CLR 429 at 437; *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] AC 191 at 201.

circumstances of the company that the bank required immediate repayment of the full amount due to the bank, that was the effect of the serving of the demand."[16]

18 Mr and Mrs Kapobassis, directors of the company, acknowledged that Mr Bew "served" the notice of demand on them[17]. Yet it is said that, for the purposes of cl 15.3, the notice was not "given" to the company. True, it was in writing. True, there was no contest that Mr Bew was an "Authorised Representative" of the Bank. True also, the notice was handed to the company's officeholders at the company's premises with an oral explanation of its purposes. What basis then could be suggested to avoid the operation of cl 15?

19 Two arguments were advanced. The first was that the notice did not contain Mr Bew's name or signature or, on its face, authorise him to "give" it to the company on behalf of the Bank. This contention rested on an assumption that such an express reference to Mr Bew was necessary. Nothing in the General Conditions say so. It is enough that the notice should be "from the Bank". As Winneke P pointed out in the Court of Appeal, where the General Conditions required the document to be "signed" or "certified" in a particular way, they said so[18].

20 The second argument persuaded the primary judge (Hansen J)[19] and one judge in the Court of Appeal (Buchanan JA)[20]. It was that the notice was not that of the Bank at all, but of its solicitors. Thus the notice was "from the" solicitors for the Bank, not from the Bank. Mr Bew was thus no more than a messenger of the solicitors' notice.

21 It is true that potentially serious consequences for the company, its shareholders, employees, creditors and customers flowed from the giving of the notice. The Bank was substantially in charge of its own documentation, including the General Conditions and notices. Few customers would have the power effectively to demand from the Bank a modification of such documents. The requirements of the General Conditions would therefore have to be complied with, in the sense that events would have to occur which fairly answered to the description of a contested clause. But in a commercial setting, and in the context

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16 [1999] 1 VR 29 at 57.

17 [1999] 1 VR 29 at 57.

18 [1999] 1 VR 29 at 37.

19 *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* (1996) 14 ACLC 698 at 707-708.

20 [1999] 1 VR 29 at 57.

of the other provisions of cl 15.3 and of the General Conditions applicable to the case, it is impossible to deny that this notice sufficiently complied with cl 15.3.

22 The General Conditions did not forbid the execution of the notice by the solicitors on behalf of the Bank. They did not require execution of the notice in any particular way or by any particular person for the Bank. The purport of the notice was clear enough on its face. The contemplation in cl 15.3(c) that a notice might be given for the Bank by telex denies any general requirement of a particular formality in the execution or signature of an instrument answering to the description of a "notice". And whatever defects might arguably arise from the typed form of the notice, the presence of Mr Bew and his colleague from the Bank, and the words expressed when the notice was handed over, made it clear beyond doubt that the form proffered was a "notice from the Bank". The act of handing it over amounted to giving the required notice for this purpose.

The agreement should be construed practically, not strictly

23 The arguments of the company (and the directors supporting it) represent nothing less than an attempt to import into the construction of cl 15.3 the same strict approach which has produced such artificialities in the case of commercial agreements with compensated sureties with which I began these reasons. It will be clear that I would not favour such an approach. That is why this appeal ultimately turns on the way in which the commercial documents between the Bank and the company should be construed.

24 In my view, such documents should be construed practically, so as to give effect to their presumed commercial purposes and so as not to defeat the achievement of such purposes by an excessively narrow and artificially restricted construction. The law facilitates and upholds commercial contractual obligations and the expectations that derive from them. Statute and equity may sometimes come to the aid of parties where various forms of unfairness or inequality can be shown. None was invoked in this appeal. But as between a commercial enterprise and a finance provider, such as a bank, the law should be the upholder of agreements. It should eschew artificialities and excessive technicalities for these will not be imputed to the ordinary businessperson. Business is entitled to look to the law to keep people to their commercial promises. In a world of global finances and transborder capital markets, those jurisdictions flourish which do so. Those jurisdictions which do not soon become known. They pay a price in terms of the availability and costs of capital necessary as a consequence of the uncertainties of the enforcement of agreements in their courts[21].

