45/85

No. 30 of 1984

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

IN THE MATTER OF THE COMPANIES (VICTORIA) CODE

- and -

IN THE MATTER OF BRINDS LIMITED

B E T W E E N :

BRINDS LIMITED, BORIS ANDREW GANKE, GULF RESOURCES N.L., ALEXANDERS SECURITIES LIMITED, CHAPMANS LIMITED, NORTHERN STAR INVESTMENTS PTY. LIMITED AND HALLMARK MINERALS N.L. — Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) — Respondents

CASE FOR THE APPELLANTS

MESSRS. INGLEDEW, BROWN, BENNISON & GARRETT,
International House,
26 Creechurch Lane,
London EC3A 5AL.

Solicitors for the Appellants.

MESSRS. COWARD CHANCE,
Royex House,
Aldermanbury Square,
London,
EC2V 7LD.

Solicitors for the Respondents

No. 30 of 1984

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

IN THE MATTER OF THE COMPANIES (VICTORIA) CODE

- and -

IN THE MATTER OF BRINDS LIMITED

B E T W E E N :

BRINDS LIMITED, BORIS ANDREW GANKE, GULF RESOURCES N.L., ALEXANDERS SECURITIES LIMITED, CHAPMANS LIMITED, NORTHERN STAR INVESTMENTS PTY., LIMITED AND HALLMARK MINERALS N.L. — Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED AND JACKSON GRAHAM MOORE AND PARTNERS (a firm) — Respondents

CASE FOR THE APPELLANTS

RECORD

1. This is an appeal from a judgment dated 16th December, 1983 of the Full Court of the Supreme Court of Victoria (Starke, Murray and Southwell JJ.) dismissing an appeal from a judgment dated 5th May, 1983 of the Supreme Court of Victoria (Tadgell J.) ordering that Brinds Limited be wound up.

Volume IV pp.28-61

Volume III pp.123-214

2. The issue of this appeal depends upon the following provisions of the Companies Code(Victoria) 1981 (as amended).

Application for winding up

363.(1) A company ... on the application of -

...

RECORD

(b) a creditor, including a contingent or prospective creditor, of the company;

...

(3) Notwithstanding anything in sub-section (1), the Court shall not hear the application if it is made by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and a prima facie case for winding up has been established to the satisfaction of the Court.

Circumstances in which company may be wound up by Court

364.(1) The Court may order the winding up of a a company if - ...

(e) the company is unable to pay its debts; ...

(j) the Court is of opinion that it is just and equitable that the company be wound up.

(2) For the purposes of sub-section (1), if -

(a) a creditor by assigning or otherwise to whom the company is indebted in a sum exceeding $1,000 then due has served on the company a demand, signed by or on behalf of the creditor, requiring the company to pay the sum so due and the company has, for 3 weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) the court, after taking into account any contingent and prospective liabilities of the company, is satisfied that the company is unable to pay its debts,

the company shall be deemed to be unable to pay its debts.

RECORD

3. Brinds Limited (hereinafter referred to as "Brinds") has for some years been a merchant bank for a group of companies connected with a Mr. Boris Ganke (hereinafter referred to as "Ganke"). Brinds Limited has provided both financial and management services for these companies and holds shares in most of these companies. Its nominal capital is $20,000,000 (all references to currency in this Case are expressed in Australian dollars) divided into 40 million shares of 50¢ each of which 2,619,075 have been issued and are fully paid. Its issued capital is therefore $1,309,537.50. Ganke holds some 45% of the issued shares and there are about 350 other shareholders.

Volume III p.123 ll. 9-18

4. Offshore Oil N.L. (hereinafter referred to as "Offshore") is a public company listed on the Australian Stock Exchanges and was a company of which for some considerable period of time Ganke was the Chairman of Directors. At the time of the litigation involved in this appeal the company was subject to the chairmanship of a Mr. L.J. Adler (hereinafter referred to as "Adler").

(a) An understanding of the relationship between Ganke and Adler is basic to an understanding of the matters in issue. Tadgell J. found, inter alia, Mr. L.J. Adler ("Adler") and Mr. B.A. Ganke ("Ganke") were of "Hungarian origin", (line 23 page 134). There appears to be no evidence on this point and in fact, Adler is Hungarian and Ganke is Russian. The only significance of the Judge's findings is that he recognised the personal nature of the conflict. "Indeed, the Petition has been opposed on the footing that it involves a personal contest between the two." ... Line 2, page 135, - See the following pages of the transcript pp.389, 469, 911, 968.

Volume II p.134 l.23

Volume III p.135 l.2

(b) Adler is the Chairman and Chief Executive Officer of F.A.I. Insurances Ltd. (hereinafter called "F.A.I.") and group of associated companies. Despite serious and substantial allegations made against Adler, during the course of the trial, Adler was never called to give evidence. - See the following pages of the transcript pp. 288, 358, 466, 473, 911.

(c) Ganke was the Chairman and Chief Executive

Officer of Brinds Limited and a group of associated Companies.

(d) F.A.I. is now a substantial Company in the Insurance field and either directly or through other Companies, operates as a money-lender.

(e) Brinds is a Merchant Banker whose business was dealing in money and promoting and managing other Companies particularly petroleum and mining exploration. - See the following pages of the transcript pp. 1518, 1563, 1576, 1615, 1758, 1815, 1829, 1836.

5. The Feud between Adler and Ganke

Ganke's greatest commercial achievement was to sponsor in the year 1969 a small Company, Offshore which then had assets of approximately $ 3 million and to transform it into a Company with assets of $100 million and an annual income from oil and gas production of $6 million. He would regard as perhaps a major achievement on behalf of Offshore, the concept and execution of a project to convert a bulk-ore carrier into an offshore oil drilling rig (known as the "Energy Searcher"), it being the largest of its kind owned in Australia. The venture cost about $90 million and was financed by an international syndicate of banks as to $67 million and the respondent, Jackson Graham Moore & Partners ascribe the net sum of $15 million as the net value to Offshore of its interest in the "Energy Searcher". See p.27 of Exhibit "PS11" to the Affidavit of Phillip Kevin Smith sworn 29th September, 1983. - Also see the following pages of the transcript pp. 85, 157-162, 185-187, 191-202, 570, 1513, 1543-4.

Volume V p.207

6. Ganke's other major achievement on behalf of Offshore was to acquire substantial interests in highly prospective exploration acreage in Australia and elsewhere. Amongst those was an application for a substantial interest in an exploration permit known as WA-64 P which was considered to be highly prospective. Ganke succeeded in "farming-out" substantial proportions of that area and put together a joint venture with overseas and Australian partners, in such a way that Offshore carried only 6% of the risk but would earn 24% of the profits, if production occurred. Non-chronologically, but to indicate that Ganke's

RECORD

confidence was not misplaced, B.H.P. has recently spent some $30million on exploration in this area. See generally, Exhibit "PS10" to the Affidavit of Phillip Kevin Smith sworn 29th September, 1983. - Also see the following pages of the transcript pp. 209, 210, 505, 511, 516, 528, 701, 731.

Vol. I p.180

7. As at an arbitrary date of 1st January, 1982 the value of Offshore shares was 40 cents, there were approximately 250 million shares on issue, giving a total market capitalisation of $100,000,000. The shares had been as high as 48 cents. - See the following pages of the transcript pp. 570, 1619.

8. Offshore had so arranged the contracts in respect of WA-64 P that Offshore was the operator of the joint venture for the purpose of drilling the wells on WA-64 P and engaged a Company of world repute to carry out the actual work. - See the following pages of the transcript pp. 205-206.

9. The well was estimated to cost approximately $13 million but very high pressures were found to exist as drilling progressed. Finally, a 24 inch spanner fell down the well due, it was alleged, to the negligence of the drilling contractor. The combination of these problems resulted in an expenditure of about $29 million on the well and the suspension for the time being, at least, of that well without it being tested for hydrocarbons which were strongly indicated during the drilling stage. - See the following pages of the transcript pp. 202-4, 700, 1028, 1737, 1753.

10. The combined effects of the delays in the bank syndicated loan drawdown in respect of the "Energy Searcher" and the excessive cost of WA-64 P well caused Offshore to experience a temporary liquidity problem. - See the following pages of the transcript pp. 238, 635, 1566-8, 1625, 1634.

11. Ganke through his group,(mainly Brinds and other public companies) owned about 33% of Offshore's issued capital amounting to a value of $30 million in 1982. All of the companies with which Ganke was associated were flourishing of which 8 were public companies listed on Stock

RECORD

Exchanges. Brinds' assets at that time were in the order of $45-50 million. - See the following pages of the transcript pp. 1464, 1711, 1871 and Vol. I p.199, Vol. II p. 3, Vol. II p. 98, Vol. II p.115.

12. Offshore had over the years under Ganke's guidance pursued a policy of capital growth and investment of surplus funds. Taxation benefits were also given high priority. In the early 1970s Offshore made a first mortgage loan to Nadi Bay Beach Corporation which later became part of the Brinds/Ganke's Group. Other investments were made in companies in which Brinds and Offshore held substantial equity interests. Depending on whether one considers these companies to be Ganke companies (the same as Offshore was considered to be by the Stock Market) or Offshore associated companies, the amount so invested reached a figure of some $7—9 million. When these investments were made, the funds were surplus to Offshore's needs and Offshore's total assets at that time were about $90 million. - See the following pages of the transcript pp. 1521, 1569, 1589, 1616, 1729, 1743-7, 1756, 1759, 1740.

13. In mid June, 1982 the position was transformed. The expenditure on the drillship and the offshore well caused liquidity problems not only for Offshore but also for the whole Ganke group. The shares in Offshore dropped to 12 cents. The market value of the assets of the Brinds group was reduced by approximately $20 million by reason of the diminution in the market value of the shares in Offshore although the intrinsic values remained relatively stable. - See the following pages of the transcript pp. 78, 1638, 1841.

14. Brinds owed to Adler controlled companies at that time, approximately $4.4 million which Adler demanded to be repaid within 6 days. Adler was prepared to forego his demand provided that Ganke would sell two-thirds of his 30% shareholding in Offshore and Adler would then be willing to fund Offshore's exploration programme in future. - See page 246 and the following pages of the transcript pp. 1374, 1390, 1623, 1792.

15. Adler and Ganke at that time, were business friends. Adler had plenty of money and intimated to Ganke that he would act as a 'white knight' to

lend Offshore funds to tide it over a difficult period. Adler promised $5 million within a week and up to $20 million, if needed, over the next 12 months. - See the following pages of the transcript pp. 1613-7, 1631, 1757. RECORD

16. Adler required repayment of the said $4.4 million to F.A.I. before 30th June, 1982. In consideration for Adler's promise to fund Offshore, it would appear that a deal was struck whereby Adler obtained 26 million Offshore shares held by Brinds, thereby extinguishing the debt due by Brinds to F.A.I. However, Adler imposed the following conditions at the last minute, namely:-

(a) A right to obtain 10 million Offshore shares at 10 cents.

(b) A right to underwrite an issue of 125,000,000 shares.

(c) A right to become Chairman of Offshore with Ganke being appointed as Executive Deputy Chairman. - See the following pages of the transcript pp. 195, 1003-6, 1058, 1116, 1383, 1390, 1623.

17. The arrangement was concluded in great haste on 1st July, 1982. It was in effect an agreement whereby Adler and Ganke would be partners in Offshore with Adler as Chairman and his companies holding 36 million shares and Ganke as Executive Director providing management expertise and his companies having a shareholding of approximately 50 million shares.

18. The feud erupted soon after Adler got into control when

(a) Adler reneged on a promise to provide the loan of $5 million to Offshore.

(b) He disregarded all of the management of Offshore and installed Stockbroker David Harry Lance and John Peter Boyer as Executive Officers under the names of Consultants. - See the following pages of the transcript pp. 226, 632, 1006, 1402.

(c) By refusing to provide loan funds and keeping the share price low, Adler created a situation where a substantial shortfall of

RECORD

the share issue would occur thereby enabling him to acquire 46 million shares under the underwriting arrangements. Initially Adler had attempted to obtain 53 million shares by refusing to accept about 2,000 applications which arrived late from overseas, mainly due to mail strikes in Australia. - See the following pages of the transcript pp. 288, 1012, 1371, 1392.

19. Adler's breach of undertaking with respect to Offshore and change in management, contrary to the agreement reached, convinced Ganke both that Adler had designs for the total control of Offshore to the exclusion of Ganke and that Adler's actions would not be beneficial to Offshore. On 27th August, 1982 a Board Meeting of Offshore was held attended only by Adler's representatives. Adler started "unexplainable actions" against companies in August, 1982 in which Offshore had a large equity interest but which Adler chose to classify as "Ganke companies". These amounted to demands for immediate repayment irrespective of whatever arrangements or agreement were in existence in respect of loan funds amounting to about $9 million. Correspondence between 10 companies and Offshore went on for a few days and without regard to submissions made by Ganke, Adler issued under Section 364 (supra) Notices of Demand against all 10 companies. - See the following pages of the transcript pp. 952, 960, 962-7, 965, 975, 982, 1092, 1201, 1313, 1360, 1417, 1431, 1484, 1627.

20. Adler also used Offshore's status as operator for WA-64 P to give a Notice of Default to Southern Cross Exploration N.L. ("Southern Cross") in respect of the overrun in drilling costs in spite of the operating committee of the joint venture not voting on such action and in spite of other companies not having complied with the JVOA (Joint Venture Operating Agreement). - See the following pages of the transcript pp. 502, 738, 1072, 1347, 1446.

21. Adler, when striking the deal with Ganke on 1st July, 1982, promised to pay contributions to the WA-64 P joint venture on behalf of Southern Cross a company in which Brinds, F.A.I. and Offshore had large shareholdings. Adler did not keep his promise and Southern Cross made a call of 5 cents on the contributing shares in order to raise funds to pay for its participation in

the drilling of WA-64 P. Adler objected to the call and on 24th September, 1982 said to Ganke, words to the effect, "I shall give your companies whatever time you say is applicable to the repayment of the loan funds, withdraw all Section 364 Notices but you must buy my shares (F.A.I.) in Southern Cross for $1.2 million (12 cents per share before call) and I shall also revoke the Notice of Default against Southern Cross made by Offshore in respect of WA-64 P." - See the following pages of the transcript pp. 521, 512, 702.

22. By that stage, Ganke was convinced that Adler was misusing his position as Chairman of Offshore and sought legal advice in the light of Adler's actions. As a result of conferences with Solicitors and Counsel, it was ascertained that Adler and his two co-directors had not obtained directors' qualification shares and the advice he received was that Adler could not continue to act as director of Offshore. As Ganke was by that stage completely disillusioned in Adler, he took the advice and shortly thereafter commenced an action in the Supreme Court of New South Wales, Equity Division, to confirm the true identity of the directors of Offshore. - See the following pages of the transcript pp. 1628, 1834.

23. Adler went to Hong Kong to launch Ganke's baby, the "Energy Searcher" and did not want Ganke to attend, although Ganke was invited by the bankers and the shipyard. Ganke stayed in Sydney and following legal action had Adler's and his co-directors' seats on the Board declared vacant on the ground that they had not acquired qualification shares.

24. Adler in retaliation applied for Injunctions against the properly constituted Board of Offshore and claimed, inter alia, that the purpose of the action to remove him was to prevent Offshore instituting winding-up proceedings based on the Notices issued under Section 364 of the relevant Companies legislation.

25. The directorship dispute came before Sheppard J. in the Supreme Court of the Australian Capital Territory and his Honour "suggested" that to stop the feuding an independent Chairman of Offshore be appointed until the position was resolved.

RECORD

Alexander Robert MacKay Macintosh (hereinafter referred to as "Macintosh") a Partner in the Sydney firm of Messrs. Peat Marwick Mitchell & Co. who was regarded as independent of both parties was then appointed and some of the litigation was concluded. - See the following pages of the transcript pp. 238, 635.

26. As a result of this forced reconciliation by the parties, Macintosh had the sole power to override any Board decision on which there was a conflict between the 'Adler' or 'Ganke' factions, which in practice, proved to be almost every decision. - See the following pages of the transcript pp. 171, 255,626, 637.

