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IN THE SUPREME COURT  
OF THE NORTHERN TERRITORY  
OF AUSTRALIA

No. 163 of 1990

BETWEEN

EDWARD JAMES WILKINSON

and

TRADE DEVELOPMENT  
ZONE AUTHORITY

CORAM: GRAY AJ

REASONS FOR JUDGMENT

(Delivered 28 February 1991)

On 25 July 1990, in action No. 163 of 1990, judgment was entered for the Trade Development Zone Authority against Austcom Incorporated for \$407,087.25 and costs.

On 10 August 1990, the Sheriff received a Warrant of Seizure and Sale from the judgment creditor's solicitors. On the same day the Sheriff executed the warrant and took possession of certain personal property of the defendant. This property included satellite equipment which was seized at the cargo terminal of Australian Airlines in Darwin.

On 22 August, the Sheriff received a claim to the satellite equipment from R.G. Nichols, E.J. Wilkinson and Pacific Satellite Services Proprietary Limited. A notice of this claim was served upon the Solicitors for the judgment creditor who disputed the claimants' claim.

In the result, only the claimant Wilkinson persisted in a claim to the equipment. When the interpleader summons came on for hearing, Ms Gearin of Counsel appeared for the claimant and Ms Kelly appeared for the judgment creditor.

Before turning to the issues raised at the hearing it is necessary to give a short summary of the events leading up to the present dispute.

On 28 October 1988 an agreement was made between the NT Government and Pacific Satellite Services Proprietary Limited (Pacsat) for the production of satellite stations in the Northern Territory. The claimant Wilkinson (Wilkinson) was a signatory of the agreement.

Wilkinson, who is a very experienced and highly qualified engineer in the Telecommunications field, became involved in the Northern Territory transaction through the agency of one Glenn Nichols. Nichols had asked Wilkinson to work for him as a consultant in about June 1987.

Following this engagement, Wilkinson got involved in the activities of the Skycom group which was an American based organisation in which Nichols had an interest.

It appears that in early 1989, Nichols sold his interest in Skycom for a price which included the provision of certain satellite equipment. At about the same time, a company named Austcom was incorporated in the United States of America to receive the proceeds of Nichols' sale of his interest in Skycom. As a result, Austcom became the owner of satellite equipment which was sent to Darwin, arriving in about May 1989. It is this equipment (hereinafter referred to as "the equipment"), less a few items, which is the subject of the present dispute.

On 17 October 1989 Austcom entered into an agreement with the judgment creditor whereby \$246,323 was advanced to Austcom subject to conditions for repayments. Austcom was very soon in default under the agreement which eventually led to judgment being entered against it in July 1990.

In the meantime Pacsat had continued its operations pursuant to the agreement of October 1988. There is no clear evidence as to the relationship of Austcom and Pacsat but it appears that Austcom was a holding company whereas Pacsat employed technical staff and undertook the manufacture of satellite stations in the Northern Territory.

In about August 1989 Nichols, who was a director of Austcom and Pacsat, arranged an overdraft for Pacsat at the Commonwealth Bank of Australia, 367 Collins Street, Melbourne. At about the same time Wilkinson became a director of Pacsat.

Later in 1989, Nichols sought to increase the Pacsat overdraft and offered the equipment as security. The Bank did not accept this proposal and asked for director's guarantees. Nichols told Wilkinson that if they each provided a personal guarantee Austcom would grant to them a lien or charge over the equipment to provide security against their contingent liability under the guarantees.

By a letter dated 3 September 1989, Austcom wrote to Wilkinson as follows:

3 September 1989

Mr E.J. Wilkinson  
Pacific Satellite Services Pty. Ltd.  
4th Floor  
450 St. Kilda Rd.  
Melbourne, Vic. Australia

Dear Jim,

This letter is to confirm Austcom Inc.'s acceptance that the Skyswitch equipment currently owned by Austcom Inc. has been made available to both you and I as collateral in exchange for the personal guarantees we have executed on behalf of Pacific Satellite Services Pty. Ltd.

Austcom Inc. recognises therefore, that we both have a lien over the equipment (Attachment A) until such time as the directors guarantees are released by the Commonwealth Bank.

Yours faithfully,

K. Glenn Nichols

Kimberley N. Morris President

Secretary

In the result, Wilkinson and Nichols executed a guarantee of Pacsat's indebtedness to the Bank, limited to \$70,000. This instrument was executed on 8 September 1989.

In October 1989 it became necessary to increase Pacsat's overdraft limit to \$100,000.