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21 On the need for certainty and regulation, see Mosley, "Risks in financing infrastructure projects", in Weerasooria (ed), *Perspectives on Banking, Finance and Credit Law*, (1999) at 69-82; Read, "Uniform law for international loans: A

(Footnote continues on next page)

25 Who could doubt that a reasonably informed businessperson, looking at the notice in this case, and how and by whom it was handed to the company, would conclude that it was "a notice from the Bank to the Customer … given by an Authorised Representative, in writing"? If this is so, for the law to come to a contrary conclusion it would need to have substantial, persuasive and practical reasons. In this case, there are none.

Conclusion: the notice was effective

26 On the other matters in the appeal that it is necessary to decide in the light of the foregoing conclusion, I agree with the other members of the Court. The notice being effective and the other antecedent conditions being satisfied, it follows that the Bank was entitled by virtue of cl 19 of the debenture to appoint a receiver. The Court of Appeal was correct to so hold. In consequence, the appeal should be dismissed with costs.

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new solution?" in Weerasooria (ed), *Perspectives on Banking, Finance and Credit Law*, (1999) at 241-260.

CALLINAN J.

Facts

27 The first-named appellant ("Pan") carried on business as an importer of processed food. The other appellants, Mr and Mrs Kapobassis and Mr and Mrs Theodoropoulos, were directors of, and shareholders in Pan.

28 From 1988 the ANZ Banking Group Ltd ("the Bank") provided finance to Pan for business purposes by way of loans at fixed and variable rates. In 1988 and 1989 and until 1994, the indebtedness was secured by a debenture in favour of the Bank over the assets and undertaking of Pan, a mortgage over land owned by Pan, and personal guarantees and mortgages over lands given by the directors.

29 The loans were first provided by the Bank in about April 1991 to Pan by way of a foreign currency loan (Non-Trade) in the sum of $562,000, a foreign currency loan (Trade) in the sum of $398,000, and commercial bills to the value of $220,000. An attempt by the appellants to establish at the trial that the duration of the facilities was five years was eventually abandoned.

30 By letter dated 11 March 1993 the Bank made the following offer to Pan:

> "The Bank is pleased to offer to the Customer the continuing availability of each Existing Facility as a Facility subject to the terms set out in this Letter of Offer, the General Conditions for Business Banking and the Specific Conditions for each Facility (where applicable) as at the date of this Letter of Offer (together the '**Agreement**')."

31 The letter described each of the facilities. It stated that $1,690,000 would be the limit of the borrowings. A term of each facility was that the termination date would be 28 February 1994, subject to annual review.

32 Clause 10 of the letter required that the Bank be provided with quarterly management data outlining sales, cost of goods sold, profit, ageing debtors and creditors, stock levels, and a full audit of stock and debtors on a yearly basis.

33 The offer was accepted by Pan.

34 The General Conditions referred to in the letter dated 11 March 1993 began with the words:

> "These General Conditions are to be read with the Letter of Offer and the Specific Conditions for each Facility, all of which, if the Letter of Offer is accepted, constitute an agreement (the 'Agreement') between the Bank and the Customer. If there is any inconsistency between the Letter of Offer and

the General Conditions or the Specific Conditions, the Letter of Offer prevails."

35 Some other General Conditions are relevant:

"5.1 On each Facility Reduction Date for a Facility the Customer shall ensure that the Principal Outstanding under that Facility is reduced so that it does not exceed the amount which is specified in the Letter of Offer as the Facility Limit for that Facility Reduction Date.

5.2 On the Termination Date for a Facility, the Customer shall repay or pay to the Bank the Principal Outstanding in respect of that Facility, together with any unpaid interest and fees and all other amounts then outstanding but unpaid in relation to that Facility under the Agreement and each other Transaction Document. On the last Termination Date for any of the Facilities the Customer shall pay to the Bank, in addition to any other amount payable on that day, all other amounts outstanding but unpaid under the Agreement and each other Transaction Document.

