

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The National Bank of Australasia, Limited, v. J. Falkingham and Sons, from the Supreme Court of Victoria; delivered the 9th July 1902.

Present at the Hearing :

LORD MACNAGHTEN.

LORD DAVEY.

LORD ROBERTSON.

LORD LINDLEY.

SIR FORD NORTH.

SIR ARTHUR WILSON.

[*Delivered by Lord Lindley.*]

This Appeal raises two questions viz., 1. What is the true construction and legal effect of a deed dated 5th June 1899 executed by a firm of contractors in favour of their Bankers and registered as required by the law of the Colony of Victoria? and 2. What effect, if any, has that deed on a prior deed of the 19th April 1898 executed by the same firm in favour of the same Bankers but not registered?

The facts which are material are few and undisputed.

J. Falkingham and Sons are a firm of contractors consisting of a father and two sons. On the 29th December 1886 they entered into a contract with the Government of Victoria to construct a certain railway; and on the 31st January 1887 they entered into articles of partnership for the purpose of carrying on and completing this contract. By these articles the capital of the firm was 8,000*l.* to be advanced by

the father and this sum was to be a debt due to him from the firm and to bear interest at 8 per cent. If any further capital was brought in it was to be treated in the same way. Each partner was to indemnify the firm against his separate debts. The National Bank of Australasia were the bankers of the firm. Provision was made for fortnightly drawings by the partners subject to account. After the completion of the railway the affairs of the Plaintiffs were to be wound up; the Plaintiffs' assets were to be realised; the costs of winding up and the debts of the firm were to be paid; accounts were to be taken; the capitals of the partners were to be paid with interest; and the residue was to be divided between the partners as mentioned in the articles.

The sons had no capital in the firm from first to last; and the financial arrangements of the firm were left by them to their father.

The railway was completed in 1891. Differences arose between the contractors and the Government and much litigation took place before the contractors obtained payment of all that was due to them. In this litigation the contractors were at first unsuccessful but on appeal to this Board they in 1900 obtained Judgment for a considerable sum of money, *i.e.*, about 25,500*l.* In August 1900 the Bank received this sum from the Government under the deed of 6th June 1899 which will be referred to presently. The Bank insists on its right to retain the whole of this sum against the contractors until repaid all its advances.

The contractors had not themselves the means either of constructing the railway or of prosecuting their Appeal without the assistance of the Bank and in April 1898 and again in June 1899 the Bank required and obtained deeds from the contractors to secure their advances. In March 1898 the amount due to the Bank for

advances was 34,555*l.* of which 31,316*l.* stood in the books of the Bank as due from the father and the rest as due from the firm. The only security the Bank then held was a mortgage on property of the father estimated to be worth 15,000*l.*

This was the state of things when the deed of 19th April 1898 was executed. It is set out in the Record. It is made between the contractors and the Bank; it recites that the contractors are indebted to the Bank in the sum of 34,555*l.*, of which 31,316*l.* stands in the name of the father and the remainder in the name of the contractors; the contractors then assign to the Bank their interest in the contract with the Government and the moneys payable under it to secure the whole sum of 34,555*l.* and further advances; and they covenant jointly and severally with the Bank to pay that sum and interest and further advances. The deed empowers the Bankers to prosecute the Appeal to the Privy Council and all moneys expended for that purpose are included in the security and covenants of the deed.

This deed was not registered in the Colony under the Book Debts Act 1896. The Bank desired to have it registered but the father writing for the firm objected on the ground that the sons did not owe the Bank the whole 34,555*l.* as stated in the deed and that it disclosed a large indebtedness which would be published in trade circulars and injure the credit of the firm.

Some discussion took place before their Lordships as to the effect of non-registration. But it seems plain to their Lordships that assuming the moneys payable by the Government under the contract and assigned to the Bank to be a book debt within the meaning of the Act the omission to register the deed of April 1898 only invalidated the assignment of that debt and

did not invalidate or in any way affect the recitals and covenant for payment contained in the deed. The 3rd Section of the Act merely says "no assignment or transfer" of book debts shall be valid unless registered, and their Lordships are unable to accept the suggestion that "assignment or transfer" means the whole instrument which contains it and is not confined to that part of the instrument which operates as an assignment or transfer. Their Lordships agree with the view of the Colonial Courts on this point.

