IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 257/94

SHARON LYNN KURSAN 1st APPELLANT

DAVID SHELDON HORWITZ 2nd APPELLANT

VERSUS

EASTERN PROVINCE BUILDING SOCIETY RESPONDENT

CORAM: HEFER, E M GROSSKOPF, VAN DEN HEEVER, MARAIS et SCHUTZ JJA

DATE HEARD: 16 NOVEMBER 1995

DATE DELIVERED: 12 MARCH 1996

SCHUTZ JA

JUDGMENT

SCHUTZ JA:

This case is concerned with the extent of the security conferred upon the respondent (the Eastern Province Building Society - "the Society") by a first mortgage bond passed over two East London properties owned by Valab (Pty) Ltd ("Valab"), now in liquidation. More exactly the question is whether a limit on the extent of the security expressed in the bond applies to interest or is confined to capital and certain expenses. The answer to this question depends upon the construction of the bond. It is not in issue that in certain circumstances

interest is secured wholly or to an extent. As already stated, the issue is whether there is a limit to that security. If there is then in some circumstances the interest or a part of it will not be secured.

The appellants stand in the shoes of a second bondholder. If the Society's contention that interest is fully secured be correct, then it will be entitled to the full net proceeds of the sale of the block of flats on the properties, and the appellants will get nothing. On the other hand, if their construction of the first bond be correct they will receive that part of those proceeds which exceeds the overall secured limit for which they contend. It is unnecessary to set out the history of the matter, save to state that the Eastern Cape Division found in favour of the Society, but granted leave to appeal to this Court.

The first three clauses of the bond read in part:

> "1. Whereas the EASTERN PROVINCE BUILDING SOCIETY has agreed to lend to the Mortgagor/s the sum of SIX HUNDRED AND FORTY THOUSAND RAND (R640 000,00) subject to the terms, conditions and provisions of this Bond and under the security thereof, and whereas the said Society may in its discretion from time to time make further advances to or payments to or on behalf of the Mortgagor/s subject to the terms, conditions and provisions of this Bond and under the security thereof, the Mortgagor/s is/are indebted to the EASTERN PROVINCE BUILDING SOCIETY its order, successors or assigns (hereinafter referred to as the Society) in the sums of:
>
> (i) SIX HUNDRED AND FORTY THOUSAND RAND (R640 000,00) (hereinafter referred to as the Capital) being the amount which the Society has agreed to lend to the Mortgagor/s and which amount is to be advanced to the Mortgagor/s or his/her/its/their nominee/s after registration of this Bond under the security thereof and subject to the terms, conditions and provisions of this Bond and the

Society's letter to the Mortgagor/s advising the Mortgagor/s of the terms and conditions of approval of the loan application by the Mortgagor/s; and

(ii) ONE HUNDRED AND TWENTY EIGHT THOUSAND RAND (R128 000,00) (hereinafter referred to as the additional sum). 2. This Bond shall be a continuing covering security to the aggregate amount of the Capital and the additional sum for all and any sums of money which shall now or may in the future be owing to or claimable by the Society from whatsoever cause arising, for money lent and advanced or which may hereafter be lent and advanced by the Society and for future debts generally including any payments made by the Society under the provisions of this Bond, and generally any indebtedness to the Society from whatsoever cause arising. The Society may advance further sums or may readvance to the Mortgagor/s under security hereof such sums or portions thereof as may have been previously repaid. This Bond further secures and affords preference for the costs of preserving and realising the property hereby mortgaged and of fire and other insurance premiums, cost of notice or bank exchange, owed by or claimable from the Mortgagor/s by the Society.

> 3. All amounts owing to the Society under this Bond shall bear interest from the date advances or any other payments are made at the relevant rate stipulated in this clause reckoned monthly in advance on the amount outstanding at the commencement of each month. At the commencement of each month any arrear interest shall be capitalised and shall thereupon form portion of the amount outstanding at the commencement of such month. Any interest due in terms hereof shall be secured under this Bond.The relevant rates of interest shall be the following...". (My emphasis).