Volume III p.163 1.18

27. The Moratorium Deed

To avoid continuous arguments and litigation in respect of the underwriting by F.A.I. of the Offshore share issue, the directorships, the loans and Section 364 Notices, an overall "settlement" was reached on 25th November, 1982 which became known, rather unfortunately, as the 'Moratorium Deed'. On 25th November 1982 an elaborate deed was executed between Offshore, its subsidiary Aureole Investments Pty. Ltd., F.A.I. and Fire and All Risks Insurance Limited (hereinafter called "F.A.R.") as creditors, Metropolitan Executors and Nominees Pty. Ltd. (a subsidiary of F.A.I.) and Brinds and nine of its subsidiary or associated companies as debtors, and Ganke, Tosio and Kippist (the Brinds faction of the Offshore Board) and Macintosh. Under the deed the debtors received an indulgence from the creditors on strict terms. The deed provided for a moratorium for up to twelve months with a view to enabling the debtors to carry on business for the purpose of progressively discharging their debts, but to do so subject to the supervision of Mr. Macintosh as examining accountant. Each debtor agreed to appoint him in that capacity and to pay his remuneration. The deed was, however, not without its benefits to the F.A.I. group, for it involved, on one view, a settlement favourable to them of some outstanding disputes. It contained acknowledgements by the debtors, in clause 10, that the debts owed to Offshore, which were the subject of dispute as to terms of repayment, were unconditionally repayable on demand, and as to the unsecured debts that they carried interest at 16 per cent from 30th November 1982. There was a further

Volume III p.163, 1.7

Vol. III pp.164-171

Volume III p.164 1.7

acknowledgement in effect, that the debts of Alexanders Securities Ltd, and Chapmans Ltd. owed to F.A.R. were repayable in full on demand. The creditors, for their part, agreed not to demand repayment during the currency of the moratorium. Moreover, Ganke, Kippist and Tosio covenanted to resign as directors of Offshore and not to stand for re-appointment at the then forthcoming annual general meeting. By the deed it was also agreed that some, at least, of a considerable body of litigation which was pending at the time of the deed's execution between the two factions of the Offshore Board, and by the P.A.I. group against various members of the Brinds group, should be discontinued.

Volume III p. 164 l.16

28. Tadgell J. was of the view that the following provisions of the deed were sufficiently important to be referred to in some detail. By clause 1(A) (i) it was provided that from the date of the deed until and including 30th November 1983 or until terminated in accordance with the provisions of the deed, whichever should first occur (which period was in the deed called "the moratorium") each of the debtors covenanted that it would carry on its affairs for the purpose of progressively discharging during the moratorium its liability to each creditor to whom it was indebted, including the realisation or refinancing of such assets (and, if necessary, all of them) as should be required for the purpose.

Volume III 9. 165 l.2

29. By clause 1(A)(ii) the debtors covenanted for the like period to commence and carry out the realisation or refinancing of such assets with expedition and diligence following upon execution of the deed.

By clause 1(B)(ii) each of the debtors agreed that it would forthwith appoint Macintosh as examining accountant, and by clause 1(B)(iii) each debtor covenanted that it would ensure that during the moratorium the examining accountant would be promptly provided with all information, records and documents of the debtor and explanations thereof and of any transactions of the debtor which the examining accountant in his absolute discretion should seek of them and provide full and free access to the debtor's records, accounts and other

Volume III p.166 l.1

RECORD

Volume III p.166 l.12

documents wheresoever situated. By clause 1(B)(viii) it was provided that each debtor should deliver to the examining accountant on or before the last business day of each calendar month or part thereof during the moratorium a report of its progress in the realisation of its assets for the purposes stated in clause 1(A) and in the discharge of its liabilities. By clause 2 it was provided that the examining accountant should monitor on behalf of the creditors the due and punctual performance of the provisions of the deed by each debtor who had appointed him examining accountant and that he should forward a monthly report with respect to each of those debtors to each of the creditors.

Volume III p.166 l.24

By clause 4.2 it was provided that each debtor separately covenanted with each creditor to deliver unaudited balance sheets and profit and loss accounts together with detailed specification and explanation of all assets and liabilities set forth in such unaudited accounts in respect of the debtor as at the end of and for each of six specified quarterly periods.

Volume III p.167 l.2

The first was provided for in subparagraph (A), from 1st July to 30th September 1982 and the accounts were, in effect, to be provided by December 1982. By subparagraph (b) accounts in respect of the quarter 1st October to 31st December 1982, were, in effect, to be provided by 30th January 1983. By clause 5 it was provided in effect that during the moratorium no debtor who had appointed the examining accountant should without his approval incur

Volume III p.167 l.22

liabilities exceeding $10,000 . By clause 6 it was provided that the examining accountant should during the moratorium (a) monitor the management of the business of each debtor who had appointed him, (b) monitor the progress of each of the debtors towards the realisation of their respective assets for the purpose of discharging their respective liabilities to the creditors and (c) "report forthwith to the creditors any default in the opinion of the examining accountant by any debtor in the observance or performance of its covenants and obligations herein contained"; and by sub-clause (d) of clause 6, it was provided that the examining accountant should comply with every direction given by all the creditors which was reasonable and proper having regard to the objects of and provisions contained in the deed.

Volume III p.167 l.26

By clause 7(1)(a) it was provided that during the

RECORD

moratorium the debtors should not take or concur in the taking of any step, action or application or legal proceedings to wind up the debtors or any of them. By clause 7(2)(a) it was provided that for the purposes specified in Clause 7 certain shares in the capital of Offshore which were pledged by Chapmans Ltd. and Alexanders Securities Ltd. to secure debts owed to FAR should be deemed to be valued at 15 cents per share.

Volume III p.168 1.1

30. By clause 8 it was provided that each of the creditors agreed with each of the debtors that they should seek to procure that Jackson, Graham, Moore & Partners, Martin Corporation Ltd., Mercantile Mutual Holdings Ltd. and Milton Corporation Ltd. (which last was another secured creditor of Brinds) become parties to the deed, or to any other deed with which the parties might replace it.

Volume III p.169 1.1

31. By clause 20 it was provided, in part:

Volume III p.169 1.9

"The parties and each of them declare and agree with each other that no provision of this Deed shall in any way operate as a waiver, compromise, alteration or extinction of any of the rights, powers or authorities which subsist in any such party pursuant to the terms of the existing agreements or deeds to which it is a party other than pursuant to Clause 7(ii) and the parties agree with each other and declare that no provision of this Deed shall be pleaded or raised in any manner against any party following expiration or determination of the Moratorium, as a defence or counter to any claim other than in response to any claim by FAR following a shortfall on realisation of securities pursuant to Clause 7 hereof."

32. By clause 22 it was provided:

Volume III p.169 1.25

"If during the Moratorium the Examining Accountant, in his absolute opinion considers that: (a) the interests of the Creditors could be prejudiced by compliance any Debtor with this Deed; (b) any Debtor is not observing or fulfilling any of the covenants or agreements herein contained, on its part to be observed and fulfilled;

RECORD

(d) without affecting the generality of sub-clause 22(b) above any debtor is not having regard to the provisions of Clause 1.A hereof making sufficient progress in the discharge of its indebtedness to the Creditors as referred to herein, including the realisation of its assets during the Moratorium so as to discharge such indebtedness, the Examining Accountant will deliver that opinion and the reasons therefor and any proposals consequent upon such opinion, to the Creditors. Any Creditor may within seven (7) days after receipt of an opinion pursuant to this Clause give notice of termination of the Moratorium to the Debtors. No party to this Deed shall challenge or contest on any account an opinion formed by the Examining Accountant."

Volume III p. 170 1.9

33. By clause 25 it was provided that the examining accountant, in exercising his powers and carrying out his duties under the deed, should be agent of the relevant debtor.

34. By clause 29 it was provided that the moratorium should terminate upon the happening of any one or more of a number of specified events including (a) "If the indebtedness of the debtors to the creditors should be discharged in full"; (b) "If any creditor should give notice to the debtors pursuant to Clause 22"; and (c) "If any debtor fails to observe or comply with any provision of the Deed."

Volume III p.170 1.23

35. By clause 30 it was provided that:

"Clauses 7(2), 10, 11.1, 12-17 inclusive, 18-21 inclusive, 23, 24, 26, 27, 34 and 35 shall survive the termination of this Deed and shall be binding upon and enure to the benefit of each party hereto, and its successors."

36. By clause 31 it was provided that not later than 20th January 1983 each of the debtors (other than Gulf Resources N.L.) should hold a meeting of its shareholders to pass resolutions to approve and ratify the execution of the deed and to approve and ratify the appointment of the examining accountant and to resolve that during the period of the moratorium the business and affairs of the debtor should be conducted pursuant to the term of the deed.

RECORD

37. By clause 37 it was provided that the examining accountant might, from time to time, extend the time for doing any matter or thing provided for by the deed as he should reasonably think fit. Volume III p.171 1.5

38. That Deed provided a 12 months Moratorium on repayment of the amounts owing to Offshore or F.A.I. by the Ganke Companies on rather harsh terms and the cessation of all litigation between the parties. These terms included an admission for the purposes of the Moratorium that all of the respective debts were then due, notwithstanding that most were not "at call" and were not due, unless and until, a demand allowing the appropriate period to pay, was made. Some of the debts were subject to equitable mortgages of 2-3 years. The Deed gave very extensive powers to Macintosh. The principal relevant power was a right for Mr. Macintosh to form and express an unexaminable opinion, (immediately after the signing of the Moratorium if he chose to do so) that the Deed was not in the best interests of the creditors which would give Adler the opportunity to seek the immediate winding-up of all the Ganke Companies. Ganke accepted this situation as he had total trust and confidence in Macintosh. Ganke says that Macintosh betrayed that trust by having secret meetings with Adler and complying with Adler's instructions to terminate the Moratorium Deed by giving an appropriate opinion. - See the following pages of the transcript pp. 127, 288, 310, 356, 455, 466, 471, 473, 474, 475, 490, 492, 546, 555, 607, 647, 705, 758, 772, 773, 778, 800, 875, 901, 902, 1002, 1073, 1425, 1436, 1544, 1692, 1845, 1846.

39. On the same day (25th November, 1982) another Deed was entered into between Southern Cross and Offshore in respect of WA-64 P which was to discontinue the arguments about alleged default and related matters.

40. Under the latter Deed, Southern Cross was obliged to pay an amount of approximately $300,000.00 to the WA-64 P joint venture which Offshore wrongly refused to accept when tendered and legal action by Southern Cross against Offshore and Macintosh (Stakeholder) commenced in December, 1982 in order to protect Southern Cross' position in respect of WA-64 P. - See the following pages of the transcript pp. 467, 771, 778, 798, 1697.

RECORD

41. In January, 1983, secret meetings were held between Adler and MacIntosh and also between Adler, MacIntosh and other parties which discussed the placing of Brinds into provisional liquidation. - See the following pages of the transcript pp. 85, 121, 291, 292-6, 344, 459, 467, 474.

42. After 21st January, 1983, MacIntosh wrote numerous letters to Ganke, which it is claimed 'manufactured evidence' of minor technical breaches of the Moratorium Deed. - See the following pages of the transcript pp. 466, 471, 546, 778, 901, 1425, 1541, 1846.

43. Unbeknown to Ganke, steps were being taken to determine the Moratorium by MacIntosh and Adler. Affidavits which Ganke says were outright misleading but in any event at least of very doubtful accuracy, were prepared for the purpose of supporting an ex parte application for a provisional liquidator to Brinds Limited. This enabled a provisional liquidator to be appointed on the ex-Parte application of Offshore,and, on the instructions of Adler, contemporaneously with the termination of the Moratorium Deed. - See the following pages of the transcript pp. 556, 558, 619, 893, 899, 897, 1002, 1311, 1412.

44. Ganke was not informed of these meetings and great care was taken to keep secret from him these arrangements so that he was simultaneously confronted with the termination of the Moratorium and notice of the appointment of the provisional liquidator. At the date of the appointment of the provisional liquidator, Brinds Limited had assets in excess of $20 million and the group had assets of about $40 million and the secretly prepared Affidavits claimed that Brinds was going to spend $1 million (2.5-5% of the total assets) in the purchase of shares in Southern Cross. No explanation was afforded as to how such expenditure could occur without first obtaining the consent of MacIntosh as required by the terms of the Moratorium Deed. Brinds group and Ganke associated companies had at that time 53,000,000 Offshore shares. Accepting for this purpose that the most likely Stock Exchange price of Offshore shares stated by the Stockbrokers, Jackson Graham Moore & Partners in a report dated 20th September, 1983, to be 36.4 cents, Ganke's holdings would have a value of in excess of $20 million. In addition, this holding of

53,000,000 shares was a parcel of great strategic value. At that time Adler had about 100,000,000 shares out of a total issued share capital of 390,000,000 and there was no other substantial shareholder except Ganke. If Ganke had made a bid for the Company he would need to have acquired only 20% of the outstanding shares as to probably control an Annual General Meeting and oust Adler. - See the following pages of the transcript pp. 910, 991, 1861.

45. On the other hand, if Brinds could be hamstrung with a provisional liquidator and finally wound up, the Offshore shares were likely to be sold at market price of 10 cents or about $5,000,000 and Adler or his friends would have been able to purchase them through the market. - See the following pages of the transcript pp. 288, 1012.

46. Adler's Motivation

The possible Brinds winding-up would eliminate simultaneously the threat to Adler's control of Offshore and enable Adler or his friends to make the potential profit of $15 million on the Offshore shares alone, with many other valuable assets and strategic shareholdings of the Brinds group coming on the market at liquidator's bargain basement prices. - See the following pages of the transcript pp. 1013-6.

47. A Court would require convincing proof of the degree of malevolence to lead it to the conclusion that Adler had depressed the price of the Offshore shares for the purpose of financially embarassing Brinds and had caused Offshore to wind-up Brinds so that Adler could acquire a direct purchase of a strategic holding in Offshore at an undervalue.

48. The way in which it was sought to formulate these matters at the trial was to introduce evidence as to the :-

(a) Secret meetings between Adler and MacIntosh, as to the manipulation of the Financial Accounts of Offshore and adverse publicity all of which were intended to depress and maintain a depression of the price of Offshore shares. For example:-

(i) The achievement of the "Energy Searcher" - See the following pages

RECORD

of the transcript pp. 179, 183, 124, 689, 1042, 1044, 1340.

(ii) Treatment of Brinds Loans - See the following pages of the transcript pp. 140, 262, 675, 816, 861, 939, 1046, 1067, 1116, 1357, 1618, 1748.

(iii) Expenditure after 30th June, 1982 - See the following pages of the transcript pp. 182, 240, 247, 662, 814, 860, 1045, 1356.

(iv) New issue of shares - See the following page of the transcript p. 221.

(v) The Louisiana Deal - See the following pages of the transcript pp. 251, 258, 662, 671, 812, 1048.

(vi) No details of Moratorium in report - See the following page of the transcript p. 836.

(vii) F.A.I. entitlement to take up shares - See the following pages of the transcript pp. 291, 1317, 1366.

(viii) No details of gas reserves in report - See the following pages of the transcript pp. 1005, 1115.

(b) Such evidence of the attitudes and motivations of Adler as was adduced from the evidence of Ganke and cross-examination, mainly of MacIntosh. For example:-

(i) Hostility to Ganke - See the following pages of the transcript pp. 389, 469, 911, 968, 1046, 1065, 1077, 1361, 1459, 1844.

(ii) Adler's greed for profit - See the following pages of the transcript pp. 215, 1013-6, 1058, 1116, 1383.

(iii) 25% Interest on loans - See the following pages of the transcript pp. 1022, 1026, 1069, 1071, 1362-3, 1421.

(iv) Desire to increase share holdings - See the following pages of the transcript pp. 1368-72, 1381, 1456.

(v) Adler deceives Ganke - See the following pages of the transcript pp. 1390, 1623.

(c) (i) That the then current market price of Offshore shares was:-

A. unnecessarily low;

B. temporarily so.

(See evidence of K.G. Wilshire at p.1017 also B.G. Jackson at pp.1233 and 1252).

(ii) That the 1982 Annual Report of Offshore

A. contributed to that undervaluation;

B. inhibited recovery.

(See evidence of B.G. Jackson at pp. 1238-9 also MacIntosh at pp.133-4, 142-3, 181, 182-5, 121-2, 219-220, 224-6, 235-6, 240-8, 263, 267, 314-322.

(iii) That the true price was 20 - 23 cents minimum. (See evidence T.J. Whitfield at pp. 1206-1213 also B.G. Jackson at pp.1233-1234).

(iv) That upon release of information known to Offshore Oil the value of the shares would rise. (See evidence B.G. Jackson at pp. 1265-7 also T.J. Whitfield at pp.1192-1193).

(v) That Adler (or F.A.I.) was buying as many Offshore Oil shares as possible. (See evidence MacIntosh at pp.125-7 also T.E. Atkinson p. 1379 et seq)

(vi) As cheaply as possible. (See evidence K.G. Wilshire at p.1016 also MacIntosh at pp. 215-7).