Not being able to procure the registration of the deed of 19th April 1898 the Bank obtained from the firm another deed dated the 6th June 1899. Drafts of this deed were prepared and objections were made to them as prepared; but ultimately the deed as printed on page 73 of the Record was executed and was duly registered as required by the Act already referred to. No claim is made to rectify this deed. The drafts cannot therefore properly be received in evidence to alter its language; still less to explain or assist in the interpretation of the deed as finally executed. The deed in its final shape is by no means well drawn as is often the case when drafts are altered. The legal effect of the deed appears to their Lordships to be quite plain up to a certain point. It is made between the contractors and the Bank. It refers to the railway contract with the Government and the completion of that contract and to disputes between the Government and the contractors. It then proceeds as follows:—

"AND WHEREAS the said Jonathan Falkingham is now indebted to the said Bank in a certain sum of money and such indebtedness stands in the books of the said Bank in the name of Jonathan Falkingham and the Assignors are jointly and severally indebted to the said Bank in another sum of money and such last-mentioned indebtedness stands in the books of the said Bank in the name of J. Falkingham & Sons and for the purpose of securing the repayment of such indebtednesses respectively in the manner

“ hereinafter mentioned the Assignors have agreed to enter
 “ into and execute these presents. NOW THIS INDENTURE
 “ WITNESSETH that in pursuance of the said Agreement and in
 “ consideration of such indebtednesses as aforesaid respectively
 “ and of the Agreement lastly hereinafter contained be the
 “ said Jonathan Falkingham as to his said indebtedness and
 “ they the Assignors as to their said indebtedness do and each
 “ of them doth by these presents assign unto
 “ the said Bank and its assigns all that and those the right
 “ title interest powers and remedies of them the Assignors in
 “ under to and by virtue of the said contract of the 29th
 “ day of December 1886 and in and to all monies now due or
 “ payable or which may hereafter become payable thereunder
 “ (without any reservation or exception whatsoever) including
 “ all their rights powers and privileges in connection with any
 “ action suit or proceeding taken or instituted by them in
 “ regard thereto or in connection with any judgment or award
 “ already delivered or made with the right of appeal therefrom
 “ (including appeal to the Privy Council)”

Now notwithstanding the words “ as to his
 “ said indebtedness ” and “ as to their said in-
 “ debtedness ” it appears to their Lordships plain
 beyond all controversy first that all the moneys
 due and to become due from the Government to
 the contractors under the contract referred to are
 assigned to the Bank ; and secondly that these
 moneys are so assigned as a security for the debt
 due from the father and also for the debt due
 from the firm, including what further advances
 might be made for prosecuting the claims of the
 contractors against the Victoria Government.
 Both of these indebtednesses *i.e.* both of these
 debts are plainly charged on the moneys
 assigned. The mode in which the moneys
 assigned are to be applied in paying the debts
 appears afterwards and is thus expressed “ All
 “ moneys received by the Bank or its assigns
 “ under or by virtue of these presents shall be
 “ applied by it or them in or towards satisfaction
 “ of the principal and interest moneys from time
 “ to time owing to it or them on the security of
 “ these presents.” Nothing can be plainer or more
 simple. The debt of the father is owing to the
 Bank on the security of his covenant which is
 contained in the deed and is therefore equally

within the description of money owing to the Bank "on the security of these presents" with the money owing on the covenant of the firm. The whole of the debts due to the Bank are to be paid out of the moneys assigned to the Bank as a security for them; and under this security no part of the moneys so assigned can be claimed by the contractors from the Bank so long as anything is due to the Bank in respect of any of the debts secured upon and made payable out of those moneys.

Considering the position of the sons and their entire dependence on their father and on his ability to raise money there is nothing unbusinesslike or surprising in their joining their father in giving such a security to the Bank.

But it is said that there are expressions in the deed which show that its true meaning is very different from that above mentioned, and the learned Judges in the Colony have so held. With unfeigned respect to them their Lordships cannot agree with them. First of all it is important to observe that there is not anywhere in the deed any allusion whatever to the share of any partner in the partnership assets, and very properly. What is assigned is a particular partnership asset which is part of the common stock of the firm; and not shares in that asset which could only be ascertained by taking the partnership accounts.

Any construction of the deed which prevents the Bank from paying the debts due to it out of the moneys assigned to them until the partnership accounts are taken is inconsistent with the direction for the application of the money assigned to them as a fund for their payment.

The Order of the Full Court on page 125 enables the Bank to repay itself the debt of the firm but not the debt of the father until the value of his interest in the asset assigned has been ascertained.

Their Lordships can find nothing in the deed to warrant this conclusion. The word "respectively" which occurs once or twice was apparently inserted to emphasise the fact that there were two indebtednesses and not one. But the word "respectively" in this deed was not really wanted and does not affect the construction of the charge. The words "as to his indebtedness" cannot be expanded into "to the extent of his interest in the debt as signed"; nor into "to the extent of his liability as between himself and his co-partners in the debts secured to the Bank." The words might be operative if the Bankers had a surplus to distribute after paying themselves. Their Lordships have no clear conception of the meaning of the words in question, and are of opinion that such vague and meaningless expressions do not control or qualify the direction in the deed for application by the Bank of the money received by it under the assignment and which direction is clear and unmistakeable.