The appellants place particular stress upon the phrase "to the aggregate amount of the Capital and the additional sum" in clause 2, as further supplemented in that clause by the twice used phrase "from whatsoever cause arising". It should be said at once that if these phrases are read so as to pervade the whole bond and to extend to clause 3, and not so as to govern only the matter dealt with in clause 2, then the

appellants must succeed. They further argue that the reason for the securing of interest being mentioned at all in clause 3 is that there may still be a doubt in our law whether it is secured without special mention to that effect.

The Society's argument, on the other hand, is that clause 2 is not intended to deal with interest, so that the phrases relied upon by the appellants are irrelevant to the issue. The very failure to mention the important matter of interest, while expenses of comparatively little significance are mentioned, is argued, with substance, to be a strong indication. Interest, the Society argues, is dealt with in clause 3, and the securing and the extent of the securing thereof in the general sentence: "Any interest due in terms hereof shall be secured under this Bond." Nor

is there a limiting phrase such as, "but subject to the limit contained in clause 2." In answer to this last argument the appellants counter by pointing out that neither in clause 2 nor 3 are there words indicating that the wide general expressions in clause 2 are not intended to extend to clause 3.

The Society further relies on the hypothecation clause which commences:

> "As security for the due payment of the Capital, additional sum and interest and all other sums of money claimable in terms of this Bond, or that may at any time be or become due and owing to the Society, arising from any cause whatsoever, and for the due performance of the conditions of this Bond, the Appearer q.q. binds as a first mortgage bond ..." (my emphasis).

The appellants respond to this apparently persuasive argument by

contending that the clause is irrelevant to the issue, which is not whether interest is secured but whether the extent of the security for interest is limited by clause 2.

Those are the main arguments advanced on either side.

When interpreting these clauses of the bond it is necessary to have regard to s 51 of the Deeds Registries Act 47 of 1937, which provides that in respect of a debt incurred after registration, the bond will give preference only if it is expressly stated (a) that the bond is intended to secure future debts generally or some particular future debt described therein, and (b) that a sum is fixed in the bond as an amount beyond which future debts will not be secured. Costs of preserving or realizing the security, or of fire insurance, cost of notice or bank exchange are not

treated as future debts for the purposes of the section.

The bond in clause 1 contemplated that there would be future debts, at least in respect of the "additional sum" of R128 000,00, and perhaps more. It was therefore essential, if the future sums lent or to be disbursed were to be fully secured, that the limit contemplated by s 51 should be expressed. That, to my mind, explains the presence of the words "to the aggregate amount of the Capital and the additional sum" in clause 2. By contrast no reason was advanced why security for interest should have been limited in a completely arbitrary way. It is not necessary to ransack the bond to find what other future debts may have been subject to the limit. The preponderating item was capital advanced or re-advanced. As regards the last sentence of clause 2, with

the exception of insurance other than fire insurance, the items listed are those exempted from categorisation as future debts under s 51.

Clause 2 and indeed the bond generally bears the marks of drafting and redrafting over the centuries, the redrafting often being a response to the latest case: without anyone having sat down to work out the effect of the constant accretions upon the whole or the other parts: and without the numerous repetitions being addressed . If a comb is taken through the 32 numbered clauses of the bond instances can be found which indicate that the words in issue in clause 2 do not constitute the definitive and entire dragnet clause defining how much and what is secured.

When interpreting clause 2 one must read it in the context of the

whole bond. If one does so the natural reading is, to my mind, that clause 2 is not intended to deal with the securing of interest at all. That is left to clause 3. And if a rule of interpretation be needed, resort may be had to that one which says that even very general words may sometimes be diminished by their context: Director of Education, Transvaal v McCagie and Others 1918 AD 616 at 623.

Furthermore:

> "While it is of course true that in construing a contract the Court must give effect to the grammatical and in ordinary meaning of the words, and that cogent reasons would be required for doing violence to plain words, it is likewise settled law that a departure from such a meaning is justified where it clearly appears from the contract that the parties intended a different meaning ..." (per Steyn CJ in Capnorizas v Webber Road Mansions (Pty) Ltd 1967(2) SA 425(A) at 434 A).