(vii) Adler (or F.A.I.) was the principal beneficiary of this low market price of Offshore Oil Shares. (See evidence MacIntosh at p.126).

(viii) That the inclusion within the 1982 report of "depressing" factors was at

RECORD

least in part the responsibility of Adler. (See evidence McIntosh at pp. 133-8, 140-1, 181-5, 126, 240-1, 245-8, 257-262)

(ix) As was the exclusion of relevant material. (See evidence Wilshire at pp. 1005-7)

(x) The allegation was implicit that Adler sought by deliberate acts to depress the value of Offshore shares either by

A. withholding information;

B. or giving a false picture of the position of Offshore.

49. A major tactical question in the conduct of the case was whether or not the weight of evidence was such that unless answered by Adler the Court would find in favour of the appellant in accordance with usual principles.

50. During the first week of February 1983 a petition to wind up Brinds and necessary supporting affidavits were prepared by, inter alia, Macintosh. The preparation of these documents was kept secret from Ganke.

51. On 10th February, 1983 Macintosh issued an "opinion" pursuant to the provisions of the Moratorium Deed. The existence of this opinion was kept secret from Ganke.

52. On 16th February, 1983 Adler purported to terminate the Moratorium Deed. This termination was kept secret from Ganke.

Volume I p.1

53. On 17th February, 1983 Offshore presented a petition for the winding up of Brinds and applied ex parte for the appointment of a provisional liquidator of Brinds. These proceedings were kept secret from Ganke.

Volume III p. 124 l.2

54. It was accepted at the trial that as at December 1982 Brinds had liabilities of $19,670,486.

Volume III p.124 l.5

The petition alleged that on the date of its presentation Brinds was indebted in the following amounts which were then overdue for payment:

$3,513,236 (unsecured) to Offshore;

$1,426,658 (secured or partly secured) to Jackson, Graham, Moore & Partners, stock and sharebrokers of Sydney; and $446,974 (secured or partly secured) to Martin Corporation Ltd. The two last mentioned creditors appeared by counsel to support the petition. There was also evidence from another supporting creditor Mercantile Mutual Life Insurance Company Ltd. but that company has since withdrawn its support. RECORD

The existence of each of the three debts specifically referred to above was not disputed by Brinds, but Brinds vehemently disputed that they were due for payment.

According to the then operative draft balance sheet of Brinds, its assets at 31st December 1982 were $20,411,140. Offshore contended that these assets were over-valued and that there was at 31st December 1982 and at the date of presentation of the petition, a deficiency of several million dollars. Volume III p.124 l.29

55. Brinds held 19,007,426 fully paid shares of 10 cents each in the capital of Offshore, which represented just over five per cent of the latter's issued capital. Companies which are either subsidiaries of or associated with Brinds and their directors and staff held between them a further nine per cent or thereabouts of the issued capital of Offshore. Volume III p.125 l.5

Until 30th June 1982 Brinds and its associated companies (hereinafter referred to as the "Brinds Group") held between them some 30% of the capital then issued in Offshore. Volume III p.129 l.2

56. The other directors of Offshore until 30th June 1982 were Messrs. J.B. Kippist and H.G. Scott. At all relevant times the directors of Brinds, in addition to Mr. Ganke, have been Mr. Kippist and Mr. C. Kristallis. Volume III p.129 l.4

57. Following the presentation of the Petition for winding-up of Brinds on 17th February 1983 the provisional liquidator was appointed on the same day upon the ex parte application of the petitioning creditor. The hearing of the petition began on 7th April 1983 before Mr. Justice Tadgell and concluded on 7th May 1983. Volume I p.4

58. Apart from contending that the petition should be dismissed because there was a dispute about the terms of repayment of its debt to Offshore, Brinds

RECORD

Volume III p.176 l.13 opposed the petition on the following five principal bases. First, that the moratorium had not been duly terminated and was still on foot, thus providing a bar to the presentation of the petition to wind up. Volume III p.176 l.15 Secondly, that in any event its acknowledgement in the moratorium deed of its present indebtedness could not be relied on because of the terms of clause 20 of the deed inasmuch as it is provided that "no provision of this deed shall be pleaded or raised in any manner against any party following expiration or determination of the moratorium as a defence or counter to any Volume III p.176 l.23 claim". Thirdly, that it had not been shown to be unable to pay its debts. Fourthly, that the non-payment of its debts is attributable not to its own Volume III p.176 l.26 shortcomings but to the conduct of its creditors and persons related to them. Fifthly, that it was in all the circumstances entitled to the exercise of Volume III p.177 l.3 the Court's discretion in its favour not to make a winding-up order.

59. Mr. Justice Tadgell gave judgment on 5th May 1983. He first described the nature of the claim and set out the facts in considerable detail. He made some Volume III p.177 observations on matters relating to the professional activities of Mr. Macintosh and made some further Volume III p.179 comments on the impression which he had formed of Mr. Ganke.

60. Tadgell J. found in respect of the five principal Volume III p.181 l.25 bases of opposition to the petition first, that the moratorium was not still on foot. He examined the argument that the opinion which Mr. Macintosh expressed by letter on 10th February 1983 was no "opinion" at all because it was not formed and expressed in good faith and was contrary to the facts. He recorded that it was argued for Brinds there was a real dispute of fact about the validity of the opinion which it was submitted he should not determine on the petition. Volume III p.183 Tadgell J. found that there had been certain technical breaches of the Moratorium Deed.

Volume III p.186 l.3 61. The second principal basis for opposition to the petition involved the interpretation of clause 20 of the deed. Tadgell J. saw that submission as involving treating the assertion of Brinds that its debt to Offshore was not now due and payable as a "claim" to which the acknowledgment of the present indebtedness Volume III p.186 l.19 by Brinds was raised as a "defence or counter". Tadgell J. was of the opinion that the word "claim" meant a pecuniary claim and did not encompass an allegation or assertion of any kind made by one of the parties to the deed to another following the termination of the moratorium. He found that the contention that

Brinds was not indebted to Offshore for a sum now due was not such a claim and that the acknowledgement in clause 10 could accordingly be relied on by Offshore against Brinds. RECORD

62. The third principal basis of opposition to the petition was that it had not been shown that Brinds was unable to pay its debts. The relevant times at which this was sought to be shown on behalf of the petitioning creditor and those supporting were the date of presentation of the petition and the date of the hearing. Volume III p.187 1.3

63. Tadgell J. was of the view that there was evidence that Brinds was on 17th February 1982 unable to pay its debts in terms of Section 364(1)(e) of the Companies (Victoria) Code. Volume III p.189 1.13

Tadgell J. regarded the circumstances of the execution by Brinds of the moratorium deed itself on 25th November 1982 as evidence, when taken along with other evidence, of the inability of the company to meet on that date the liabilities which it therein acknowledges. Tadgell J. recorded the contention of Brinds that he should have regard to what it alleged to be an excess of its assets over its liabilities. He referred to a table which after the inter-company debts have been eliminated, showed what might be available to Brinds, or indeed what it says would be available as a result of its resort to its subsidiaries. That table showed that at 31st December 1982 it had assets potentially available to it from its subsidiaries of some $33,000,000 and that there were liabilities on that basis of some $22,000,000. The table further showed assets which might be available if Brinds were able to resort to some of the other companies in the Brinds Group, not specifically its subsidiaries but with which it is associated. Volume III p.190 1.9 Volume III p.194 1.20 Volume III p.194 1.26 Volume III p.195 1.6

On that basis, it is said, there are total assets exceeding $41,000,000 and total liabilities of some $14,000,000. Volume III p.196 1.1

64. Tadgell J. was of the view that the assets of Brinds were, as to some of them, over-valued in its own estimation. He gave as an example (albeit with another matter) that part of the assets of Brinds consisted of its Offshore shares of which there were some 19,000,000. These were valued at 20 cents, and were therefore said to represent an asset of some $3,800,000. Volume III p.196 1.3 Volume III p.196 1.12

Tadgell J. found that if there were to be a realisation within a reasonable time in the future of

RECORD

those shares, it appeared to him to be in the highest degree unlikely that they would realise 20 cents. He therefore found that in that one asset alone there appeared to be an "over optimistic valuation" by some $2,000,000.

Volume III p.196 l.26

Volume III p.197 l.22

65. Tadgell J. found that notwithstanding that there might, on one view, if one looked at the whole of the Brinds Group, be a substantial excess of assets over liabilities judging simply by balance sheets, this was not sufficient to override what appeared to him from the other evidence that as at the date of the petition, 17th February and for "many months before that" and at the date of judgment, Brinds was unable to pay its debts as they fell due.

Volume III p.198 l.2

Volume III p.199 l.4

66. As to the fourth and fifth principal bases upon which the opposition was founded; that is, that any inability of Brinds to repay its debts or any non-payment by it of its debts were attributable to the conduct of the creditors and parties related to them; and that there should, because of these and the other circumstances be an exercise of the Court's discretion in favour of the company.

Volume III p.199 l.23

67. In Tadgell J.'s opinion the evidence did not sustain the conclusion that Macintosh was "designedly remiss in his dealings with the Brinds Group under the deed. Even then it might be said that, whether designedly remiss or not, he, in the exercise of his discretion, refused to allow Mr. Ganke to proceed with plans which, had they been proceeded with, would have enabled the company to be in a better position than it is now."

Volume III p.201 l.31

68. Tadgell J. refused to exercise a discretion in favour of the company based on the argument that there was, if the company was allowed to go about its business, a prospect of its realisation within a reasonable time sufficient to enable it to pay its debts.

Volume III p.203 l.8

69. Tadgell J. also refused to have regard to the wishes of the opposing creditors and as urged by them to dismiss the petition. He noted that all creditors who appeared and opposed the petition were companies that are associated in one way or another with Brinds. All of them were companies of which Mr. Ganke is chairman of directors. He felt that in the circumstances the approach to be taken was that stated in re Melbourne Carnivals Limited (No. 1) [1926] V.L.R. 283 that a winding-up order should not be made against the wish of a body of creditors representing a majority

RECORD

in value as against the petitioner and any creditors supporting unless the petitioner has satisfied the Court that under all the circumstances it would not be just or equitable that the wishes of the opposing majority should prevail. He stated that a similar approach seems to have been taken by the Court of Appeal in re E. & J. McRae Ltd. 1961, 1 W.L.R. 229, and that a course which had been followed by the Victorian Supreme Court, notably by Sir Henry Winneke when Chief Justice in re Maiella Construction Co. Pty. Ltd. an unreported decision delivered on 18th February, 1965. He stated that he was satisfied that a winding up by the Court would be just and equitable.

Volume III p.203 l.25

Volume III p.204 l.6

70. By Notice of Appeal dated 18th May, 1983 the appellants appealed to the Full Court of the Supreme Court of Victoria. The appeal came before Starke, Murray and Southwell JJ. on 10th October, 1983. On 10th October, 1983 the Full Court of the Supreme Court of Victoria granted leave to the appellants to amend the Notice of Appeal by adding new grounds as described in the Notice of Motion filed by the appellants on 29th September, 1983.

Volume III p.220

Volume IV p.16

Volume IV p.9

71. On 26th October, 1983 the appellants filed a Notice of Motion seeking adjournment of the hearing of the appeal until judgment be given in Action No. 4254 of 1983 in the Supreme Court of New South Wales in its Equity Division and alternatively that the appellants have special leave at the hearing of the appeal to adduce fresh evidence as described in the said Notice of Motion.

Volume IV p.19

72. On 28th November, 1983 the said Full Court of the Supreme Court of Victoria dismissed the above Notice of Motion. On 16th December, 1983 the said Full Court of the Supreme Court of Victoria dismissed the appeal and gave reasons for its order of 28th November 1983. The judgment of the Full Court of the Supreme Court of Victoria was a joint judgment which summarised the course of the proceedings and referred to the earlier proceedings before Mr. Justice Tadgell.

Volume IV p.25

Volume IV p.61

Volume IV p.28 et seq.

73. The Full Court was of the view that in general terms the petition was defended by Brinds upon two main grounds namely that the debts were not immediately due and payable by it and secondly, that Offshore, the petitioning creditors, was not acting bona fide in bringing the petition and was actuated by ulterior and collateral motives with the result

Volume IV p. 29 l.26

RECORD

that the Court should, in the exercise of its discretion, dismiss the petition.

74. The Full Court of the Supreme Court of Victoria first considered the matter in respect of which the appellants sought to introduce fresh evidence. Such
Volume IV p.30 l.14 evidence related to matters which occurred after the order of Tadgell, J. had been made and no question therefore arises as to whether the evidence could have been discovered before the hearing by the exercise of
Volume IV p.30 l.22 due diligence. The Court proceeded upon the basis that the evidence must be credible and must be such that if it had been before the learned primary Judge he probably would have accepted it and that it would have been likely to have led to a different result in the proceedings.

Volume IV p.30 l.26 75. The Court noted that before Tadgell J. a great deal of time was spent in the cross-examination of witnesses to demonstrate that by various means Adler had endeavoured to depress the market price of the shares of Offshore so as to embarrass Brinds financially and force it into liquidation with the object of ultimately being able to obtain the large parcel of shares in Offshore held by Brinds which would need to be disposed of in the course of the liquidation.

Volume IV p.31 l.8 It had been submitted that various matters demonstrated that the report and accounts of Offshore published in 1982 were manipulated by Adler for the purpose of presenting an unduly pessimistic view of the financial position of Offshore thereby causing the market price of the shares in Offshore to be lower than it otherwise would have been. Reference was made to other matters such as issues of shares at par, claimed to be directed to the same end.

Volume IV p.31 l.15 76. The Full Court noted that in his judgment, Tadgell J. was not prepared to find that the allegations of a lack of bona fides on the part of Offshore had been made out and refused to dismiss the petition as a matter of discretion on that ground.

Volume IV p.31 l.19 77. The Full Court recorded that the fresh evidence sought to be introduced related to winding up proceedings in the Supreme Court of New South Wales in June and July 1983. In those proceedings Fire & All Risks Insurance Co. Ltd. (F.A.R.), a company controlled by Adler, petitioned for an order that Southern Cross Exploration N.L. ("Southern Cross") a company associated with Ganke, be wound up. In the course of those proceedings it appears that counsel appearing for F.A.R. announced on 28th July 1983

that some four million shares in Offshore owned by Southern Cross which had been held by F.A.R. as security for a debt due to it by Southern Cross had been sold. The evidence alleged that the market price of Offshore shares had been depressed by certain operations and that the shares had been sold at the temporarily depressed price to a company, Nationwide Resources Pty. Ltd., in which company Adler owned a substantial interest. RECORD

78. It was submitted that the evidence to be led in action No. 4254 of 1983 in the Supreme Court of New South Wales to be heard by Waddell, J. in March 1984 would demonstrate that Adler had engaged in a market-rigging operation designed to depress the price of Offshore shares thus enabling Nationwide Resources Pty. Ltd. to purchase the shares owned by Southern Cross at a discount. The evidence disclosed that shortly after the shares had been purchased nearly half of them were sold at a price of fifteen cents whereas they had been purchased at a price of thirteen cents. Volume IV p.32 l.6

It was submitted that if this evidence had been called in the proceedings before TadgellJ. it would have had the effect of convincing Tadgell J. of the truth of the allegations that Adler and his associated companies had engaged in somewhat similar conduct in relation to Offshore shares for the purpose of injuring Brinds. Volume IV p.32 l.16

Having heard the submissions advance on behalf of the appellants and the reply to those submissions on behalf of the respondents, the Full Court on 26th November 1983 dismissed the motions for an adjournment and for special leave to the appellants to adduce fresh evidence. Volume IV p.32 l.21

79. The Full Court expressed the view that the evidence fell far short of achieving the purposes for which it was desired to adduce it. The Court expressed the view that if the evidence was to be admitted it must be relevant and probative if it might be said to be evidence of a system or a course of conduct pursued by Adler and to demonstrate motive on his part. If it fulfils this purpose it does not matter, as a matter of logic, that it relates to conduct subsequent to the conduct in question (see Phipson 10th ed. para. 503.) Logically a course of conduct pursued by a person may have the same probative value whether it is pursued before or after the events under consideration. But to be admissible Volume IV p.33 l.3

RECORD

for the purpose of proving system the evidence must have a high degree of cogency. It must be such that the similarity tends to prove the central facts sought to be proved and not merely ancillary or subsidiary facts. The Full Court stated that in the hearing before Tadgell J. the central fact sought to be proved was not that Adler was dishonest or that he was prepared to attempt to influence the market price of Offshore shares. What was sought to be proved was that Adler did these things for the purpose of forcing Brinds into liquidation so that the large parcel of shares owned by Brinds in Offshore could be obtained by companies associated with Adler, thereby better securing his control of and interest in Offshore and thus preventing Ganke from attempting to gain control of Offshore. The Full Court further stated that if this could be proved it might well demonstrate bad faith of a relevant kind in that it might demonstrate that the winding-up petition was brought not for the legitimate purpose of recovering moneys due by Brinds but for a subsidiary and malicious purpose.