Then there are the covenants for the payment of the debts secured. The words "in respect of his indebtedness" in these covenants are important and prevent the covenants from being joint and several covenants to pay the whole amount due to the Bank (as in the first deed). The covenants in the second deed are first a several covenant of the father to pay his debt; and secondly a joint and several covenant of the firm to pay the firm's debt. But this form of covenant, although consistent with the construction put on the rest of the deed by the Colonial Court, is equally consistent with the construction put upon it by their Lordships.

The form of the covenants does not either alone or in conjunction with the obscure words already commented upon cut down the charge on the moneys assigned.

Upon this deed of the 6th June 1899 their Lordships have come to the conclusion that the construction contended for by the Bank is correct and that the Bank is consequently entitled to judgment in the action brought against it by the contractors.

The Bank also contends that in addition to this security the Bank is entitled to enforce against the contractors their joint and several covenant contained in the first deed of 19th April 1898. A counter-claim to this effect was pleaded by the Bank. The Bank relies on the fact that there was no agreement to cancel the first deed, that it has never been cancelled or given up or asked to be given up; and the benefit of it is distinctly reserved to the Bank by general words in the second deed of 6th June 1899. The words relied on are as follows:—

“Nothing herein contained shall suspend
 “prejudice or affect the rights and remedies of
 “the said Bank in respect of the said indebted-
 “ness respectively or of any part or parts thereof
 “or prejudice or affect any other securities or
 “security now held or hereafter taken by the
 “said Bank.”

In answer to this contention the contractors put in a reply to the effect that the first deed was executed under a mistake and upon the representation of the manager of the Bank that the covenants were restricted to the respective indebtedness of the covenantors. It was for the contractors to prove this if they could. Their attempt to prove it at the trial utterly failed. The Bank manager was dead; the contractors' testimony was disbelieved and their Lordships think it unnecessary to say more on this attempt of the contractors to invalidate the first deed.

Their Counsel further urged that the non-registration of the first deed invalidated the covenants contained in it. Their Lordships have

already stated their reasons for rejecting this contention.

Lastly it was urged that the two deeds were so differently framed as to be really inconsistent and to lead to the inference that the second deed was intended by all parties to be substituted for the first. Upon this point there was a difference of opinion in the Colony. Mr. Justice Hodges considered that the first deed still remained in force; the Full Court took a different view and held that the second deed was substituted for the first. Their Lordships have carefully considered this question which they regard as the most difficult in the case; and they have come to the conclusion that the view taken by the Full Court ought to prevail. There is no doubt that the Bank wanted the second deed because they could not get the first registered. It is also clear that the great object of the Bank was to make sure of the fund assigned to them. The covenants of the sons were comparatively worthless to the Bank. They were however very burdensome to the sons in the form in which they were framed in the first deed. It appears to their Lordships that the main consideration which induced the contractors to execute the second deed was to get rid of the burden imposed by the recitals and covenants in the first deed; and that the Bank was willing to meet their views to this extent provided the Bank preserved its hold on the fund assigned. This conclusion is arrived at by comparing the two deeds together, bearing in mind the circumstances which rendered the second deed desirable to both parties. The Bank held other securities for the moneys owing by the contractors; these are preserved by the general words in the second deed relied upon by the Bank; and it is not necessary in order to give effect to the words to hold that the first deed is preserved by them. The Bank's counter-claim therefore cannot be supported; but having regard to the

defence pleaded to it and to the costs occasioned by it and to the evidence of the contractors in support of it their Lordships do not think it right that the contractors should have any costs which that defence or the counter-claim may have occasioned.

Their Lordships regard the right of the Bank to retain the fund assigned and apply it in payment of their advances in full as the great point in dispute from first to last; and on this point the Bank has now succeeded. All the rest is comparatively unimportant and the costs of the counter-claim may be fairly treated as balanced by the costs occasioned by the unfounded defence pleaded to it.

Their Lordships will therefore humbly advise His Majesty to discharge the Orders appealed from; and to direct Judgment in the action to be entered for the Defendants *i.e.* the Bank with costs; and to direct judgment on the counter-claim to be entered for the Plaintiffs in the action *i.e.* the contractors without costs and to order the Plaintiffs in the action to pay the costs of the Appeal to the Full Court in Victoria.

The Plaintiffs in the action *i.e.* the contractors must pay the costs of this Appeal.