…

10.1 Each of the following, unless waived by the Bank under general condition 16.3, is an Event of Default:

…

(j) ([M]aterial adverse effect) [I]f an event occurs or circumstances arise which, in the opinion of the Bank may have a material adverse effect on the business, assets or financial condition of the Customer, or a Relevant Company or on the ability of the Customer or a Surety to perform its obligations under any Transaction Document …"

36 The material parts of cl 11 provided:

"**11. TERMINATION, EARLY TERMINATION OR AMENDMENT**

11.1 The Bank may:

(a) upon conducting an Annual Review or a Periodic Review (to the satisfaction of the Bank), by 30 days' notice effective on or after the relevant Annual Review Date or Periodic Review Date (as the case may be); or

(b) if an Event of Default has occurred and has not been remedied, by notice to the Customer,

do any of the following:

(c) …

(d) terminate its obligations under the Agreement;

(e) declare that the Principal Outstanding on that day and all accrued but unpaid interest and fees and all other moneys actually or contingently owing or to become owing by the Customer under or in respect of any or all of the Facilities (other than a Lease Finance Facility or a Foreign Currency Dealing Facility) are due and payable, in which case that Principal Outstanding and the relevant interest, fees and other moneys will be immediately due and payable by the Customer; and

(f) …

11.2 If, for the purposes of general condition 11.1(f), the Bank gives notice to the Customer in the form of a Variation Letter, then, unless the Customer accepts the letter in the manner provided, within 30 days after the date of the letter (or such longer time as the Bank allows by notice to the Customer), the Bank's obligations terminate immediately and the Principal Outstanding under all Facilities and all other moneys actually or contingently payable are immediately due and payable as if the Bank had given a notice in accordance with General Condition 11.1(c), (d) and (e), effective in respect of all the Facilities, on the expiry of that 30 day period.

11.3 The Customer indemnifies the Bank in respect of, and shall pay to the Bank on demand all costs and losses (including, without limitation, legal fees on a full indemnity basis) which the Bank may incur in connection with the occurrence of an Event of Default or any action taken under General Condition 11.1(d), (e) or (f) including, without limitation, any amount which the Bank determines is required to compensate it for cost incurred as a result of premature payment of Principal Outstanding at any time or failure to roll any Bill (taking into account any benefit which (in the opinion of the Bank) will accrue to it as a result of the premature payment or failure to roll the Bill)."

37 Clause 15.3 of the General Conditions was in the following terms:

"15.3 Unless otherwise stated for the purposes of any particular provisions in the Agreement, a notice from the Bank to the Customer must be given by an Authorised Representative, in writing and is treated as having been given and received:

(a) if delivered to the Customer's address to which the Letter of Offer is addressed (or whatever other address is specified by the Customer by written notice to the Bank), when delivered;

(b) if sent by the Bank to the Customer by pre-paid mail, on the third Business Day after posting; and

(c) if transmitted by telex to the Customer's telex number in the Letter of Offer (or whatever other telex number is specified by the Customer by written notice to the Bank) and the Customer's answerback is received, on the day of transmission if a Business Day, otherwise on the next following Business Day."

38 It is also necessary to refer to cll 18(q) and 19 of the debenture:

"18. The moneys hereby secured shall at the option of the Bank (notwithstanding anything hereinbefore contained) immediately become due and payable and the security hereby created shall immediately become enforceable without the necessity for any demand or notice (and notwithstanding any delay or previous waiver of the provisions of this Clause by the Bank) upon the happening of any one or more of the following events:

…

(q) if the Mortgagor is carrying on business at a loss and in the opinion of any officer of the Bank further prosecution by the Mortgagor of its business will endanger this security;

…

19. At any time after the moneys hereby secured become payable the Bank by notice in writing signed by any officer of the Bank may appoint any qualified person to be a Receiver of the mortgaged premises or any part thereof and may remove any Receiver and appoint another Receiver in his place and may fix the remuneration of any such Receiver and determine the conditions upon which he shall hold office PROVIDED ALWAYS that every such Receiver shall be the agent of the Mortgagor and the Mortgagor alone shall be

> responsible for his acts and defaults and such Receiver so appointed shall without any consent on the part of the Mortgagor have [various] power[s]."