Volume IV p.33 l.17

Volume IV p.33 l.25

80. The Full Court was of the view that facts sought to be proved by the fresh evidence would, however, go no further than to show that Adler was prepared to engage in an improper and indeed unlawful market rigging transaction. The motive for this transaction seems to have been demonstrated by the evidence itself to have been the making of a profit on the purchase and subsequent sale of the shares in question. The artificial depression of the value of Offshore shares was purely temporary. No sooner had the price been depressed and the shares of Southern Cross purchased than th market price regained what the evidence indicated was probably the true level. The element of a long term depression of the value of the shares in Offshore with the purpose of forcing financial embarrassment and winding up of companies associated with Ganke that owned shares in Offshore is absent. The element of securing a large parcel of shares in Offshore for the purpose of extending Adler's control of that company is absent. The purpose of preventing Ganke from obtaining control of Offshore is absent.

Volume IV p.34 l.1

81. Upon close analysis in the opinion of the Full Court the real similarity which the fresh evidence, if admitted, would demonstrate with the evidence led before Tadgell, J. would be that Adler was prepared to engage in unlawful market rigging operations for various reasons. Consequently in truth the evidence is really directed at the impermissible target of Adler's credit.

Volume IV p.34 l.17

RECORD

A second matter in respect of which evidence of the proceedings in the Supreme Court of New South Wales was sought to be led was that it appeared that in the course of those proceedings a document was produced relating to advances by F.A.R. to Southern Cross which demonstrated that the system, employed in companies controlled by Ganke in relation to inter-company advances was the somewhat informal system alleged by Brinds in the winding-up proceedings before Tadgell J. and relied upon by Brinds to demonstrate that the moneys borrowed by Brinds from Offshore were repayable on twelve months' notice. However, Tadgell J., while expressing a good deal of scepticism as to the genuineness or otherwise of the document in question, did not base his decision upon his possible disbelief of that document. As Tadgell J. observed, events overtook the question and the basis of Tadgell J's decision was the result of his consideration of the moratorium agreement entered into by the parties. It was the opinion of the Full Court that Tadgell J's decision turned upon his view of the interpretation of the agreement and would not have been affected by a different view as to the genuineness or the legal effect of the document relied upon by Brinds to demonstrate that the loan, prior to the moratorium agreement being entered into, was repayable only upon twelve months' notice. Consequently in the opinion of the Full Court, leave was not to be given to permit the fresh evidence to be led and the motion both in respect of the adjournment until the determination of the proceedings before Waddell, J. in New South Wales and in respect of the application to introduce fresh evidence was dismissed with costs.

Volume IV p.34 l.23

Volume IV p.35 l.5

Volume IV p.35 l.12

Volume IV p.35 l.23

82. The Full Court of the Supreme Court of Victoria then considered the matters of appeal. The Court first considered a chronology of the events. The Full Court recorded that the principal grounds pressed before it were grounds

1. That on the evidence the learned Judge should have found that the dispute between Brinds Limited and the petitioner as to the terms of repayment by Brinds Limited of its indebtedness to the petitioner was genuine and precluded him from making a winding up order.

Volume IV p.37 l.7

2. That in proceeding to determine the dispute as to the terms of repayment by Brinds Limited of its indebtedness to the respondent the learned Judge misdirected himself.

Volume IV p.37 l.12

RECORD

83. In support of those grounds the Full Court noted that it had been asserted that Mr. Sher Q.C., who with Mr. Neesham appeared in the court below for Brinds and for Ganke in his capacity as a director of Brinds, had on the second dayof the hearing submitted that the hearing should go no further, and that a mere reading of the affidavits showed that there was a bona fide dispute upon substantial grounds. The transcript of proceedings threw no light on the substance of any submission by Mr. Sher, and it appeared that Tadgell J. made no ruling. The parties then made enquiries of Mr. Heerey, junior counsel for the petitioner, and of Mr. Sher. The Full Court was by consent provided with a copy of Mr. Heerey's notes of Mr. Sher's submissions. It appears that Mr. Sher was at that time permitted by Tadgell J. to outline the issues which would arise, and he then foreshadowed that ultimately he would submit that having regard, inter alia, to the nature of the dispute concerning the debt, proceedings by way of winding-up petition were inappropriate. However, before the Full Court counsel were agreed that Mr. Sher did not then submit that the hearing should go no further; he did not make any further submission that the petition should be dismissed until his final address on 2nd May 1983.

Volume IV p.37 1.24

Volume IV p.37 1.34

84. The Full Court recorded that Mr. Sher submitted that the petition should be dismissed, not only on the ground that there was a bona fide dispute as to the debt, but on five further grounds, the first two relating to the moratorium; the third that inability to pay debts had not been proved; fourth, that the non-payment of debts was attributable not to the company's shortcomings, but to the improper conduct of the petitioner and the supporting creditor, and fifth, that in all the circumstances the discretion of the Court should be exercised in favour of the company.

Volume IV p. 38 1.9

The Full Court also found that on the second day of the hearing, Mr. Sher elected to proceed without making any submission that the petition should there andthen be dismissed; that he cross-examined Mr. Macintosh for four days and others of the petitioner's deponents at length; that he did not complain that he was in any way inhibited by the fact that there had been no discovery or interrogatories nor did he make any application in respect of them; that Ganke was cross-examined at length, but no complaint was made that he was unfairly treated.

Volume IV p.38 1.18

The Full Court noted the submission that notwithstanding the preceding matters, Tadjell J. should of

his own motion have refused to embark upon, or continue the hearing of, the petition on the ground that a "bona fide dispute" existed as to the debt.

The Full Court considered the position which faced Tadgell J. at that stage of the proceedings.

The Full Court noted the submissions

(a) that by proceeding with the hearing, Brinds was denied the opportunity of interlocutory investigation afforded in a normal common law action.

(b) That in the conduct of the hearing in which the question was not the result of the dispute, but whether a dispute in fact existed, it was not necessary to produce all available evidence bearing on the matter.

The Court also referred to an affidavit of Mr. Hunt, Brinds' Melbourne solicitor, who stated that steps would have been taken had the matter proceeded as an action for debt. Volume IV p.40 l.19 Volume II p.1

On the assumption that the submission made on behalf of Brinds is correct the Full Court regarded it as suggesting that Offshore should first have sued Brinds for the debt and analysed the way in which that action would be pleaded and the way evidence might have been adduced.

85. The Full Court found that it is well established that a hearing of a petition for winding up is not normally the appropriate time to decide the question whether a debt is properly proved. Authorities cited were Re Q.B.S. Pty. Ltd. 1967 Qld. R. 218 at p.225 (Gibbs, J. (as he then was)); Bateman Television Ltd. (in liquidation) v. Coleridge Finance Co. Ltd. 1971 N.Z.L.R. 929 at p.931 per Lord Upjohn: Re Nickel Mines Ltd. (1978) 3 A.C.L.R. 686 at p. 687 (Needham J.) Volume IV p.43 l.25

86. The Full Court felt that the question whether the debt was due and payable was inextricably interwoven with the questions of the motives and purposes of Adler, and in turn, with the bona fides of Macintosh. Upon the hearing of the debt claim, no question would arise as to whether Adler acted with some improper collateral purpose; and that all the evidence or at any rate nearly all of it, which would be relevant to that question would be relevant to the conspiracy theory which would be at the heart of the defence to the debt claim. Volume IV p.46 l.1

RECORD

Volume IV p.46 1.10

87. Accordingly the Full Court was of opinion that once all the evidence was in, for the learned Judge to have then dismissed or stayed the petition would have been a wrongful exercise of discretion.

Volume IV p.46 1.16

88. The Full Court then considered the grounds of appeal which related to the construction of the moratorium deed, making special reference to certain clauses, namely clauses 10, 20, 22, 30.

89. The Full Court noted the submissions of counsel appellants that no rights are permanently altered by the moratorium, and neither party can plead the moratorium after it has been determined as an answer to a claim by another party. Therefore, after the termination of the moratorium, the parties reverted to their pre-existing rights, which involved in turn a finding that the loans were upon twelve months' call and that since His Honour had made no finding on this aspect there was no proven debt and thus no basis for a winding up order.

Volume IV p.48 1.23

90. The Full Court noted that as the learned trial Judge said in his judgment, this submission "involves treating the present assertion of Brinds that its debt to Offshore is not now due and payable as a 'claim' to which the acknowledgement of the present indebtedness by Brinds is now raised as a 'defence or counter' and that His Honour held that "the word 'claim' means a pecuniary claim and does not encompass an allegation or assertion of any kind made by one of the parties to the deed following the termination of the moratorium. The present contention that Brinds is not indebted to Offshore for a sum now due is not, in my opinion such a claim. The acknowledgement in clause 10 may accordingly be relied on by Offshore against Brinds." The Full Court endorsed the view of Tadgell J.

Volume IV p.49 1.6

91. The Full Court was of the opinion that if the question was merely - at the end of the hearing, and before judgment had there been on any relevant issue a bona fide dispute on substantial grounds, that the answer must be "yes".

However, in their opinion that was not the only question. The Court held that the Judge had a discretion to decide how far the case should go and that he correctly exercised such discretion.

Volume IV p.50 1.6

92. The Full Court noted that the main and basic submission was that Tadgell J. embarked on the determination of a dispute upon which he should not have embarked. It was submitted that Tadgell J. having accurately identified the area of the dispute,

failed to examine the evidence in respect of it and to express his conclusions upon it. Certain passages in Tadgell J.'s reasons for judgment were cited, namely at p.661; RECORD

> "In summary, the contention (which I shall have to consider in a little more detail soon) is that those responsible for the management of Offshore have designedly acted and induced others to act with a view to depressing the value on the market of the issued shares in its capital, thus embarrassing Brinds financially for the purpose of having it wound up so that they might ultimately acquire the Offshore shares which Brinds and its subsidiaries now hold. The Petition has accordingly been contested on the footing that an investigation is required not merely of the financial position of Brinds and its subsidiaries and associated companies, but also of the present and prospective position of the petitioner and, to some extent, of the conduct of those who control the petitioner."

And at p.670:

> "It is said on behalf of the opponents of the petition that it is to be regarded not as a genuine attempt by Offshore to recover its debt from Brinds, but as part of a vendetta by Mr. Adler against Mr. Ganke, and is inspired by motives ulterior to the best interests of Offshore."

Volume IV p.51 l.1

In support of this argument, Counsel for the appellants relied on the authority of Pettit v. Dunkley (1971) 1 N.S.W.L.R. 376 - a decision of the New South Wales Court of Appeal. At p.382 Asprey, J.A. said:

> "In my respectful opinion the authorities to which I have referred and the other decisions which are therein mentioned establish that where in a trial without a jury there are real and relevant issues of fact which are necessarily posed for judicial decision or where there are substantial principles of law relevant to the determination of the case dependent for their application upon findings of fact in contention between the parties, and the mere recording of a verdict for one side or the other leaves an appellate tribunal in doubt as to how those various factual issues of principles have been resolved, then, in the

RECORD

absence of some strong compelling reason, the case is such that the judge's findings of fact and his reasons are essential for the purposes of enabling a proper understanding of the basis upon which the verdict entered has been reached and the judge has a duty, as part of the exercise of his judicial office, to state the finding and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law."

Volume I p.51 l.31

The Full Court recorded that the principle was well recognised in Victoria. See Brittingham v. Williams 1932 V.L.R. 237.

The Full Court said what is or is not adequate must depend upon the circumstances of each case and no general rule can be laid down.

Volume IV p.59 l.3

93. The Court then considered in detail the reasoning process of the Trial Judge. The Court was of the view that the appeal should be dismissed.

Volume IV p.57

94. The Court then considered matters relating to costs and in particular in relation to costs associated with the appeal against an order of Master Jacobs made on 17th February 1983 appointing a provisional liquidator of Brinds Limited.

95. The appellants respectfully submit that both Mr. Justice Tadgell and the Full Court of the Supreme Court of Victoria erred in holding that Brinds Limited should be wound up.

(a) It will be submitted that what amounted to a denial of natural justice occurred before Tadgell J. by reason of the fact that:

(i) Tadgell J. recognised at page 683, line 12, that a detailed investigation of various matters took place and stated that :-

Volume III p.148 l.15

"This was undertaken, according to counsel for the opponents, and necessarily so, in order to show that there is substance to the dispute."

(ii) It was submitted to Tadgell J. in specific terms that His Honour should not decide the dispute without the appellant having had the

benefit of pleadings, discovery, inspection, interrogatories and other procedural advantages normally afforded to a similar placed litigant. RECORD

(iii) His Honour's decision, made in the course of his judgment, to effectively decide the issue without first informing the appellant of his intention of taking that course and without inviting the appellant to bring such further evidence as might be appropriate on a final hearing of the issue, deprived the appellant of the opportunity to properly litigate the matter.

(iv) As a result of the foregoing, the Court will be asked to consider the nature of the procedural advantages of which the appellant was deprived and to consider the nature and effect of evidence which might otherwise have been adduced before the Trial Judge.

(b) Tadgell J. found (at page 731, line 15) it was common ground throughout the proceedings that the then present market price of Offshore shares was in the region of 10 or 11 cents and opined as follows:

> "... it appears to me to be in the highest degree unlikely that they would realise 20 cents, which is said by Mr. Tosio to be their value on an asset-backing process. In one asset alone, there appears to be an over optimistic valuation by some $2,000,000." Volume III p.196 l.22

It will be submitted that the fresh evidence, if admitted, would have shown that the shares had been selling as high as 18 cents and that in addition for each two shares held by a shareholder he had become entitled to the right to purchase one share at 10 cents. Accordingly, each share, which His Honour held would "... in the highest degree be unlikely to realise 20 cents ...", have for some time been selling in the vicinity of thatprice and more recently, in excess of that figure. (See Exhibit "P" in the Supplementary Affidavit of Phillip Kevin Smith sworn 30th September, 1983). Volume V p.231

It has been submitted in the market rigging proceedings in Sydney that the effect of Mr.

RECORD

Adler's actions was to reduce the current value of the shares by about 6 cents to 16 cents per share and on that basis had it not been for Mr. Adler's actions, the shares would now have a market value of from 28 cents to 36 cents.

Further additional evidence is in the form of a document written by Mr. David Lance on 2nd August 1983 in which he anticipates that the price of shares in Offshore Oil N.L. would go towards 20 cents in the ensuing few weeks. (Exhibit "PS8" in the Affidavit of Phillip Kevin Smith sworn 29th September 1983.)

Volume V. p.177

Additional fresh evidence which it would have been sought to adduce was a valuation of the shares of Offshore by the respondent, Jackson, Graham, Moore & Partners. (Exhibit "PS11" in the Affidavit of Phillip Kevin Smith sworn 29th September 1983). After an exhaustive examination, they arrived at the conclusion that on the most pessimistic valuation, the shares are worth 18 cents, but that the most likely value is 36.4 cents per share.

Volume V p.180

96. Two basic contentions put before Tadgell J. by the Appellants to explain the motivation for the Petition to wind-up Brinds were:-

Volume III p.126 1.5

(i) "In summary, the contention (which I shall have to consider in a little more detail anon) is that those responsible for the management of Offshore have designedly acted and induced others to act with a view to depressing the value on the market of the issued shares in its capital, thus embarrassing Brinds financially for the purpose of having it wound up so that they might ultimately acquire the Offshore shares which Brinds and its subsidiaries now hold. The Petition has accordingly been contested on the footing that an investigation is required not merely of the financial position of Brinds and its subsidiaries and associated companies, but also of the present and prospective position of the petitioner and, to some extent, of the conduct of those who control the petitioner."

Vol. III p.135 1.4

(ii) "It is said on behalf of the Opponents of the Petition that it is to be regarded not as a genuine attempt by Offshore to recover its debt from Brinds, but as part of a

> vendetta by Mr. Adler against Mr. Ganke, and is inspired by motives ulterior to the best interests of Offshore."

It is respectfully submitted that although his Honour acknowledges that the making of the Winding-Up Order was opposed on the grounds that the Petition was inspired by improper motives, his Honour, in his Judgment, made no examination of any such evidence and came to no conclusion in respect of those matters. In Pettit v. Dunkley (1971) 1 N.S.W.L.R. 376, Moffitt J.A. said,

> "The judge has a duty, as part of the exercise of his judicial office, to state the findings and the reasons for his decision adequately for thatpurpose. If he decides in such a case not to do so, he has made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law."