Wilkinson and Nichols, on 27 October 1989, executed a further guarantee limited to \$30,000.

On or shortly before 13 February 1990, Nichols persuaded Wilkinson to obtain a personal loan from the Bank of \$40,000 and make the proceeds available to Pacsat. Wilkinson lodged the Certificate of Title to his house in McKinnon with the Bank as security. None of the \$40,000 was received by Wilkinson. He authorised the Bank to disburse the funds according to a list provided by Nichols. Some of the funds went to New Zealand and the rest to various accounts nominated by Nichols. It would seem that the Bank advanced these funds on or about 19 February 1990.

Wilkinson had been advised by a lawyer friend that the letter dated 3 September was a doubtful security. Accordingly, two forms of agreement were drafted and sent to Nichols for execution. These agreements were apparently signed by Nichols in New Zealand on 22 January 1990 and are in the following terms:-

Agreement Providing Grant of Right to Realize Upon All Plant and  
Equipment of Austcom Inc.'

Whereas:

E.J. Wilkinson of 1 Coimadai Rd.

Diggers Rest  
Victoria, 3427  
Australia

proposes to lend Pacific Satellite Services Pty. Ltd. A\$40,000 plus charges and interest and is being made available to assist the business activities of Pacific Satellite Services Pty. Ltd.

Then

This Agreement duly prepared and attested is to authorize Mr E.J. Wilkinson as above listed (hereinafter referred to as "Wilkinson") to take such sales action as is necessary to realise upon plant and equipment currently held in Darwin, NT Australia as it becomes necessary, to effect loan repayments to Wilkinson at a point in time when funds available from the business operations of Pacific Satellite Services Pty. Ltd. are insufficient to meet the loan repayment.

In further clarification

Details of the stock inventory and plant and equipment being made available for sale by Wilkinson should this course be necessary are set down in Appendix A to this Agreement.

Acknowledgement by Parties

The parties acknowledge that they have entered into this Agreement after being advised by legal counsel and fully understand the rights and obligations provided for herein.

In Witness Whereof

The undersigned hereby execute this Agreement as a wholly Voluntary act:  
Signed at Wellington and Melbourne

Date 22/2/90

For Austcom Inc

Witness Kimberley Morris R.G. Nichols

For E.J. Wilkinson

Witness Kaye E. Jeffs E.J. Wilkinson

It is not mandatory under USA Company Law to use a Company Seal. Herewith the signature of the Company Secretary duly witnessed.

Secretary K.N. Morris Witness J.E. Jesson

Schedule A

UNITS	DESCRIPTION
19	Trunk Control Units
19	Voice Control Units
4	Distribution Units
4	Distribution Monitor Units 27
	Echo Cancellors
4	IF Pilot Units
3	Port Card Cages
4	Echo Cancellor Card Cages
4	Outdoor Units

'Agreement Providing Grant of Right to Realize Upon All Inventory Stock of Skyswitch Satellite Equipment of Austcom Inc.'

Whereas:

E.J. Wilkinson of 1 Coimadai Rd.

Diggers Rest  
Victoria, 3427  
Australia

R.G. Nichols of 3/11 Blake St.

Darwin, NT  
Australia

propose, as Directors of Pacific Satellite Services Pty. Ltd., a subsidiary company party owned by Austcom Inc., to enter into a Deed of Guarantee prepared by the Commonwealth Bank of Australia, 367 Collins Street, Melbourne covering the repayment of overdraft accommodation to be made available by the Commonwealth Bank of Australia. This loan by way of overdraft has an upper limit of A\$120,000 plus charges and interest and is being made available to assist the business activities of Pacific Satellite Services Pty. Ltd.

Then:

This Agreement duly prepared and attested is to authorize the above listed directors of Pacific Satellite Services Pty. Ltd. to take such sales action as is necessary to realise upon inventory stock and plant and equipment currently held in Darwin, NT Australia as it becomes necessary, to effect loan repayments to the Commonwealth Bank of Australia at a point in time when funds available from the business operations of Pacific Satellite Services Pty. Ltd. are insufficient to meet the loan repayment.

In further clarification

Details of the stock inventory being made available for sale by the Directors should this course be necessary are set down in Appendix A to this Agreement.

Acknowledgement by Parties

The parties acknowledge that they have entered into this Agreement after being advised by legal counsel and fully understand the rights and obligations provided for herein.

In Witness Whereof

The undersigned hereby execute this Agreement as a wholly Voluntary act:  
Signed at Wellington and Melbourne  
Date 22/2/90

Austcom Inc.