39 There then followed a collection of powers of the kind conventionally conferred upon receivers, including powers of dealing extensively with the mortgaged property. They need not be reproduced here.

40 Carson & McLellan a firm of accountants (of whom the third respondent was a partner) engaged by the Bank provided two reports to it. In the first, dated 16 May 1994, they expressed the opinion that as the business was then structured, "Pan Foods would probably continue to trade at a loss of about $200,000 per annum … ." The accountants recommended no further loans to Pan, and added, that, unless the management of the company agreed to provide "a viable restructuring programme" within a month, the Bank should "enforce its security to protect its position". In their second report, dated 3 June 1994, the accountants wrote:

> "1.1 The directors are unable to make any significant alteration to the structure of the business that would enable it to become profitable.
>
> 1.2 The company will continue to make significant losses in the next twelve months and will require further funding from the ANZ of around $550,000 to continue operation.
>
> 1.3 The ANZ has no option but to enforce its security by appointing a Receiver and Manager. A Receiver would commence a programme for winding down the business and realising the company's assets. It is proposed that this would be done with the assistance of the directors."

41 On 15 June 1994 Mr Trevor Bew, a manager of the Bank (whose responsibility it was to supervise the Pan account), on its behalf personally delivered to four of its directors a notice stating:

> "**TAKE NOTICE** that **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED ACN 005 357 522** of 100 Queen Street, Melbourne ("the Bank") **HEREBY DEMANDS** payment of the several sums of money, indebtedness and liabilities in or for which the persons listed in the Second Schedule ("the Customers") are indebted and liable to the Bank (particulars of which indebtedness and liabilities are referred to in the Second Schedule) and which you have covenanted and agreed to pay under or by virtue of one or more of the documents referred to in the Third Schedule.
>
> **TAKE FURTHER NOTICE** that if you do not pay or satisfy the indebtedness and liabilities referred to in the Second Schedule by 10 am on

> 16th June 1994 the Bank may without further notice to you institute proceedings for the recovery of the said indebtedness and liabilities or exercise rights, powers and remedies conferred on the Bank by one or more of the documents referred to in the Third Schedule or both exercise such rights powers and remedies and institute such proceedings.
>
> …
>
> DATED the 14th day of June 1994."

42 At the foot of the notice were written the words "Freehill Hollingdale & Page" above the same words in typescript, followed by the words "Solicitors for Australia and New Zealand Banking Group Limited".

43 Pan was unable to comply with this demand.

44 A request by Mrs Kapobassis on 15 June 1994 to give the company a respite of six months to deal with the demand was refused by Mr Bew. On the following day he did however agree to defer the appointment of a receiver to give the directors an opportunity to sell Pan's business to a competitor, Delta.

45 The third respondent (Mr McLellan) who was the author of the reports provided by Carson & McLellan and the person whom the Bank intended to appoint as receiver of Pan, discussed with the directors of Pan the prospect of a sale to the competitor. He afterwards reported to Mr Bew that it was unlikely that there could be a sale for some time, and, on 28 June 1994 the Bank appointed Mr McLellan as receiver and manager of the assets and undertaking of Pan pursuant to the debenture. By September 1994 Mr McLellan had sold all of the assets of Pan. There was a shortfall between the proceeds of those sales and the total indebtedness of Pan.

46 These proceedings were brought in an attempt to forestall the respondent Bank's enforcement of the mortgages over the personal appellants' residences. The proceedings were brought in the Supreme Court of Victoria against the Bank and the accountants claiming damages on a number of bases, including breach of contract, trespass and conversion. The appellants alleged that the respondent Bank was not entitled to appoint a receiver and that any steps taken by him were not validly taken. They also sought an injunction to restrain the sale of the guarantors' lands which had been mortgaged to the Bank.

47 In this appeal, this Court is not concerned with the claims that were also made against the accountants, in negligence, trespass and for breach of s 11 of the *Fair Trading Act* 1985 (Vic).

48 Central to the claim against the Bank were three matters: the proper construction of the contractual documents; whether the notice of demand was valid; and, whether the Bank was entitled to appoint a receiver.