In concluding that clause 2 does not limit the securing of interest

I do not think that it is necessary to do violence to plain words, but if it were I would do so, as the overall intent of the bond in the relevant respect is to my mind quite clear. Whilst one does not approach the construction of a contract with preconceptions of what it contains, I do think that one must take into account that the Society is in the business of lending money for interest and against the security of fixed property: and that Valab knew as much. In those circumstances it would have been extraordinary if the parties had intended to place a capricious limit upon the extent to which interest was secured, when there was no legal compulsion to do so, and when the bond is replete with examples of the Society's interests being protected and protected again, to the limit.

For these reasons I agree with the construction put forward on

behalf of the Society.

The appeal is dismissed with costs.

W P SCHUTZ JUDGE
OF APPEAL

HEFER JA)
)CONCUR
EM GROSSKOPF JA)

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Appellant

and

EASTERN PROVINCE BUILDING SOCIETY Respondent

CORAM: HEFER, E M GROSSKOPF, VAN DEN HEEVER, MARAIS et SCHUTZ JJA HEARD ON: 16 NOVEMBER 1995

DELIVERED ON: 12 MARCH 1996

J U D G M E N T

VAN DEN HEEVER JA

I agree that the appeal fails, and add to the reasons advanced by my colleague Schutz JA, some possibly unnecessary detail, as follows.

The bond consists of a printed form which tries to cater for a wide variety of eventualities, leaving spaces for special provisions to be inserted and incorporating by reference the terms and conditions of the "Letter of Advice Granting a Loan" which has a similar format. It is an untidy document containing matter unnecessary by reason of statutory provisions or what had been already said elsewhere. The draftsmen were singleminded in their purpose: to protect to the hilt the interests of the Society, the very lifeblood of which is interest on capital advanced to or paid on behalf of clients. In their zeal, words were used which, in more than one instance, cannot possibly be read literally. As examples: in terms of clause 5 the mortgagor purports to renounce "all benefits of the exceptions hereinafter specifically referred to and all other exceptions which might or could be pleaded in bar to the validity of the said debt or any part thereof or for any indebtedness or claim under the Bond with

the meaning and effect of which exceptions the Appearer declared the Mortgagor to be perfectly acquainted. In particular the Mortgagor/s renounce/s all benefits of the legal exceptions" which are then listed. Surely the mortgagor could not be held to be "perfectly acquainted" with and have renounced defences even the money-lender could not call to mind! And clause 7, taken literally, duplicates insurance against the same risks, once by the mortgagor, again by the Society, both at the expense of the former. Reference to the "Letter" makes it clear that that liability is not intended to be cumulative but in the alternative.

The untidiness of the document is exacerbated by the fact that no-one bothered to delete phrases or clauses in the printed document which undoubtedly have no bearing whatever on the relationship between the parties to the particular transaction to be secured by the bond.

I cannot agree that clause 12 of the bond is of any particular significance in favour of interpreting the limitation in clause 1 of the bond as being applicable to interest as well as further capital

disbursements perhaps to be made to or for the mortgagor. I do not understand the suggestion to be that, were there no limitation at all provided in the bond in respect of future debts, interest on what I may refer to as the primary capital debt would not be secured unless the amount to which interest may run were limited. In a contract such as the one in issue, the primary capital amount would be exceeded constantly since for the first five years only interest was payable, no redemption on the capital of the loan is provided for. The relevant section of the Deeds Registries Act was passed against the background of the generally accepted view that when a real right of security is created in favour of the creditor, the security extends automatically to interest charged as compensation for the extension of credit. Cf e.g. JOHANNESBURG MUNICIPALITY v COHEN'S TRUSTEES 1909 TS 811 at 818; and see LAWSA Vol 17 para 401 and cases referred to in notes 2-4; De Wet & van Wyk, KONTRAKTEREG EN HANDELSREG 5 ed Vol 1 pp 409-

410. Whether that relates to interest on the initial capital advance or advances or disbursements subsequently made appears to me to be irrelevant.