Manning J.A. said that he had read Moffitt J.A.'s judgment and further,

> "I agree with him that if it can be established that a judge has failed or declined to give any reasons for his decision in circumstances where there was a judicial duty, expressed or otherwise, to do so, then there has been an error of law."

He further said,

> "As to whether an error of law could be shown to exist in this particular case and such error attracts the jurisdiction of this court, I agree with Moffitt J.A. in his reasons for concluding that although it cannot be said that there was an apparent error in the decision of his Honour, it is sufficient to show an error of law in the judicial process."

Moffitt J.A. also said,

> "... one is left with the view that the error of law in giving no reasons may well have concealed error in the decision. In

my view, however, in order to found the jurisdiction to order a new trial, it is sufficient to show error of law in the judicial process."

Tadgell J. did not suggest and it is not the fact, that there was no evidence touching the two basic contentions before him. So that it may be inferred that his Honour was of the view that having come to the conclusion that the debts were presently due and payable and that on the state of the Company's accounts, as his Honour found them to be, the Company could not pay its debts, the matters adverted to in paragraphs (i) and (ii) above were irrelevant, at least in the sense that they did not afford an answer to the Petition.

It is respectfully submitted that if Tadgell J. had been of the view that the matters contained in paragraph (i) were relevant and might have resulted in the Petition being dismissed, notwithstanding his Honour's other relevant findings, his Honour would necessarily have considered the evidence in relation to these matters and made findings in respect thereof.

97. The appellants respectfully submit that the law is and has been, at least since 1858, that a winding-up petition issued in bad faith may on this ground alone, be dismissed. This would appear to be the result of the permissive nature of the jurisdiction but it would seem that the Court will not dismiss a petition for lack of bona fides unless the circumstances amount to an abuse of the process of the Court or, at least to something approaching that degree of bad faith.

Ex parte Hawkins, In re the Metropolitan Saloon Omnibus Co. Ltd. (1858) 28 L.J. (CH) 830 (per Knight Bruce L.J.); In re a Company (1894) 2 Ch. 349 per Vaughan Williams J.; Re The M'Donald Gold Mines Ltd. (1898) T.L.R. 204 per Lord Justice Rigby; Mann v. Goldstein (1968) 1 W.L.R. 1091 per Ungoed-Thomas J.; Re First Western Corporation Ltd. (1970) W.A.R. 136 per Virtue S.P.J. In I.O.C. (Australia) Pty. Ltd. v. Mobil Oil Australia Ltd. (1975) 49 A.L.J.R. 176, Gibbs J. delivering a judgment, with which Stephen J. and Jacobs J. concurred, recorded that the High Court of Australia recognises the

principles which the appellants submit are applicable; although in that case, the evidence was insufficient to justify the Court's intervention on that ground.

98. The Court has a defined discretion as to whether or not it will stand over the Petition for a lengthy period (which might even be some years) if it is satisfied that it is just, in the circumstances, to do so. L.H.F. Wools Ltd. (1970) Ch. 27.

99. The general principles of the law of bankruptcy are applicable to winding-up petitions. There are two well established principles of bankruptcy law, which, in the appellants' submission, are relevant to these proceedings, namely abuse of process and extortion.

Volume 3 of the 4th Edition of Halsbury's Laws of England states the applicable principles.

It is submitted that if the appellant can establish that the petition was actuated or infected by extortion or was otherwise "an abuse of process" it should be dismissed notwithstanding, that the debt may be due and payable and that according to normal commercial standards, the company may be unable to pay its debts. Rozenbes v. Kronhill (1956) 95 C.L.R. 407.

The appellants submit that the principles on which an application for security for costs may be defeated, namely that the applicant has been in some respect responsible for the impecuniosity of the defendant are analogous and may be considered as a guide to the exercise of the discretion to dismiss or adjourn a winding-up petition. (Per Meares J. in Lynnebry Pty. Ltd. v. Farquhar Enterprises Pty. Ltd. (1977) 3 A.C.L.R. 133; per Smithers J. in Tradestock v. T.N.T. (1973) A.C.L.C. 40-377.

100. It will be submitted that

(i) There are essentially two different types of petition, namely:

A. Petitions based on matters entirely within the exclusive jurisdiction of the winding-up Courts, and

RECORD

B. Petitions based on unpaid debts.

(ii) Type A Petitions contain the essential allegations relied upon, e.g. misfeasance of direction, fraud on minority. It follows that particulars, discovery, inspection and interrogatories can be effective for trial procedure.

(iii) Type B Petitions are based on the dual allegation of unpaid debt and inability to pay such a debt.

(iv) The primary rule is that if the debt is disputed on substantial grounds the winding-up court is not the appropriate forum. If this is a rule of law it must limit the power of the Court to hear matters coming within the rule and logically prevents the winding-up Court from exercising jurisdiction in such matters. The basic rule appears as long ago as the decision in Cadiz Waterworks Co. v. Barnett (1874) L.R. 19 Eq. 1 and as recently as the decision of this Committee in Re Bateman's case (1971) N.Z.L.R. 650.

(v) There have been some minor inroads into the basic rule:-

(a) where the dispute involves only a matter of construction of a document - re Horizon Pacific 2 A.C.L.R. 495 per Needham J.

(b) where the parties expressly or impliedly consent to the winding-up Court determining the dispute.

(vi) The appellants are not aware of any judicial decision which permits the winding-up Court to determine a substantial dispute (except as in para. (v) above) as to the existence or the availability of a debt to support a Petition despite the protest of the respondent that the winding-up Court is not the appropriate forum.

(vii) If this submission is correct it follows that if the debt was disputed on substantial grounds, the winding-up Court had no power to hear the matter without the express or implied consent of the parties.

RECORD

(viii) The appellants made their attitude clear at the earliest opportunity (on the second day of the hearing) and maintained that position in the final address. That position was recognized by Tadgell J. as a submission that the Petition should be dismissed without "further ado" because the debt was disputed on substantial grounds.

(ix) The question is now asked whether because the hearing continued for some weeks and involved "... a detailed investigation upon the hearing of various matters by reference to which the debt was disputed," there was an implied consent to his Honour finally determining the disputes.

(x) Tadgell J. clearly did not regard any such consent as having been given because he recognized that the enquiry "... was undertaken, according to counsel for the opponents, and necessarily so, in order to show that there is substance to the dispute. It was in that way that the Court heard what was, for winding-up proceedings, an unusual range of cross-examination over matters that are not commonly investigated upon a winding-up Petition." (emphasis added). Volume III p.148 1.15

(xi) It is submitted that no implied consent can be read into the conduct of the lengthy hearing when the Learned Judge specifically explains the purpose of the hearing.

(xii) It is respectfully submitted that in the absence of either express or implied consent from the parties, Tadgell J. had no power or alternatively, wrongly exercised his discretion, to decide the matters by reason whereof the debt was disputed if in fact that dispute was substantial.

(xiii) It necessarily follows from the limited purpose for which the "detailed investigation" took place, namely, "to show that there is substance to the dispute," that no Court could be satisfied that the same evidence would have been presented in the same fashion if it had been directed to a different end namely whether in fact and law the debt was due and payable.

RECORD

(xiv) The determination of the dispute depended to a substantial extent on the credibility of certain witnesses.

(xv) As an example of the difference between a trial enabling final determination of certain issues on the one hand and a mere demonstration of the existence of a substantial dispute on the other, the precedent investigation of many of the issues during the two months which elapsed after the presentation of the Petition and before the hearing commenced, without the benefit of discovery, inspection and interrogatories would necessarily be of a different nature and magnitude to the preparation of a "full-scale" trial involving a disputed debt of some $3 million involving complex issues of fact and law. Cross-examination, probably inhibited by the limited facilities for investigation, might well stop Counsel short at some point where it was believed that Counsel had demonstrated the unreliability of a particular witness's evidence, without necessarily proceeding to the full extent essential at a trial when issues are posed for final determination.

The process of a winding-up petition was inappropriate. The only issue tendered was whether there was a dispute. His Honour's finding that there was no dispute is incorrect. The basic issue as to whether the debt was due and payable depended on three principal matters -

(1) In its original form, was the debt payable at call or only on 12 month's notice?

(2) Did the debt not become payable by virtue of the Moratorium Deed?

(3) Was the Moratorium Deed effective as at the date of the hearing of the Petition?

This involves determining whether or not there was a "bona fide" termination of the Deed.

If there was a bona fide termination of the Deed, was the Deed then available to convert a loan payable at 12 months' call into a loan payable instanter.

These issues were never defined by pleadings and Brinds was denied the normal interlocutory processes of discovery and interrogatories needed to prove its case. The unfortunate effects of bypassing these normal procedures are evidenced by the material which has since come to light. His Honour came close to suggesting that the documents evidencing the 12 months' call aspect were a fabrication.

After hearing some four weeks of evidence the Judge should have been satisfied that there was a bona fide dispute and should not have gone on to determine that dispute or alternatively should not have gone on to determine that dispute without identifying it and giving the parties a reasonable opportunity to present such material and submissions in relation thereto as they may have been advised and/or to have had the opportunity of seeking directions as to the form of such material including inter alia directions for the making of discovery and the delivery of interrogatories.

101. The appellants will further submit -

(i) The Petition (as amended) was based solely upon an allegation so far as the petitioner was concerned;

(a) that a certain sum was due and owing at the date of the Petition;

(b) that the company was unable to pay its debts and ought to be wound up (see Appeal Book Volume 1 Page 1).

(ii) There is no provision in the Rules relating to winding-up petitions for the filing of a Defence and accordingly so far as the pleadings are concerned the only obvious issue is an assumed denial by the respondents of the relevant allegations in the Petition.

(iii) As a matter of practice and procedure the issues to be litigated arise -

(a) from the respective allegations made in the affidavits filed on each side;

(b) from the cross-examination of the witnesses;

(c) from an examination of the exhibits;

(d) from the opening addresses of counsel;

(e) from the course of the proceedings;

and

(f) from the closing addresses of counsel.

(iv) Because the only relevant issue appearing in the only pleading namely the Petition was an allegation the debt was due and payable and that the company was unable to pay its debts, particulars, discovery, interrogatories and other interlocutory proceedings would not be apt to assist in the determination of issues raised at the times and by the processes referred to in the preceding paragraph hereof,

(a) because those issues were not known before the proceedings commenced, and

(b) because the absence of pleadings in the ordinary sense precluded the limitation of issues, in the manner in which pleadings limit and define the issues in matters before the Common Law and Equity Jurisdictions of the Court.

(v) The matters in dispute may be considered as at three points of time -

(a) at the close of the affidavit evidence,

(b) at the conclusion of the evidence,

(c) at the conclusion of the final addresses of Counsel.

(vi) Although various disputes were expanded and were the subject of cross-examination, discussion and additional evidence the position in relation to the areas of dispute mentioned hereunder does not appear to have materially altered from the beginning of the case to the end.

(vii) This is not a case where a Court embarked in what appeared to be a simple hearing

which turned out to be unexpectedly complex. The affidavits reveal the following areas of dispute.

THE DISPUTES

A. As to the date of Payment of the Debt

(a) Whether Mr. Ganke as chief executive officer of the respective companies had power to bind each company to an agreement that the petitioner's advance was lodged with Brinds on 12 months' call.

(b) If he had such authority, whether he exercised it in this case.

(c) Whether the document which acknowledged the deposit was -

(i) genuine

(ii) prepared at the time when according to the internal evidence of the document it appeared to be prepared.

(d) Whether the document was bilateral in the sense that it bound both companies.

(e) Whether the provenance of the document should lead to a belief that it was manufactured post-hoc, i.e. at a time when Ganke was not authorised by Offshore to have the document prepared.

(f) Whether the account cards in respect of the petitioning creditors' debt were genuine.

(g) Whether the notation referring to 12 months' call made on the relevant card by Miss Lenka Pauler was made at a time when she could properly make that entry on behalf of those companies.

(h) Whether the evidence of Ganke relating to the making of a loan should be accepted.

RECORD

(i) Whether the accounting records kept by Brinds and Offshore were appropriate to disclose the true position between the companies.

(j) Whether the transaction whereby Offshore's funds were deposited with Brinds was a true commercial transaction or whether it was a "mere abstraction" of funds from Offshore to Brinds with overtones of commercial immorality if not worse on the part of Mr. Ganke.

(k) Whether in fact the funds advanced by Offshore were advanced in part to companies in which Offshore had substantial shareholdings, e.g. $824,000.00 was deposited by Offshore with Investment Corporation of Fiji a company in which Offshore held 50% of the shares (see page 1745 of the Transcript.)

B. Moratorium Deed

On the 25th of November, 1982 a Moratorium Deed was entered into by a number of Parties including the petitioner and Brinds dealing inter alia with the debt the non-payment of which founded the Petition. The existence of the Moratorium would have prevented the Petition from relying on the debt to found the Petition but the Moratorium was brought to an end on 10th February, 1983 pursuant to an opinion given by Mr. Macintosh which under the terms of the Deed enable the creditors to terminate it.

The disputes which arose on the winding-up Petition included the following -

(a) Whether Mr. Macintosh had given his opinion -

(i) in bad faith,

(ii) in breach of a duty owed to the debtors.

(b) Whether Macintosh failed to fully inform himself of the business and

operations of Brinds, failed to appoint any or any adequate meetings for the purposes of defining the manner of implementation of the deed and failed to give Brinds extensions of time for compliance with the deed as were reasonable.

(c) Whether Macintosh failed to exercise an independent discretion but allowed himself to be overborne by Mr. Adler or conspired with Mr. Adler to wrongfully determine the Moratorium.

(d) Whether Macintosh misrepresented to Ganke what his intentions with respect to the Deed were and lulled Ganke into a false sense of security so as to create technical breaches by Mr. Ganke which would enable Macintosh to have grounds to terminate the Deed.

(e) Whether Macintosh waived compliance by Mr. Ganke with the terms of which he subsequently alleged were breaches and represented to Mr. Ganke that he did not require strict compliance with the Deed.

(f) Whether Macintosh held secret meetings with Mr. Adler at which agreement was reached between them to frustrate the Deed and thereafter Macintosh acted as a tool of Mr. Adler to bring about the destruction of the Deed and thereby the destruction of Mr. Ganke and his companies.

(g) The construction of the Deed.

C. Disputes as to the Bona Fides of the Petitioner's motives in presenting the Petition

The areas of dispute were as follows:-

(a) Whether the petitioner under the direction of Adler was seeking the destruction of Brinds in order to cause the 53 million shares held by the Brinds group to be sold by a liquidator so either Mr. Adler or his friends could acquire them or they

would be dissipated on the market so that they would not remain in Mr. Ganke's hands as a threat to Mr. Adler's control of Offshore by virtue of the 100 million shares he had acquired.

(b) Whether Mr. Adler was engaged in a design to lower and to keep low the value of the shares in Offshore Oil on the Stock Exchange so that the principal asset of the Ganke group namely the Offshore shares will apparently have small value with the result -

(i) there would not be adequate security to borrow money to pay back outstanding loans,

(ii) Brinds would appear to be insolvent and thus to be wound up.

(c) Whether this plan was implemented by Mr. Adler and whether it was manifested by the issue of ten million shares to F.A.I. at par (10 cents) at a time when the last issue of a substantial quantity to an institution had been at 33 cents, and when the shares had never been below 11 cents and when the last sale had been at 15 cents.

(d) Whether the one for two share issue was made in the interests of Offshore or whether it was made -

(i) for the purposes of further depressing the market;

(ii) for the purposes of enabling Mr. Adler to obtain at par 53 million Offshore shares, subsequently reduced to 47 million after protest from Ganke at the failure to honour applications for shares which arrived out of time due to a postal strike.

(e) Whether the writing off of some 9 million dollars of loans to the Ganke companies was made by Adler and Macintosh acting in concert to destroy the credit of the Ganke companies and

at the same time reduce the profits of Offshore so as to further depress the value of Offshore shares and further reduce the value of Brinds' assets.

(f) Whether the method of dealing with the "Energy Searcher" and other matters in the accounts of Offshore was calculated to paint as bleak a picture of the prospects of Offshore as was feasible for the purposes of depressing the demand for and the value of shares in Offshore.

(g) Whether the real purpose of the Petition was not legitimate and was to destroy Ganke and his companies.

102. The appellants will further submit that there existed several 'disputes' within the dictionary definition of "dispute" as a controversy, debate; quarrel, difference of opinion, (Oxford Dictionary) and that Tadgell J. did not take into account:

(i) First Dispute

Apparent dispute on the affidavits between Wilshire and Ganke as to existence of "12 months" document. This required -

(a) an examination of the affairs and relationship between Offshore and Brinds to determine the course of business as throwing light on the efficacy of what might otherwise appear to be an "informal document".