49 The trial judge, Hansen J[22], found for the appellant directors. His Honour held that on a proper construction of the facilities agreement entered into between Pan and the Bank, the Bank was not entitled to terminate the agreement and demand repayment of money outstanding under the facilities in the absence of default, without giving 30 days' notice in accordance with cl 11.1(a) of the General Conditions. In so far as cl 5.2 of those conditions might suggest the contrary, it had to give way, his Honour held, to the specific terms in the letter of offer. Further, his Honour held, that in any event the notice dated 14 June 1994 and signed by the Bank's solicitors, was not "given" by an "Authorised Representative" of the bank as required by cl 15.3 of the General Conditions.

50 Another holding of his Honour, that the appellants had not waived, nor were they estopped from contending, that the receiver had been invalidly appointed by remaining silent and co-operating with the receiver in the sale of Pan's assets, need not, for reasons which will appear, be considered by this Court.

51 The Court of Appeal (Winneke P, Kenny and Buchanan JJA) allowed an appeal by the Bank to that court.[23]

52 Because I am in substantial agreement with Winneke P I will set out some portions of the reasons for judgment of his Honour in respect of the issues which were resolved in favour of the Bank, and were sufficient to dispose of the appeal to the Court of Appeal. His Honour said:[24]

> " … I am, like Kenny JA, unable to agree with the trial judge's conclusion that the notice dated 14 June 1994 was not 'given by an authorized representative of the bank' in accordance with cl 15.3 of the general conditions. It was common ground that this notice was prepared by the bank's solicitors upon the instructions of Mr Bew and it was not contended otherwise than that, at the relevant time, Mr Bew was an 'authorized representative' of the bank. That notice was handed to the directors of Pan at the company's premises on 15 June. In those circumstances, and

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22 *Pan Foods Company Importers and Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd* [1996] 14 ACLC 698.

23 *Australia and New Zealand Banking Group Ltd v Pan Foods Company Importers and Distributors Pty Ltd* [1999] 1 VR 29.

24 [1999] 1 VR 29 at 37-38.

> assuming that a notice under cl 11.1 (b) was required to be 'given' in accordance with cl 15.3, I am unable to see why this notice was not 'a notice from the Bank to the Customer ... given by an Authorised Representative in writing'. It cannot cease to be a notice 'from the Bank' simply because it had been prepared and signed by the bank's solicitors as 'solicitors for the ANZ bank'. It was the judge's view that the word 'given' in cl 15.3 was not to be equated with 'service' but means that the authorised representative must either 'sign' the notice or 'otherwise duly authenticate' it. I am unsure what his Honour meant in this sense by the words 'duly authenticating' the notice but in my view the fact that Bew handed the document over to the company's directors as the bank's document can only mean that he was providing authenticity to the document as the bank's document. It was clearly not necessary, in order to comply with cl 15.3, for the 'authorized representative' to sign the document because cl 15.3 contemplated that such a notice may be transmitted by telex.
>
> It is significant, as Mr Karkar contended, that cl 15.3 does not specifically require the notice to be 'signed' or 'certified' by the bank when other clauses of the general conditions descend to such requirements: see, eg, subcll 9 (iii) [sic] and (iv). For my own part I cannot see why the word 'given' in the body of cl 15.3 cannot comprehend the physical handing over of the document, particularly when the subclause treats a document 'as having been given and received' when there has been no physical handover. In my view the word 'given' should be ascribed its natural and ordinary meaning. In this respect I respectfully agree with the reasons given by Kenny JA.
>
> Because the learned trial judge appears to have rested content upon his conclusion that the notice of 14 June 1994 was not 'given' in accordance with cl 15.3 of the general conditions, it seems to me that he has not made a conclusion upon the other matter raised by the respondents at trial; namely that the notice was not one within the meaning of cl 11.1(b) because it did not contain the 'declaration' required by cl 11.1(e). Clause 11, quite apart from contemplating the circumstances in which the bank may terminate or vary an existing facility following conduct of an 'annual review', also contemplates the 'early termination' of such an agreement by notice to the 'Customer' if an 'event of default' has occurred and not been remedied."