J J F HEFER JA_____

on behalf of L VAN DEN HEEVER JA

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CORAM: HEFER, E M GROSSKOPF, VAN DEN HEEVER,

MARAIS et SCHUTZ JJA

HEARD: 16 November 1995

DELIVERED: 12 March 1996

J U D G M E N T

MARAIS JA/

MARAIS JA/

I find myself in respectful disagreement with the majority of the court in this matter. This being a minority judgment I shall state as tersely as I can why I am unpersuaded that the limitation provision does not apply to interest. It is trite that when a dispute arises as to the interpretation of a written contract one approaches the question without attributing a priori to the parties any particular intention. Their intention must be found in the document. That does not mean of course that it must be examined as narrowly as if it were a fly entombed in amber but there are limits to what extraneous factors one may have regard in ascertaining what was intended. Truisms about the commercial importance of interest to a moneylender are in my respectful view of little help. The fact that interest is dealt with

in this bond in a clause devoted to it alone (clause 3) and that it is said in that clause to be secured does not, in my view, lend any support to respondent's interpretation of the bond. The elaborate provisions which it contains relating to the payment of interest, such as the payment of "availability" interest pending the date upon which the loan was actually paid out to the borrower, the rates of interest payable, and the capitalization of unpaid arrear interest, were peculiar to the subject of interest, and the fact that the interest was dealt with in a separate clause, as any draftsman would deal with it, cannot be invested with interpretational significance. Nor can the fact that the interest is said in that clause to be secured. Given the well-known controversy as to whether or not interest needs to be specifically stated to be secured before it is secured by a bond, the making of a clear and unambiguous statement that it is to be secured in the very clause

which is devoted to interest is to be expected. Moreover, the dispute in this case is not whether interest was to be secured by the bond; it is quite plain that it was. The question is to what extent it was to be secured: wholly or (potentially) only partially. Again I consider that a specific reference in that clause to the securing of interest begs the question. There are other clauses in which other classes of debt are specifically said to be secured even although they had already been included as secured by reason of the wide sweep of the language used in clause 2. See, for example, clause 12 which deals with life insurance premiums paid by the mortgagee. It provides that the "amount so paid shall be portion of the indebtedness secured under the bond and shall bear interest as stipulated herein -----". Any amounts so paid would surely be part of the "future debts ----- including any payments made by the Society under this bond" referred to in clause

2 and therefore subject to the ceiling. The point is simply this: the fact that a particular class of debt is specifically and separately said in some other clause to be secured does not necessarily mean that it is not subject to the ceiling for which clause 2 provides. I shall return again to clause 12 which seems to me to be of considerable significance. Finally, on this particular score, the notional distinction between interest and capital is blurred by clause 3 itself for it provides for the capitalization of unpaid arrear interest. Arrear interest is thereby merged with outstanding capital and outstanding capital is obviously subject to the ceiling.

The opening words of clause 2 ("This Bond shall be a continuing covering security to (my emphasis) the aggregate amount of the Capital and the additional sum. . . .") amount to nothing more than a quantification of the ceiling of the security provided by the

bond. They alone do not recite that the capital and the additional sum or indeed anything else are or is secured by the bond; it is the rest of the clause which has to be read to see what debts are being secured, and whatever they prove to be, they are all subject to the ceiling set forth in the opening words. The rest of clause 2 plainly includes the capital and the additional sum but it equally plainly includes disbursements made on behalf of the mortgagor and any indebtedness from whatever cause arising. Re-advances and further advances are specifically covered and are equally affected by the ceiling because they represent "money hereafter lent and advanced" and "future debts generally". I can see no linguistic justification for excising interest from the category of debts to which clause 2 relates. The clause is not prefaced by the kind of qualification commonly and usually employed by draftsmen when it is intended to except from the ambit of an

apparently all inclusive provision something with which it is intended to deal in a subsequent provision. Clause 2 is not prefaced by words such as "Subject to the provisions of clause 3" or a similar qualificatory expression. Nor is clause 3 prefaced by words such as "Notwithstanding anything to the contrary elsewhere in this bond".

The hypothecation clause takes the matter no further. It is entirely silent on the question of a ceiling, yet a ceiling there undoubtedly was. It also merely repeats what had been said before, namely, what types of debts were to be secured by the bond. It did not purport to say to what extent they would be secured by the bond.