(b) an examination of the circumstances in which the loan was made including

(i) whether Ganke had authority on behalf of the respective boards to fix the terms of the loan;

(ii) whether he did so in the terms alleged.

(c) An examination of what was meant by the money market, the method by which Brinds and Offshore dealt on the money market and the general operation of the money market.

RECORD

The essential difference between loans in the real sense andmoney market operations is that in the case of an ordinary loan the lender investigates the financial position of the borrower, the nature of the security and the terms of the loan for each transaction. On the money market, organizations approve one another as authorised borrowers and the transaction is determined by the question whether at any given time the "lender" has surplus cash upon which it wishes to earn interest and whether the "borrower" can effectively use that cash. The market operates by money market operators who may be quite young men and women who are informed by their company that they have surplus cash not required for a certain period and it is the function of these operations to telephone to borrowers approved by the Company to ascertain which borrower can use the money for the specified time and offers the best rate. The transactions are normally concluded by informal documents similar to the one in evidence here.

(ii) Second Dispute

Tadgell J. failed to take into account that

(a) the availability of the debt for the purpose of the petition depended on the construction of a complex moratorium deed;

(b) there were extremely complex questions of fact and law which necessarily had to be determined to decide whether or not the moratorium was effective;

(c) there was then currently pending in the Supreme Court of New South Wales a proceeding commenced on the 24th February 1983 by the Ganke group against the Adler group and Macintosh. Brinds (as in provisional liquidation) was also a defendant.

The sole issue in those proceedings was the validity of the opinion given by Macintosh upon which the Petitioner relied in these proceedings.

l) A further legal question which arose was the effect on the existence or otherwise of a presently payable debt if the Moratorium as held to be validly terminated.

2) The correctness of the exercise of the Judge's discretion to himself determine the dispute instead of permitting the dispute to be determined in the normal way, falls to be considered as at two dates (see 3 and 5 (infra)).

3) Until the affidavits had been read and the Court had decided questions of admissability of the affidavits and exhibits, the nature of the case and the issues tobe raised could not be known to the Judge. Pleadings, particulars, discovery and interrogatories are devices developed by the courts over many years to facilitate an orderly and efficient presentation of the case and to prevent either party (or indeed the Court) being met with issues without warning.

4) Accordingly the conduct of winding up proceedings without the benefit of those interlocutory steps must necessarily be more complex than if those proceedings had taken place before the trial.

5) At the end of the reading of the Affidavits there were revealed to the Judge highly complex disputes which by their nature were likely to occupy a common law or equity court for a lengthy period. The disputes were obviously very substantial. Ganke's allegation that the original debt was payable on twelve months' call was supported by documentary evidence and was prima facie correct and could only be defeated by showing that the documents relied on were in substance fraudulent in that they were not created at the time when Ganke had the power on behalf of Offshore to cause them to be created. There was no suggestion in the affidavits of the Petitioner that Ganke's allegations were not bona fide.

6) Moreover the dispute concerning the termination of the deed involved the additional allegations that Mr. Macintosh had not acted bona fide and the determination of that dispute could obviously require detailed examination of the creation, operation and termination of the Moratorium of the forces acting upon Macintosh, his responses to those forces and his ultimate motive in issuing the opinion.

RECORD

7) The determination of these disputes was likely therefore to involve virtual allegations of fraud against Ganke without benefit of particulars or interlocutory proceedings and allegations of mala fides against Macintosh who would be equally prejudiced.

8) There were then before the Court 345 pages of affidavits and exhibits setting out the opposing intentions.

9) It was at this point and before any oral evidence was given that Mr. Sher Q.C. submitted there was a question of a 'bona fide dispute'.

10) The failure of Tadgell J. to cause to be recorded his reasons and judgment on this initial submission are sufficient in themselves to constitute a failure of the judicial process within the meaning of Pettit v. Dunkley (1971) N.S.W.L.R. 376 "... The Judge has a duty to state the findings and the reasons for his decision adequately for that purpose. If he decides in such a case not to do so, he had made an error in that he has not properly fulfilled the function which the law calls upon him as a judicial person to exercise and such a decision on his part constitutes an error of law" (see appellants' submission p.2).

11) The effect is that this Committee has no way of knowing what matters the trial Judge took into consideration so that it is impossible for an Appeal Court to say whether his reasoning was correct or incorrect.

12) Accordingly Tadgell J.'s judgment was vitiated without anything further.

13) During the course of the trial it became ever increasingly apparent that there were disputes of major proportions between the parties entirely unsuited to a determination in a winding-up petition.

14) One of the most important features was the tendering into evidence of the Summons and the Statement of Claim tendered on page 1801 of the Transcript. These documents were tendered on 28th April, 1983 the

Volume III
pp.98-109

fifteenth day of the trial, in the course of the re-examination of Ganke who was the first witness for the defence.

15) It was submitted by Mr. Sher Q.C. in the course of his final address that Tadgell J. should adjourn the further hearing of the trial until the conclusion of the matter in Sydney. Tadgell J. acknowledges in his judgment that he was invited to "dismiss the Petition without more ado" but stated that "having considered the documentary evidence and listened to the lengthy oral evidence" he "does not feel able to take the view that the evidence of arrangements between Offshore and Brinds as to moneys moved from the former to the latter is such as to raise a bona fide dispute on substantial grounds which is sufficient to justify dismissal of the petition".

16) Tadgell J. makes no referenceat all in his judgment to the submission made on the second day of the trial. He gives no reasons whatever for the making of the decision to determine the matter with respect to the moratorium deed and specifically makes no reference to the proceedings oncurrently pursued or the Statement of Claim which was in evidence before him on that matter.

17) The proceedings in Sydney although confined to the single issue of the termination of the deed were far more comprehensive in that they involved all of the relevant Companies in the Ganke and Adler groups as well as the necessary personal parties such as Macintosh against whom the allegations were made.

18) These proceedings were commenced on 25th February 1983 and were obviously not commenced as a manoeuvre to frustrate this winding-up petition. If that had been the intention the summons would have been exhibited to affidavits filed before the commencement of the winding-up petition. The evidence is very close to being conclusive that the dispute with respect to the moratorium was substantial and bona fide. Tadgell J.'s decision to proceed was doubly unfortunate. Firstly, the Judge made a winding-up decision and secondly, the

RECORD

petitioners armed with Tadgell J's decision proceeded to the hearing before Needham J. in Sydney.

19) Counsel for Offshore in address stated "Needham's judgment echoed Tadgell." The procedure in New South Wales in case of urgency is for the respective parties to submit a draft index of most important documents required for Appeal. These are bound and known as the "Appeal Papers". The remaining documents, transcript etc., are available to the Court in unbound form.

20) The Appeal Papers before the Court of Appeal comprise 243 pages of which pages 78-168 comprise the judgment of Mr. Justice Tadgell i.e. about 35% of the Appeal Papers are Mr. Justice Tadgell's judgment. One of the matters argued by the Respondents was that the decision of Mr. Justice Needham should be affirmed on the ground that certain Appellants (including Mr. Ganke) were "bound by an issue estoppel arising out of the proceedings before Mr. Justice Tadgell in Victoria".

21) Although not so stated in either judgment one can have little doubt that Needham J. and their Honours in the Court of Appeal had regard to Tadgell J's judgment.

22) Before Mr. Justice Needham, Offshore and the Adler group claimed that Mr. Ganke and his group including Brinds were by reason of proceedings in the Supreme Court of Victoria No. 13015 and the Judgment of Tadgell J. dated 5th May 1983 were "estopped from asserting that the opinion given by Mr. Macintosh under Cl.22 is of no effect and further from asserting that the deed was not validly terminated".

23) The Judgment of the Court of Appeal has since been made the subject of an appeal to the High Court of Australia. The High Court of Australia was asked to consider only the question as to whether the alleged premature determination of the Moratorium Deed constituted a "penalty". It proceeded to determine this matter in a fashion which, it is submitted, permits of a determination of such issue as a separate issue by this Committee.

24) It is respectfully submitted that Tadgell J.'s decision to determine the issues related to the original date of payment of the debt and as to the termination of the Moratorium are vitiated

(a) by the failure to give any reason for rejecting the submission by Sher Q.C. when first made;

(b) by failing to give any or any adequate reasons for dismissing or deferring the hearing when application was made by Sher in the final address;

(c) by failing to take into account relevant matters;

(d) by apparently taking into account irrelevant matters such as his view of the commercial desirability of the loans by Offshore to Brinds;

(e) because in the terms of the decision in this Committee in Bateman's case (supra) His Honour was wholly wrong.

103. The appellants will submit that Tadgell J. and the Full Court of the Supreme Court of Victoria did not give a correct construction to clause 20 of the Moratorium Deed.

(i) The submission of Counsel for Offshore in this matter at the appeal did not differentiate between the position during the existence of the Moratorium and after its termination.

(ii) Counsel for Offshore submitted that if clause 20 applied during the existence of the Moratorium, the first part of the clause would negative the effect of the Moratorium. This submission may in fact be correct.

(iii) Although the first sentence of clause 20 is not in terms limited to a time after the termination of the Moratorium, the second sentence is so limited.

(iv) Upon the assumption that the submission of Counsel for Offshore is correct, in order to give effect to the clear terms of a carefully drafted document, it is necessary to

RECORD

read each of the first two sentences of clause 20 as being applicable only to the position after the termination of the Deed.

(v) The Deed refers in numerous instances to a moratorium (see clause 1, 1B, 3, 4(iii), (iv), (v), 5, 6, 7 and indeed clause 20).

(vi) A "moratorium" is normally understood to comprise a suspension of rights during a given period rather than an alteration of rights.

(vii) It would therefore not be surprising if the Deed provided that at its expiration, the parties reverted to their pre-existing rights. This is precisely what clause 20 says; no rights are permanently altered by the Moratorium and neither party can plead the Moratorium after it has been determined as an answer to a claim by another party.

(viii) Whilst it is possible to speculate as to the respective advantages sought to be obtained by each party as a result of the Moratorium, there were obvious advantages to both parties -e.g. clause 11.1 where Ganke, Kippist and Tosio covenant to resign as directors of Offshore, clause 11.2 where each of Ganke, Kippist and Tosio agree not to stand as a director of Offshore and other restrictions; clause 12 under which Offshore which had (under the direction of Ganke) started certain proceedings against Adler and others would file Notice of Discontinuance; clause 14 whereby Ganke agreed to discontinue proceedings in the Supreme Court of the A.C.T. and an order for costs was agreed.

(ix) In these circumstances it is not permissible to speculate that the Adler group demanded and received a permanent acknowledgment of indebtedness and this is contrary to the express terms of the Deed on a fair interpretation.

(x) If this construction be correct it follows that upon the terms of the Deed, the parties reverted to the pre-existing condition under which the funds were at twelve months' call

and no call having been made there was no debt available for the Petition.

(xi) Whether or not a call had been made, as to which there was also a possible dispute, the period of any call had certainly not expired at the date of the Petition, the date of the hearing or the date of the Judgment.

(xii) It follows that Tadgell J. had not made any finding as to whether the funds were repayable on demand or at twelve months' call and so there was no basis on which the winding-up order could have been made.

104. On the question of the appointment of the Provisional Liquidator and the related question of costs, the appellants will submit that the appointment of the provisional liquidator was:-

(a) wrong;

(b) the subject of appeal beforeTadgell J. (who did not determine the matter); and

(c) the subject of appeal to the Full Court (which did not determine the matter).

It is the appellants' submission that if there had been no provisional liquidator Brinds would in the ordinary course of events have defended the proceedings and would have paid for its defence out of its funds.

If it had been held that the provisional liquidator should not have been appointed then one asks should not the lower Court have made such orders as are appropriate to rectify any injustice caused by the unjustifiable appointment of the provisional liquidator without notice on an ex parte application. It was pointed out by the Full Court that what was really being sought was a different order as to costs than that which Tadgell J. had made and that special leave was necessary in that regard. Special leave was sought and granted and the application was then for an amended order as to costs.

This order was, it is submitted, appropriate if it is assumed that the Court acceded to the

RECORD

arguments that it should proceed upon the basis of rectifying the special injustice which arose from the appointment of the provisional liquidator.

It was conceded that the order sought was not appropriate as an alternative order to the order which Tadgell J. made in the exercise of his discretion. Insofar as the Full Court was being asked to exercise a different discretion with respect to that of Tadgell J., the order sought was that the company's costs as between solicitor and client be paid out of the assets of the company as part of the costs of the winding-up.

The order refers to Ganke's costs. This should more accurately have been stated as costs incurred or expended by Ganke or by companies associated with him in fulfilment of the obligations of Brinds to pay its costs to its solicitors and counsel.

Insofar as a variation of the order is sought on the basis that Tadgell J. wrongly exercised his discretion, it is submitted that the reasons advanced by His Honour as set forth in the affidavits of Danny Melech Ungar sworn 18th November 1983 and 28th November 1983 was not a proper exercise of His Honour's discretion. There never was any suggestion in the evidence that Ganke was pursuing a "vendetta" against Adler as stated by Tadgell J.

Volume VI p.212
Volume VI p.217

It is further submitted that Tadgell J.'s failure to adequately consider and deal with the submissions relating to the depression in value of Offshore shares and Adler's motivation in causing the Petition to be prosecuted, precluded his Honour from having a proper basis for finding that the company should be deprived of any of the costs properly incurred by it.

VolumeVI p.64

105. By order dated 2nd February, 1984 the Full Court of the Supreme Court of Victoria granted the appellants leave to appeal to Her Majesty in Council.

Volume VI p. 61

106. The appellants submit that the judgment of the Full Court of the Supreme Court of Victoria dated 16th December, 1983 should be reversed, altered or varied and that -

(1) the Petition should be dismissed;

(2) the respondents should pay the appellants' costs of the Petition;

and

(3) the respondents should pay the appellants' costs of this Appeal to be taxed.

S U B M I S S I O N S

107. The Petitioner failed to make out the statutory ground that Brinds Limited was unable to pay its debts.

108. The Court may order the winding up of a company if the company is unable to pay its debts (Companies Code (Victoria) (S.364(1) (e)).

Companies Code (Victoria), S.364(2) provides that for the purposes of S.364(1) a company is deemed to be unable to pay its debts if:

(a) a creditor by assignment or otherwise to whom the company is indebted in a sum exceeding $1,000 then due has served on the company a demand, signed by or on behalf of the creditor, requiring the company to pay the sum so due and the company has, for three weeks after the service of the demand, failed to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;

(b) execution or other process issued on a judgment, decree or order of any court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) the Court, after taking into account any contingent and prospective liabilities of the company, is satisfied that the company is unable to pay its debts.

109. Section 364(2) (a) and (b) are not limited in any way by S.364(2)(c). The creditor is not obliged to rely on the statutory presumptions of insolvency under S.364(2)(a) or (b) and, as was sought to be done in this case, may produce evidence which shows that the company is unable topay its debts: Re Premier Permanent Building Land and Investment Association; Ex parte Stewart (1890) 16 V.L.R. 20; Syd Mannix Pty. Ltd. v. Leserv Constructions Pty. Ltd. (1971) 1 N.S.W.L.R. 788; L & D Audio Acoustics Pty. Ltd. v. Pioneer Electronics Australia Pty. Ltd. (1982) 1 A.C.L.C. 536 but in such a case the test as postulated by S.364(2)(c) must be satisfied and account must be taken of "contingent and prospective liabilities" which shows that the correct test is not a simplistic immediate commercial insolvency test. The insolvency of the company is a question of fact.

In Re Tweeds Garages Ltd. (1962) 1 All E.R. 121, Plowman J. discussed insolvency within the meaning of the U.K. equivalent of S.364(2). His Honour said: "Insolvency in the relevant sense is explained in Buckley on the Companies Act (13th edn) p.460 in this way:

> "The particular indications of insolvency mentioned in paras. (a), (b) and (c) (of Sec. 223 of the Companies Act, 1948) are all instances of commercial insolvency, that is of the company being unable to meet current demands upon it. In such a case it is useless to say that if its assets are realised there will be ample to pay 20s. in the pound: this is not the test. A

company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realisable; but although this be so, yet if it have not assets available to meet its current liabilities it is commercially insolvent and may be wound up."

The expression "contingent and prospective liabilities" relates to possible liabilities which may be incurred as a result of contracts or activities entered into at the time the presumption of insolvency is raised; Community Developments Pty. Ltd. v. Engwirda Construction Co. (1969) 43 A.L.J.R. 365.