53 His Honour then set out the relevant parts of cl 11.1(b) of the General Conditions and continued:[25]

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25 [1999] 1 VR 29 at 38.

"This clause picks up the 'events of default' which are prescribed in cl 10.1. Relevantly, that clause prescribes an 'event of default' as including:

> '(j) (material adverse effect) if an event occurs or circumstances arise which, in the opinion of the bank, may have a material adverse effect on the business, assets or financial condition of the Customer ... or on the ability of the Customer ... to perform its obligations under any Transaction Document.'

By cl 19 'Transaction Document' included:

> 'the Letter of Offer, these General Conditions, the Specific Conditions for each Facility and each other document contemplated by or required in connection with the Agreement ... .'

As I have already stated, it was one of the bank's contentions at trial that an event of default had occurred in accordance with cl 10.1(j) when the bank received the 'disastrous' trading results for Pan for the March 1994 quarter and the subsequent information which it received from the accountant. It contended that the notice which it gave to the directors was a notice pursuant to cl 11.1(b) and (e) and that such notice was duly given pursuant to cl 15.3. Because his Honour found that the notice was not 'given' in accordance with cl 15.3 (a conclusion with which I respectfully disagree), he does not appear to have determined this issue, and in particular, the contention by the respondents that the notice did not satisfy the requirements of cl 11.1(e). I say that his Honour does not appear to have decided these issues …"

54 The President agreed with Kenny JA that "given" in cl 15.3 of the General Conditions meant "physically handed over" which is its "natural and ordinary meaning"[26]. Buchanan JA was of a different mind and agreed with the trial judge on this point[27].

55 It is convenient at this point to refer to the reasons of Kenny JA with respect to the question whether the Bank had proved an Event of Default as specified in cl 10.1(j) of the General Conditions. Her Honour was satisfied that it had. This Event occurred by reason of the substantial trading loss in the quarter ended 31 March 1994, the declining sales, inadequate cash flow, stale stock, and a presumption of the inability to restructure the business of the company[28].

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26 [1999] 1 VR 29 at 37 per Winneke P, 45 per Kenny JA.

27 [1999] 1 VR 29 at 56.

28 [1999] 1 VR 29 at 44.

Her Honour accordingly held that it could not be said that the Bank had failed to establish at least one relevant Event as contemplated by the conditions.

56 With that reasoning Winneke P agreed, differing only from her Honour on the question whether the notice was defective in failing to contain a declaration in terms of cl 11.1(e). The President, unlike Kenny JA, was, as I have indicated, of the opinion that the form of the notice, the manner of its address to Pan, and its contents and schedules logically sufficed to satisfy the requirements of the clause. His Honour had already pointed out that it would not matter, for what purpose the notice was designed, if it in fact fulfilled the function of a notice given pursuant to cl 11.1(b) and (e)[29].

The Application for Special Leave to Appeal and the Appeal to this Court

57 The appellants appealed to this Court pursuant to a grant of special leave made on 12 February 1999. The matter that exercised the minds of their Honours who sat on the application for a grant of special leave (McHugh and Gummow JJ) appears to have been a submission that the Court of Appeal may have failed to decide an issue which could have effected the outcome of the appeal to that Court. After full argument that has proved not to be so. The parties now accept that if the appellants' appeal were to fail on a ground other than 2A of the grounds of appeal, their present appeal would totally fail. In this Court the respondent accountants were not separately represented and no different arguments from those of the respondent Bank were advanced on their behalf.

58 The appellants' grounds of appeal to this Court are as follows:

> 1. On the proper construction of the Facility Agreement the General Conditions and the debenture and in the circumstances referred to in the reasons of the Court of Appeal Kenny JA was wrong to hold that the Bank could appoint a receiver without having made a declaration under Clause 11.1(e) of the General Conditions given in the manner required by Clause 15.3 of the General Conditions.
>
> 2. Alternatively to paragraph 1 her Honour was wrong in failing to consider the question referred to in paragraph 1.
>
> 2A. It was not open to her Honour to infer that the Bank had in fact formed an opinion under cl 18(q) of the Debenture.