Any suggested difficulty in the computation of a sum which would be sufficient to secure interest fully strikes me as more apparent than real. Firstly, similar difficulty (if difficulty it be) attends the estimation of what future amounts might be lent or advanced to,

or laid out on behalf of, the mortgagor yet it proved possible to set a ceiling. Secondly, the accrual of unpaid interest is to a very large extent something over which the mortgagee has considerable control. If the interest arrears are in danger of exceeding the ceiling of security available, the mortgagee can call up the bond. It is true that there may be delays in obtaining payment caused by factors beyond the mortgagee's control but they are likely to be the exception rather than the rule. In any event, there is no statutory restriction upon the amount which the mortgagee may select as the ceiling and it should not prove difficult to set a realistic and relatively safe ceiling.

I think that the incorporation by reference in the bond of the letter from the Society advising that the bond would be granted throws little light on the question. The letter in its turn incorporated whatever was to be in the bond. It recited that the bond had been

approved "subject to the rules of the Society, on the terms and conditions appearing on the face and reverse of this letter and in the Bond/s to be registered/already registered". Reference to both documents is therefore necessary to determine what the terms and conditions are and neither document can be interpreted in isolation as if it were itself a definitive and exhaustive exposition of those terms and conditions.

In my view there is insufficient justification for assuming that the bond has been the subject of frequent redrafting and that redrafting has occurred casuistically and without any attention being given to its impact upon the bond as a whole. The instances of clauses which "indicate that the words in issue in clause 2 do not constitute the definitive and entire dragnet clause defining how much and what is secured" to which reference is made in the judgment of

the majority are only significant if they are inconsistent with the ordinary meaning of clause 2 and I am unable to locate any that are. It is of course so that it is not clause 2 in isolation which falls to be interpreted but the entire bond insofar as it relates to the securing of interest.

I am unpersuaded that contextual considerations entitle me to depart from the plain and ordinary meaning of the language used in the bond. As was emphasised in Capnorizas's case (cited in the majority judgment), such a departure is justified only "where it clearly appears from the contract (my emphasis) that the parties intended a different meaning". To my mind, it does not clearly appear that such is the case.

Indeed clause 12 is, in my view, clear evidence that interest was intended to be governed by the ceiling. This particular

class of future debt is one for which section 51 of the Act required a ceiling to be provided if the debt was to be effectively secured. Unless one regards this kind of debt as being included in the broad sweep of clause 2, no ceiling will have been provided for it and it will not be secured. But it was obviously intended to be secured because clause 12 expressly says so. One should not lightly conclude that the parties failed to achieve their stated object when the language of clause 2 is so apt to accomplish their purpose. And if they did accomplish their purpose, as I think they did, I fail to see how it can be successfully maintained that the ceiling was intended to apply only to the premiums advanced and not to the interest on the premiums. Together they undoubtedly constitute a future debt. Neither of them existed at the time of the passing of the bond. Whatever the position may be where an existing debt bears interest and assuming (without

deciding) that the interest which may accrue in respect of such a debt is not "a debt incurred after the registration of (the) bond" within the meaning of sec 51 (1), that certainly cannot be said of the interest which will fall to be paid on a debt which does not yet exist and can only be incurred after the registration of the bond. It is as much a future debt as the principal debt is a future debt and it cannot exist independently of the principal debt. This shows, conclusively to my mind, that interest was intended to be governed by the ceiling on this bond for, if it was not, the parties would have failed to achieve the object which they set out to achieve in clause 12, namely, to secure both the premiums and the interest. It is settled law that where the language of a contract permits it, an interpretation which accords with applicable statutory provisions, rather than one which falls foul of them, is to be preferred.

Once it is clear that interest payable in respect of future debts is governed by the ceiling despite the fact that provision is made for the securing of such interest in a separate clause distinct from clause 2, what justification is there for saying that interest on other specified or unspecified future debts is not governed by such ceiling? Indeed, as I have pointed out, the interest payable upon such future debts is as much a future debt as the principal debt itself. Unless a ceiling is provided for the interest as well as the principal debt, the requirements of sec 51 (1) (b) cannot be said to have been met. If that is so, then by parity of reasoning, the parties must not be taken to have failed to provide a ceiling for such interest and so frustrated their own objective. And if that be so, what warrant exists for saying that the ceiling in clause 2 was intended to apply to one class of interest only, namely, that accruing on future debts, but not to that accruing on

a debt existing at the time of the passing of the bond? Surely none. The conclusion that the ceiling applies to all interest is, I think, inexorable. I would allow the appeal with costs.

R M MARAIS