110. Section 364(2) supplies a statutory definition of three situations in which a company is treated as being unable to pay its debts. The third of these requires positive proof , to the satisfaction of the Court, of the actual insolvency of the company, but the other two are instances of what Buckley called "commercial insolvency", that is, of the company's inability to meet current demands. In the first two cases, it is immaterial that the company's assets do in fact exceed its liabilities, since once the prescribed conditions are satisfied the company is by statute deemed to be unable to pay its debts.

111. Inability to pay debts. The phrase "unable to pay its debts" which appears in S.364(2)(c) is susceptible of two interpretations. One meaning which may properly be attached to it is that a company is unable to pay its debts if it is shown to be financially insolvent in the sense that its liabilities exceed its assets (Re Chemical Plastics Ltd. (1951) V.L.R. 136; cf. also Re European Life Assurance Socy. (1869) 9 Eq. 122. "Assets" in this context include potential calls on shareholders provided there is no evidence of wide-spread insolvency among them: see (1869) 9 Eq. at p.131; also Re Buzolich Patent Damp-Resisting Paint Co. (1881) 10 V.L.R. (E) 276, 282).

The other possible meaning of the phrase is insolvency in the commercial sense (Re Premier Permanent Bld. Assocn., supra at p.23; see also Buckley, op. cit., p.460 approved in Re H.C. Collison Ltd. (1906) 23 S.C. 721, 724 (Cape of Good Hope); Rosenbach v. Singh's Bazaar Ltd., supra; E.M. Martin Ltd. (1962) 5 W.I.R. 39; Re Bryant Investment Co. Ltd. (1974) 1 W.L.R. 826, 829; Re Capital Annuities Ltd. (1979) 1 W.L.R. 170, 187)- that is, inability to meet current demands, irrespective of whether the company is possessed of assets which, if realised, would enable it to discharge its liabilities to the full.

RECORD

From this it follows that insolvency in this form is principally a question of fact. Ultimately, however, the issue in every case is whether, on the evidence placed before it, the court is prepared to make an order that the company be wound up; and since the determination of this question involves, at least partly, the exercise of judicial discretion, the court is entitled to take account of a variety of factors, such as the nature of the company's undertaking (Re North Sydney Investment Co. (1892) 3 B.C. (NSW) 81), the character of the unpaid debt (Re Redhead Coalmining Co. (1893) 3 B.C. (N.S.W.) 50) especially in the instant case where by their opposition to the petition certain of the creditors could clearly be seen as not requiring immediate payment.

Financial solvency is certainly relevant at this point, for the court is not disposed to wind up a company with assets which are capable of being realised in order to pay the debt without at the same time so crippling the company that it becomes unable to continue its business (See Irvin & Johnson Ltd. v. Oelofse Fisheries 1954 (1) S.A. 231, at p.239). As was said in a South African case -

> "The proper approach in deciding whether the company should be wound up on this ground appears ... to be that if it is established that a company is unable to pay its debts, in the sense of being unable to meet the current demands upon it, its day to day liabilities in the ordinary course of its business, it is in a state of commercial insolvency ... If the company is in fact solvent, in the sense of assets exceeding its liabilities, this may or may not, depending on the circumstances, lead to a refusal of the winding up order. The circumstances particularly to be taken into consideration against the making of an order are such as show that there are liquid assets or readily realisable assets available out of which, or the proceeds of which, the company is in fact able to pay its debts. Nevertheless in exercising its powers the court will have regard to the fact that ... a concern which is not in financial difficulties ought to be able to pay its way from current revenue or readily available resources."
>
> (Rosenbach v. Singh's Bazaar Ltd. 1962 (4) S.A. 593, per Caney, J., at p.597).

112. A company "unable to pay its debts" connotes that the inability "must be inability to pay debts absolutely

due, i.e. debts on which a creditor can go to the company and instantly demand to be paid" (per James V.-C. Re European Life Assurance L.R. 9 Eq. 127).

In deciding whether a company is "unable to pay its debts" all the cash resources available to the company, including credit resources, are to be looked at, and in determing those credit resources there are to be taken into account the times extended to the company to pay its creditors and the times within which it will receive payment of debts owing to it (Calzaturificio Zenith v. N.S.W. Leather & Trading Co. (1970) V.R. 605).

In determining the ability to meet debts as they become due, account must be taken of outstanding debts, i.e. debts "due". They have to be paid or allowed for in answering the question. Cognisance must be taken of trade practice and that debts become "due" when a creditor is pressing for payment and the debtor is unable to make payment. Isaacs J. spoke of the related question in personal bankruptcy matters in a commercially realistic way in Bank of Australasia v. Hall (1907) 4 C.L.R. 1514 at 1543.

113. The action is concerned with solvency, not with liquidity. As it was put in Sandell v. Porter (1966) 115 C.L.R. 666 (per Barwick C.J. at p.670) and Rees v. Bank of New South (1964) 111 C.L.R. 210 per Barwick C.J. at 218.

Slade, J. in Re Capital Annuities Ltd. (1979) 1 W.L.R. 170 commented:

> "I cannot, however, accept that mere evidence that a company ... has for the time being insufficient liquid assets to pay all its presently owing debts, whether or not repayment of such debts has been demanded, by itself proves inability on its part to pay its debts, within the meaning of Ss. 222 and 223 of the 1948 Act..." (S. 361 and 362 of Victorian Code).

It is not unreasonable that proper demand is required before liabilities are taken into account and compared with available assets to prove inability to pay, although it is not specifically required except under paragraph (a). Slade, J. said that the court requires up to date, although not necessarily formal, valuations of the company's liabilities and assets.

114. What is the standard of proof of this inability to pay debts? A casual approach is inappropriate;

RECORD

something more than a mere admission or allegation of insolvency is needed. In Re Exclusive Master Book-Binding & Manufacturing Co. Pty. Ltd. (1977) A.C.L.C. 29, 572, 29, 575, for example, Bray C.J. stressed that an earlier equivalent of S.364(2)(c), unlike the previous two paragraphs (where service and non-compliance created the presumption of inability to pay debts), required positive evidence of the company's inability. The third paragraph or ground "is not proved simply by the allegation that the company is unable to pay its debts, because the court has to be satisfied that this is so." (See also Slade, J. in Re Capital Annuities Ltd. (supra).

115. The petitioner failed to make out a case for the Court to exercise its discretion to make a winding-up order.

116. The court has under s.364(1) a discretion whether or not to wind up a company.

There are however many cases which, while continuing to recognize the creditor's prima facie right (Re Krasnapolsky Restaurant (1892) 3 Ch. 174) to a winding up order, also admit the existence of a number of exceptions which show Lord Carnworth's principles to have been somewhat too widely stated. (See Bowes v. Hope Life Insurance Co. (1865) 11 H.L.C.: 11 E.R. 1383. Indeed, it is now settled that the creditor's rights are always subject to the overriding discretion which is reposed in the court both by the introductory words of the section and by the permissively worded language of the section, with the result that the court is never bound to make an order merely upon proof of a ground for winding up, but has a discretion to decide whether or not it will do so. (Contrast, however, the remarks of Bowen L.J. in Re Chapel House Colliery Co. (1883) 24 Ch. D. 259, 270). Its power to refuse an order is, however, fairly strictly regulated and is exercised in accordance with principles which are relatively well defined. Certainly included in the reasons which will justify the court in refusing to make an order on the petition of an unpaid creditor are that the debt is bona fide disputed by the company and that winding up is opposed by other creditors.

The court exercises a wide discretion in winding up hearings to dismiss or adjourn the hearings or make such other orders as it thinks fit.

In Re Concrete Piles and Cement Products Ltd. (1926) V.L.R. 34, 38, Irvine C.J. applied the statutory discretion to dismiss a petition presented by a

creditor even though the creditor had fulfilled the prima facie statutory requirements. Edmund-Davies L.J. in Re L.H.F. Wools Ltd. (1970) Ch. 27, contradicted any suggestion that a companies court is "powerless" once a debt is established and not satisfied. See also Gibbs J. in I.O.C. Australia Pty. Ltd. v. Mobil Oil Australia Ltd. (1975) 49 A.L.J.R. 176, 182).

117. The word "may" and not "shall" is used in s.364(1). A discretion exists, although sparingly used when the statutory criteria are otherwise met. (See Virtue S.P.J. in Re First Western Corp. Ltd. (1970) W.A.R. 136, 138, citing Myers C.J. in Tench v. Tench Bros. (1930) N.Z.L.R. 403, 406. See also O'Bryan J. in Re K.L. Tractors Ltd. (1954) V.L.R. 505, 512). The court has refused winding up orders or granted injunctions where, for example, the petitioner exhibited an improper motive, where a majority by value of creditors opposed the order, where the petitioning creditor had some other remedy than the drastic step of winding up. (See McGarvie J. in Fortuna Holdings Pty. Ltd. v. F.C. of T. (1976) A.C.L.C. 28,634, 28,643. Often the opponents of a winding up hope that given time and proper management the debtor company will trade itself out of trouble. (In Re Melbourne Carnivals Pty. Ltd. (No. 1) (1926) V.L.R. 283 the court acknowledged that those opposing a petition on the grounds that the company could trade out of its difficulties would probably be unable to displace the prima facie right of the petitioner to have the company wound up. But this depends on the facts of the case. In Re St. Thomas's Dock Co. (1876) 2 Ch. D. 116, Jessel M.R. stood over a petition for six months to allow the company the chance to become profitable.)

118. The Court will make a winding up order only if the petitioner genuinely seeks it in order to recover the debt which the company owes him. Consequently, even if the petitioner makes out his case, the court will refuse to make a winding up order if the petition is presented in order to coerce the company into satisfying some groundless claim made against it by the Petitioner (Re Professional, Commercial and Industrial Benefit Building Society; Re Planet Benefit Building and Investment Society (1872) LR 14 Eq. 441; (1964) Ch.240, (1963) 2 All E.R. 940), or a claim to which the company has a substantial defence to plead (Mann v. Goldstein (1968) 1 W.L.R. 1091) or in order to procure the company's dissolution so as to prevent it from enforcing continuing obligations (such as restrictive covenants) against the petitioner or a third party. Re Surrey Garden Village Trust Ltd. (1965) 1 W.L.R. 974). A

RECORD

petition will also be dismissed if, although it is probable that the petitioner is entitled to a winding up order on the evidence, the petition deliberately misstates material facts or omits to disclose relevant matters, and no application is made on the hearing to amend it. (Re A Company (1973) 1 W.L.R. 1566).

119. A 'winding-up' order should not have been made as there was a "bona fide dispute" as to the debt alleged by the petitioner

120. An order will not be made if there is a bona fide dispute concerning the debt the subject of the demand; Re London & Paris Banking Corporation (1874) 19 Eq. 444.

It appears that a bona fide dispute must be based on substantial grounds: Re Welsh Brick Industries Ltd. (1946) 2 All E.R. 197; Re K.L. Tractors Ltd. (1954) V.L.R. 505. What constitutes a dispute on substantial grounds is a question of fact to be decided in each case. In Re Lympne Investments Ltd. (1972) 2 All E.R. 385 Megarry J. said at p.389 that:

> "A real dispute, turning to a substantial extent on disputed questions of fact which require viva voce evidence, and involving charges of fraud or near fraud, cannot properly be decided on petition ... The Companies Court must not be used as a debt-collecting agency, nor as a means of bringing improper pressure to bear on a company. The effects on a company of the presentation of a winding up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation, or to be kept in suspense over the company's head while that litigation is fought out."

In Stonegate Securities Ltd. v. Gregory (1980) 1 All E.R. 243, Buckley L.J. said at p.243 that:

> "Where a creditor will take one of two courses, depending on whether the petitioner is a creditor whose debt is presently due, or one whose debt is contingent or prospective by reason of the proviso in s.224(1), proviso (c) [S.364(c)]... If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way. But if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be

dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed."

121. To invoke the winding up jurisdiction when, on substantial grounds the debt is disputed is an abuse of the process of the Court: see Mann v. Goldstein (1968) 1 W.L.R. 1091 and the applicant has no locus standi to present an application even though the company may be insolvent: Re Lympne Investments Ltd. (supra); Mann v. Goldstein (supra); Bateman Television Ltd. v. Coleridge Finance Co. Ltd. (supra); Re Calsil Ltd. (1982) 1 A.C.L.C. 329, and for the proceedings in which it will be an abuse of process, see L & D Audio Acoustics Pty. Ltd. v. Pioneer Electronics Australia Pty. Ltd. (1982) 1 A.C.L.C. 536 at p.538.

Needham J. in G.B. White Pty. Ltd. v. Taylor Railtrack Pty. Ltd. (1977-78) C.L.C. 40-443 said: "The procedure given by Sec. 222 (sec. 364) of the Companies Act is one given to a 'creditor'. Where an alleged creditor seeks to take advantage of those procedures before establishing his debt in the ordinary course, and seeks to use them against a solvent company, I think the court should be most wary of shutting the company out from its right to have its liability determined in accordance with the process given by law for that purpose."

122. A winding up petition is not to be used for the improper purpose of compelling a solvent company to pay a disputed debt which would certainly be discharged as soon as the company's liability was clearly shown to exist. (Re Imperial Silver Quarries (1868) 14 W.R. 1220; Re Imperial Hydropathic Hotel Co. (1882) 49 L.T. 147, 150. But where the debt is not disputed it is not improper for a creditor to present a petition with the object of forcing the company to pay: Re St. Thomas' Dock Co. (1876) 2 Ch. D. 116, although as stated above, a six months adjournment was granted in that case.

The general principle is, however, a discretionary one, and in exceptional circumstances winding up orders have been made even though the existence of the debt was genuinely disputed. In all these cases (Re Russian & English Bank (1932) 1 Ch. 663; Re Russian Bank of Foreign Trade (1933) Ch. 745; Re Tovarishestvo Manufactur Liudvig-Rabenek (1944) Ch. 404) the debtors were Russian companies which had been nationalised by

RECORD

Soviet decree, and winding up was ordered in spite of the dispute because it was impossible to establish the debt by bringing action and the only remedy left to the petitioner was that provided by the Companies Act.

123. Nature of Dispute Raised

The dispute must be genuine or bona fide, both in the sense that it must be honestly believed to exist by those who allege it, and in the sense that the belief must be based on reasonable (Re Imperial Hydropathic Hotel Co. (1882) 49 L.T. 147) or substantial grounds. (Re Kings Cross Industrial Dwellings Co. (1870) 11 Eq. 149, 151; Re Imperial Anglo-German Bank (1872) 25 L.T. 895, 989; Re Imperial Silver Quarries Co. (1868) 16 W.R. 1220; Re Welsh Brick Industries Ltd. (1946) 2 All 197, 198; Re K.L. Tractors (1954) V.L.R. 505, Bateman Television Limited v. Coleridge Finance Company Limited (1969) N.Z.L.R. 794; affd. (1971) N.Z.L.R. 929 (Privy Council); Fortuna Holdings Pty. Ltd. v. F.C.T. (1976) 2 A.C.L.R. 349. Contrast Re Imperial Hydropathic Hotel Co. supra).

It is, of course, impossible to predict in advance precisely what will constitute a "substantial" ground, but a suggested test is that there must be "so much doubt and question about the liability to pay the debt as that the court sees there is a question to be decided" (Re General Exchange Bank (1866) 14 L.T.582, 583) or, in the words of Sir George Jessel, the duty of a company which claims to dispute a debt is a duty "to bring forward a prima facie case which satisfies the court that there is something to be tried" (Re Great Britain Mutual Life Assurance Society (1880) 26 Ch. D. 246, 253. Contrast Medi Services International Pty. Ltd. v. Jarson Pty.Ltd. (1978) 3 A.C.L.R. 518, where the onus was said to be on the petitioner to show that there was no dispute of substance). The burden is therefore somewhat heavier than that resting upon a defendant who seeks leave to defend an action begun by specially endorsed writ (Re Welsh Brick Industries Ltd., supra) for in that case leave is always granted unless there is clearly no real question to be decided. (Cf. Codd v. Delap (1906) 92 L.T. 510, H.L.).

124. Court's Powers Where Debt Disputed

The usual practice where the debt is disputed is to dismiss the petition outright (Palmer, op.cit. p.27; Re Martin Wallis & Co. (1893) 37 Sol. Jo. 822; Re Meaford Manufacturing Co. (1919) 46 O.L.R. 252; Re Glenbawn Park Pty. Ltd. (1977) 2 A.C.L.R. 288; Re Norper Investments Pty. Ltd. (1977) 2 A.C.L.R. 453) but the

court has power to adjourn the hearing conditionally or unconditionally, and on a few occasions this power has been exercised in order to allow the petitioner to bring an action to establish the debt. (Re Catholic Publishing Co. (1864) 33 L.J. Ch. 325; Re Q.B.S. Pty. Ltd. (1967) Qd. R. 218; Re Horizon Pacific Ltd.(1977) 2 A.C.L.R. 495).