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29 cf *Union Bank v Downes* (1896) 12 WN (NSW) 131; *Canberra Advance Bank Ltd v Benny* (1992) 38 FCR 427; *Nund v McWaters* [1982] VR 575.

3. Upon the proper construction of the said documents and in the said circumstances the learned President of the Court of Appeal was wrong to hold that the notice in fact received by the Appellants comprehended or alternatively necessarily implied a declaration of the matters required by Clause 11.1(e).

4. Upon the proper construction of the said documents and in the said circumstances the learned President and Kenny JA were wrong to hold that a declaration of the matters referred to in Clause 11.1(e) could be given pursuant to Clause 15.3 by the delivery by a Manager of the Respondent of a document signed by the Solicitors for the Respondent.

59 The Bank has filed a Notice of Contention that the decision of the court below should be affirmed on various grounds other than (and additional to) those relied upon by the court below. It is unnecessary to refer to that notice to resolve this appeal.

60 It remains the respondent Bank's case that it was entitled to appoint a receiver upon either or both of two bases: the occurrence of an Event of Default of the kind to which cl 18(q) of the debenture referred; and, the happening of an Event of Default as defined by cl 10.1(j) of the General Conditions and notification in accordance with cl 11.1(b), (d) and (e) and cl 15.3 of the General Conditions.

61 The relevant provisions of the two documents upon which the respondents rely are not inconsistent. The debenture is the document which directly protects the lender's security and is designed to facilitate action to prevent its loss or erosion, if need be, in great haste, if it is in peril. Clause 18 of the General Conditions therefore provides for the secured money to become immediately due and payable upon the occurrence of default without demand or notice. The Bank was therefore entitled to enforce its rights under the debenture without demanding repayment of money under the facilities agreement on notice pursuant to cll 11.1 and 15.3 of the General Conditions[30]. That cl 11.1 of the General Conditions may make provision for the termination of obligations and rights by a different and further process does not give rise to any inconsistency between the two sets of rights possessed by the Bank[31]. As the Privy Council advised in *China & South Sea Bank Ltd v Tan Soon Gin*[32] in respect of the

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30 cf *Fire Nymph Products Ltd v Heating Centre Pty Ltd (in liq)* (1992) 7 ACSR 365 at 371 per Gleeson CJ, 378 per Sheller JA.

31 cf *DFC Financial Services Ltd v Coffey* (PC) [1991] 2 NZLR 513.

32 [1990] 1 AC 536.

availability to a creditor of different remedies for enforcement, the creditor may exercise them, "simultaneously or contemporaneously or successively or not at all"[33].

62 The observations of Winneke P with respect to the satisfaction of the requirements of cl 11.1(e) of the General Conditions are correct. The declaration required by the clause is not a declaration in the formal, legal sense of a declaration made by a court. In context, the declaration which the clause requires is a clear expression of the reaching of a state of satisfaction of the mind of the respondent Bank that a relevant Event of Default in fact has occurred, and that the Bank has resolved to act by taking steps that it is entitled to take consequent upon that. The fact that the Bank has so acted indicates the formation of the requisite state of mind. A declaration was therefore at least implicit in the decision of the Bank to give notice, and the giving of the notice with the content, and in the form that it did.

63 The evidence to which Kenny JA referred and which has been summarized, of the parlous state of Pan's business, including its deteriorating trading position and the unmarketability of its assets, amply entitled the Bank (Mr Bew) to form the opinion that Pan was carrying on the business at a loss, and that further prosecution by it of the business would endanger the Bank's security, and that the Bank had in fact formed that opinion.

64 Winneke P in the reasons quoted fully covered the question of the adequacy of the notice and its delivery to Pan as required by both cll 11.1(e) and 15.3 of the General Conditions. With those reasons and his Honour's conclusions I am in agreement.

65 The appeal should be dismissed with costs.

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33 [1990] 1 AC 536 at 545. See also *Re McCann* [1985] 2 Qd R 381; Sykes, *The Law of Securities*, 5th ed (1993) at 137.