Witness Kimberley Morris R.G. Nichols

Pacific Satellite Services Pty. Ltd.

Witness Kaye E. Jeffs E.J. Wilkinson  
Witness Kimberley Morris R.G. Nichols

It is not mandatory under USA Company Law to use a Company Seal. Herewith the signature of the Company Secretary duly witnessed.

Kimberley Morris Secretary K.N. Morris Austcom Inc.

J.E. Jesson Witness."

The loan of \$40,000 to Wilkinson was for a 3 month term and was due for repayment on or about 19 May 1990. In late May or early June, Wilkinson decided to take steps to enforce his lien or charge over the equipment. He discovered that the equipment was being held by

Australian Airlines because the freight charges had never been paid. To enable the equipment to be released, Wilkinson secured a further advance from the Bank of \$8536.68 to pay the freight. The freight was paid but when Wilkinson sought to have the equipment delivered from Darwin to Melbourne, he discovered that it had already been seized by the Sheriff.

The question of the enforceability of Wilkinson's lien or charge over the equipment now arises.

Ms Gearin rightly conceded that the most that could be claimed for Wilkinson's security is that it is an equitable charge over the equipment. Thus, the issue becomes whether such a charge can be found in any one or more of the three documents relied upon, there being no evidence of an orally created charge.

Ms Kelly subjected each of the documents to penetrating criticism.

As to the document dated 3 September 1989 it was said, among other things:-

- (i) that the property to be charged is not identified, there being no evidence of the existence of "Attachment A."
- (ii) that it refers to guarantees which "we have executed" although it is clear that the guarantees in question had not then been executed.
- (iii) that it contains no language capable of being interpreted as the creation of a charge.

As to document dated 22 February 1990 dealing with the advance of \$40,000, which during the argument was called Document No. 2, it was said that:-

- (i) it does not purport to confer a proprietary right over the equipment or charge it as security.
- (ii) it merely authorises Wilkinson to sell certain property belonging to Austcom to pay a debt of Pacsat.
- (iii) it refers to Wilkinson's intention to loan \$40,000 to Pacsat in the future although the evidence shows that the funds had been disbursed by 22 February 1990.

- (iv) it refers to a loan to Pacsat although the evidence fails to establish that Pacsat received any of the \$40,000.

As to document No. 3, also dated 22 February 1990, it was said additionally that:-

- (i) the property is insufficiently identified
- (ii) the authority is given to Nichols and Wilkinson as directors of Pacsat
- (iii) it is not clear that property of Austcom is being referred to
- (iv) there is no evidence that the conditions precedent to the authority has ever been met
- (v) the authority is merely to sell property and pay debts
- (vi) there is no evidence that the proposed guarantees were ever given.

In my opinion, the criticisms levelled at Documents 2 and 3 are unanswerable. It is impossible to extract from either or both of Documents 2 and 3 any intention to confer upon Wilkinson a proprietary interest in the specified equipment, quite apart from the other suggested defects. Accordingly, I do not need to consider Ms Kelly's further point that Documents 2 and 3 are rendered void by Section 205A of the Companies Code.

Ms Gearin, as I understood her, eventually accepted that her case for the existence of an enforceable charge must depend upon the document dated 3 September 1981 which, she contended, must be liberally construed in the light of the circumstances revealed by the evidence. She placed particular reliance upon the judgment of Joske J in Re Mount Thorma Blue Metals Ltd (In Liq.) (1963) 4 FLR 478 and the authorities there referred to. Ms Gearin's argument was that the intention of the parties which clearly emerges from the document is that Austcom would provide Wilkinson with a security over the equipment in consideration of Wilkinson guaranteeing a Bank advance to Pacsat. This, so Ms Gearin contended, means that Wilkinson obtained an equitable charge over the equipment from 3 September 1989.

Before examining whether an intention to create a charge over the equipment can be discovered, it is necessary to consider the further point taken by Ms Kelly that any agreement to create a charge over the equipment is unsupported by consideration.

The proposition that an equitable charge must be supported by consideration was not challenged by Ms Gearin. See Re Earl of Lucan (1890) 45 Ch.D 470.

Ms Kelly's point was that there is no evidence of any consideration passing from Wilkinson to Austcom, in contrast to the sufficiency of evidence of consideration passing from Wilkinson to Pacsat.

Upon the case for Wilkinson, the essence of the agreement contained in the document dated 3 September 1989 is that Wilkinson agreed to give a guarantee of Pacsat's debt to the bank in consideration of Austcom's promise to give Wilkinson security over Austcom's equipment.

Wilkinson, by performing his obligation under the agreement, has provided valuable consideration moving from the promisee Wilkinson to the promisor Austcom.

It is not, I think, necessary to have evidence of a request by Austcom for the giving of the guarantees by Wilkinson. It is sufficient if the giving of the guarantees is shown to be in consideration of Austcom's promise to give security over its equipment.

If a specific request has to be shown, I consider that the evidence does justify the conclusion that Nichols, in making his requests to Wilkinson, was acting as a director of Austcom and Pacsat. Furthermore, the evidence does in my view support the conclusion that Austcom was a beneficiary of the guarantees of Pacsat's bank account. There was adequate evidence that Pacsat was a subsidiary of Austcom and that Austcom had a financial interest in the success of Pacsat's business operations.

In the result, I am satisfied that the agreement to create a charge in favour of Wilkinson was adequately supported by consideration. The position may have been different if Pacsat had sought to enforce Wilkinson's promise to provide a guarantee.

I now turn to consider Document No. 1 in the light of Ms Kelly's criticisms of it.

It can be readily accepted that the document is clumsily expressed. Although it purports to be a letter from Austcom to Wilkinson, it speaks of the equipment being "made available to both you and I as collateral". But it is quite apparent from the circumstances that "you and I" means Wilkinson and Nichols. This follows from the fact that Nichols was clearly the author of the letter and its principal signatory.

Some criticism was made of the expression "collateral" which was said to be a meaningless expression. But, as Ms Kelly conceded, it is commonly used as a synonym for "security".

Attention was drawn to the imprecise description of the property. But the evidence shows that as between the parties to this agreement, the description was adequate to identify it as the equipment which had arrived from the United States of America less certain items sold to AAP.

Ms Kelly placed reliance upon what she said was the absence of any express language appropriate to the creation of a charge and the presence of what were said to be meaningless expressions.

Notwithstanding these trenchant criticisms, I am disposed to think that the document can be read as if the words following "has been made available" read "to Wilkinson and Nichols as security for the personal guarantees which they have undertaken to give to secure Pacsat's debt to the Commonwealth Bank until such time as either is released from liability under such guarantees."

When one considers the language used in the document in the light of the circumstances in which it came into existence, the above interpretation does, in my opinion, represent the clear intention of the parties. Indeed, the existence of the document can hardly be explained upon any other basis.

I cannot accept the view that the reference to guarantees "we have executed" produces the result that the consideration expressed is past consideration and therefore insufficient to support Austcom's promise to charge the property. The literal meaning of the language used must be considered in the light of the evidence that the only guarantees held by the Bank post dated the document dated 3 September 1989.

The interpretation I have placed upon the document does, in my view, create a "security for a debt redeemable on discharge of the debt" per de Jersey J in National Westminster Finance v Johnson & Co (1990) 2 ACSR 650 at p.653.

In this case, the security is valid and enforceable until Wilkinson is released by the Bank from liability under the guarantees.

I was troubled during the hearing by the absence of any evidence of a default by Pacsat in relation to its indebtedness to the Bank, or of any demand by the Bank under the guarantees given by Wilkinson. But upon further reflection and a perusal of the Bank file in evidence, I do not consider that this circumstance prevents Wilkinson succeeding on this summons. It is apparent from the Bank file that Pacsat's overdraft has stood at a figure in excess of \$100,000 for many months without receiving a single credit. The only changes in the account have been increases in the debit balance brought about by bank charges, taxes and interest. It is equally apparent that the Bank intends to look to Wilkinson for payment under the guarantee.

The amount secured by Wilkinson's charge over the equipment will, in the final result, depend upon the amount that he can show is due and payable under the guarantees.

For the reasons I have already stated, the charge does not extend to the \$40,000 personal loan raised by Wilkinson in February 1990.

Ms Kelly drew attention to the provisions of Section 121 of the NT Taxation (Administration) Act which requires that a document creating a charge be stamped. Ms Gearin accepted that stamping was required to make the document dated 3 September 1989 admissible in evidence. It follows that the declaration I propose to make is subject to the proper stamping of the document.

I propose:-

- (i) an order for the sale of the property referred to in the lists marked "A" and "B" which are annexed to the affidavit of Karen Jackson sworn 11 September 1990
  
- (ii) a declaration that the claimant, Wilkinson, has an equitable charge over the property in the said list marked "A" to the extent of his liability to the Commonwealth Bank of Australia under two guarantees dated 8 September 1989 and 27 October 1989 respectively.

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