Normally, however, the petition will be dismissed, since a winding up petition is not intended to be a substitute for an action at law (Re Imperial Guardian Life Assurance Society (1870) 9 Eq. 477; Re Lympne Investments Ltd. (1972) 1 W.L.R. 523, 527; F.J. Reddacliffe & Associates Pty. Ltd. v. A.R.C. Engineering Pty. Ltd.(1978) 3 A.C.L.R. 426, 428).

125. The onus of establishing that there is a bona fide dispute as to the debt, and the onus of establishing that the company is presently solvent, are both on the company: Re Convere Pty. Ltd. (1976) V.R. 345; Re Glenbawn Park Pty. Ltd. (1977) 2 A.C.L.R. 288; and Malayan Plant (Pty.) Ltd. v. Moscow Narodny Bank Ltd.(1978) 2 M.L.J. 81, which was noted in 1979 Company Law Bulletin 8. But where the parties had been in dispute for some months over a debt alleged to be due by the company to the petitioner, it was stated that it was for the petitioner to show plainly and without doubt on a balance of probability, that there was no substance in the dispute: Medi Services International Pty. Ltd. v. Jarson Pty. Ltd. (1978) 3 A.C.L.R. 518.

126. The early rule, when a company disputed the debt was, generally, to stand over or adjourn the petition until the question of the disputed debt was determined by the court: Ex parte Rhydydefed Colliery Co. Glamorganshire Ltd. (1858) 3 De F. & J. 80. In the later case of Re Gold Hill Mines (1883) 23 Ch.D. 210, where a petition was brought to compel payment of a small debt which bona fide was disputed and the petition was not supported by any evidence that the company was insolvent, it was held that where a petition to wind up is improperly filed, the court has jurisdiction to stay all proceedings under it, or to dismiss it as an abuse of the process of the court; and on the facts in that case the court dismissed the petition as an abuse of the process of the court. Since those cases, many other decisions where the company has disputed the debt have been reported. Some of the principles in the early cases are still applied. For example, in Re Q.B.S. Pty. Ltd. (1967) Qd. R. 218; Re Gold Hill Mines, was applied and the petition was stayed; and in Mann v. Goldstein (1968) 1 W.L.R. 1091

RECORD

a petition was dismissed as an abuse of the process of the court because it was found that the alleged creditor was not a creditor within the meaning of the section. The modern rule, generally, is to dismiss the petition where there is a bona fide dispute on good, substantial and reasonable grounds as to the existence of the alleged debt, except in an unusual case; see, for example, Re Yanuca Holdings Pty. Ltd., noted in 1975 Company Law Bulletin 47, where a petition was stood over to enable the company to get in money owed to it and pay the debt. The court may, in an appropriate case, hear and determine the dispute: Bateman Television Ltd. (in liq) v. Coleridge Finance Co. Ltd. (1969) N.Z.L.R. 794 (CA); (1971) N.Z.L.R. 929 (PC), where all the evidence was available to the court; and see also Re Turf Enterprises Pty. Ltd. (1975) Qd. R. 266; 1 A.C.L.R. 197; and Re Nickel Mines Ltd. (1978) 3 A.C.L.R. 686. When a petition was called on and, the debt being disputed, counsel for the petitioner submitted that orders should be made to enable the existence or otherwise of the debt to be determined within the proceedings, and he relied on s.63 of the Supreme Court Act 1970 (NSW) which gave the court extended powers to grant remedies, Street CJ in Eq. considered that course then inappropriate and he dismissed the petition; Re R. & A. Smith Enterprises Pty. Ltd.(Supreme Court, NSW, 19 April 1973).

127. The creditor must ensure the debt is prima facie proved. It is not prima facie proved if the debtor company raises what is objectively a substantial or aguable dispute, one that cannot be tried on an interlocutory application but which must be tried in separate proceedings. (See Malins VC in Re Imperial Silver Quarries Co. Ltd. (1868) 16 W.R. 1220, 1221: "It is against the principles of this Court to wind up a company either (1) upon a disputed debt, or (2) of it is clear that on the debt being established it will be paid. But as to the first point, the dispute must be one in which the Court feels that there is substance, so that it cannot be decided on interlocutory application." See also Re Horizon Pacific Ltd. (1977) A.C.L.C. 29,422 where the dispute centred on defective execution of a deed under seal. Needham J. held this was not a case where the questions in dispute could be decided on the contents of the petition and the affidavits in reply.). Usually when a substantial dispute arises over indebtedness other proceedings are required before the application can progress. (See Gibbs J. in Re Q.B.S. Pty. Ltd. (1967) Qd. R. 218, 225). As noted above, until such disputes are resolved the applicant's standing under s.363 is in doubt. The grounds for denial must be substantial. In fact little enough is required of the company to show a substantial or bona fide dispute. Such grounds were

found in a lengthy list of disputes - including allegations of breach of promise, of breach of contractual clauses, of cross-claim and part payment - in G.B. White v. Taylor Railtrack Pty. Ltd. The issues between the parties, Needham J. said, could not be described or "dismissed as frivolous or not substantial." ((1978) A.C.L.C. 30,100, 30,105). His Honour explained his role:

> "It is not for me on this application, having reached that conclusion [that there are substantial issues in dispute], to determine the issues between the parties, nor, I think, to separate out the issues which I think are substantial from any which may not be so considered. The procedure given by s.222 of the Companies Act is one given to a "creditor". Where an alleged creditor seeks to take advantage of those procedures before establishing his debt in the ordinary course, and seeks to use them against a solvent company, I think the Court should be most wary of shutting the company out from its right to have its liability determined in accordance with the process given by law for that purpose."

128. The solvency of a company may be influential in the court's decision as to whether there was a substantial dispute warranting rejection of a petition. There are ample dicta in this vein (See Bateman's case (1969) N.Z.L.R. 794, 819-820; Community Development Pty. Ltd. v. Engwirda Construction Co. (1968) Qd. R. 541, 546-547. See also Gibbs J. in Re Q.B.S. Pty. Ltd. (1967) Qd. R. 218, 224-225: "It has been held that this rule [that a bona fide dispute by the company is grounds for refusal or suspension] does not apply if the company is insolvent (Re A Private Company (1935) N.Z.L.R. 120)..."). Yet in Mann v. Goldstein (supra) perhaps the first decision directly on the point, both companies subject to a threat of winding up were insolvent. Still the prosecution of the petition was restrained: the petitioners had not established their standing. An admittedly insolvent company also convinced the court to dismiss a winding up petition in Re Glenbawn Park Pty. Ltd. (1977) 2 A.C.L.R. 288. It can be argued that would-be creditors have a right to be warned of the company's insolvency, and that the application ought to be advertised and proceedings continue even where the applicant's claim and thus his standing is disputed on substantial grounds. On the other hand one can point out that such proceedings seriously prejudice a company's chances of recovery, and that only a true creditor should exercise the winding up power. The court in Mann's case took the latter view.

RECORD

129. To determine whether a dispute is substantially based the court may examine more than the mere quality of the dispute itself. The motives of the petitioner may be relevant. Thus Needham J. has said:

> "There is in my opinion, a discretion vested in the court to determine the issue of debt or no debt or to leave that issue for resolution elsewhere. In the present case, were it not ... plain that Laverton is a creditor of Nickel Mines ... I would have been disposed to determine the issue of debt or no debt in these proceedings, principally for the reason that, as it seems to me, practically all the evidence relevant to the issue was presented by the parties in the course of litigating the question whether the debt existed .... A further reason why I would have been disposed to determine the matter in these proceedings is that this is not a case when a petitioner seeks to embarrass or blackmail the debtor company into paying a debt, although disputed, in order to save itself from the effects upon its business of the filing of a petition to wind it up. In such cases, little evidence is required, I think, to cause the petition to be stayed or dismissed."
> (Re Nickel Mines Ltd. (1978) 3 A.C.L.R. 686, at 687-688).

130. Convenience of forum is also relevant. Thus the court may refuse to "take complicated and contested accounts" to determine the preliminary question of who is a creditor of who; or may consider that fairness to the company requires that it be allowed to defend serious charges, for example, of fraud or dishonesty, by fully availing itself of the procedures for pleading, discovery and cross-examination and by having power to join as parties those actual persons against whom the charges are made. (Re Lympne Investments Ltd. (1972) 2 All E.R. 385, at 388).

131. Where indebtedness is disputed, the practice of the courts was originally to adjourn the petition to allow trial at common law of the alleged debt. (Ex parte Rhydydefed Colliery Co. Ltd. (1858) 3 De G. & J. 80; 44 E.R. 1199; Ex parte Owen; Re the Island of Anglesea Coal & Coke Co. (1861) 4 L.T. 684; Re Catholic Publishing and Bookselling Co. (1864) 2 De G. j. & S. 116, at 121; 46 E.R. 319, at 321 per Turner L.J.; Re The Universal Bank Ltd. (1866) 14 W.R. 906). This practice changed in 1865 in Re The Brighton Club and Norfolk Hotel Co. Ltd. ((1865) 35 Beav. 204; 55

E.R. 873), where Romilly MR. emphatically dismissed the petition before him. This is now the general practice, (In re London & Paris Banking Corporation (1874) L.R. 19 Eq. 444; Re Martin, Wallis & Co. (1893) 38 Sol. Jo. 112; Re Meaford Manufacturing Co. (1919) 46 O.L.R. 282; Re Welsh Brick Industries Ltd. (1946) 2 All E.R. 197; Re Lympne Investments Ltd. (1972) 2 All E.R. 385) even where a cross-claim is raised (Re Glenbawn Park Pty. Ltd. (1977) 2 A.C.L.R. 288; Re Madison Avenue Carpets (1974) A.C.L.C. 40-125, p.27,895), because in the words of Megarry J.:

> "The effects on a company of the presentation of a winding up petition against it are such that it would be wrong to allow ... (a petition)... to be kept in suspense over the company's head while ... litigation is fought out."
> (Re Lympne Investments Ltd. (1972) 2 All E.R. 385, at 389).

However, an adjournment pending the litigation of the disputed debt may be appropriate: where there is some doubt as to the solvency of the company; (Re Q.B.S. Pty. Ltd. (1967) Qd. R. 218 at 226; Medi Services International Pty. Ltd. v. Jarson Pty. Ltd. (1978) 3 A.C.L.R. 518) where there is a cross-claim - but probably only where it is also foreign (Re L.H.F. Wools Pty. Ltd. (1970) Ch. 27), or where the solvency of the company is in doubt (Re Horizon Pacific Ltd. (1977) 2 A.C.L.R. 495) - though even there dismissal has been ordered (Re Glenbawn Park Pty. Ltd. (1977) 2 A.C.L.R. 288), and where the ground of dispute is fraud or collusion in obtaining the judgment debt. The power to impose conditions on the granting of any adjournment has been exercised liberally.

132. The matter was considered by the Judicial Committee in Bateman Television Ltd. (in liquidation) & Anor. v. Coleridge Finance Co. Ltd. (1971) N.Z.L.R. 929. This was an appeal to the Privy Council from the decision of the New Zealand Court of Appeal (1969) N.Z.L.R. 794. The Committee held that the general rule is that an order for winding up will not be made on disputed debts but a Judge has a discretion to make a winding up order on disputed debts which is not reviewable unless exercised on a wrong principle or the Judge included or omitted consideration of a relevant fact or was wholly wrong. See also Kearney J. in Field Group Chemicals Pty. Ltd. v. Preston (Supreme Court of N.S.W. 19th August, 1980 (unreported); McLelland J. in L & D Audio Acoustics Pty. Ltd. v. Pioneer Electronics Australia Pty. Ltd. (1982) 7 A.C.L.R. 180; Mervyn

RECORD

Davies J. in In re a Company (1984) 1 W.L.R. 1090; Harman J. in In re a Company (1983) Com. L.R. 202; Macpherson, J. in National Mutual Life Association of A/sia Ltd. v. Oasis Developments Pty. Ltd. (1983) 7 A.C.L.R. 758; Macpherson J. in General Welding and Construction Co. (Qld.) Pty. Ltd. v. International Rigging (Aust) Pty. Ltd. (1983 8 A.C.L.R. 307; Legoe J. in Re Gem Exports Pty. Ltd. & Ors. (1983) 8 A.C.L.R. 755; White J. in Re Mobitel (International) Pty. Ltd. (1984) 8 A.C.L.R. 695; White J. in Re Manufacturers Australia Pty. Ltd.(1984) 8 A.C.L.R. 706; Kelly J. in Re John A. Yeates & Associates Pty. Ltd. (1985) 3 A.C.L.C. 1; Ryan J. in Re Cottonvale Distilleries Pty. Ltd. (1985) 3 A.C.L.C. 316; Helsham C.J. in Equity in The Orleans Marketing Company Pty. Ltd. v. Neydharting Moor (Australia) Pty. Ltd. (1985) 3 A.C.L.C. 147; Master Staples in Re H.J. Ingle Pty. Ltd. (1985) 3 A.C.L.C. 649.

133. The Court failed to properly consider the wishes of other creditors in determining whether to make a 'winding up' order.

134. S. 431(1) Companies Code (Victoria) provides:

> "The Court may, as to all matters relating to the winding up of a company, have regard to the wishes of the creditors or contributories as proved to it by any sufficient evidence..."

135. The words "all matters relating to the winding up of a company" certainly embrace the question of whether or not a winding up order should be pursued or issued. (See Pape, J. in Re Metropolitan Fuel Pty. Ltd. (1969) V.R. 328, 332; Weigall A-J in Re Melbourne Carnivals Ltd. (No. 1) (1926) V.L.R. 283, 290; Re Roma Industries (1976) 1 A.C.L.R. 296, 298-299; Re St. Thomas's Dock Co. (1876) 2 Ch. D.116, 121).

Interpreting the predecessor of s.431(1), Irvine C.J. in Re Concrete Pipes and Cement Products Ltd. (1926) V.L.R. 24, 38-39 ruled that a winding up petition is not for the benefit of the petitioner alone but also for the benefit of the class to which he belongs. Once a court is seized of such an application it should consider the interests of the other creditors, particularly those of a majority (numerically or, especially, by value) if that majority opposes an order. Pape, J. in Re Metropolitan Fuel Pty. Ltd. cautioned:

> "it is for the court to examine the reasons given by the majority of the creditors for itself, and ... it should not give effect to them simply because they are the wishes of the

> majority, but ... in deciding whether it is just and equitable to give effect to them. The burden of showing that it is not just and equitable that the wishes of the majority should prevail would appear from the Melbourne Carnivals Case to be on the petitioning creditor."
> ((1969) V.R. 328, 332).

136. Opposition to winding up may proceed from the petitioner's fellow creditors, who may be secured or unsecured, or from the company or (what is virtually the same thing) from the shareholders. The significance of opposition to winding up varies in direct proportion to the relative importance of the opposing interest involved. Where the company is insolvent the foremost consideration naturally is the interests of the creditors, and these prevail over the interests of other persons likely to be affected by the winding up, such as the company and shareholders. (Cf. Re Lonsdale Vale Co. (1868) 16 W.R. 601; Re Pavy's Felted Fabric Co. (1875) 24 W.R. 91; Re New York Exchange Ltd. (1888) 39 Ch. D. 415; Re Melbourne Carnivals Ltd. (1926) V.L.R. 286, 290). As regards creditors, more importance attaches to the views of unsecured creditors for the obvious reason that, unlike the secured creditors, they have no means other than winding up by which they can obtain payment of their debts. (Re Crigglestone Coal Co. (1906) 2 Ch. 327; cf. also Re Karamelli & Barnett Ltd. (1917) 1 Ch. 203, 205). Within each class of creditors, the general policy is to treat the creditors themselves as best fitted to decide what is in their interests, (Re Rubber Improvement Ltd. (1962) The Times, June 5; (1962) C.L.Y. 382) and in pursuance of this policy the court is enjoined by the Code to have regard to the wishes of the creditors, as proved to it by any sufficient evidence, and if necessary to direct that meetings be held for the purpose of ascertaining those wishes. (It must be conceded that the section does not specifically refer to the wishes of the majority: See Re Leonard Spencer Ltd. (1963) Qd. R. 230, 234, but it has always been understood to mean this). This provision, which has been held to apply whenever a winding up petition is before the court, (Re Western of Canada Oil Co. (1873) 17 Eq. 1; Re Chapel House Colliery Co. (1883) 24 Ch. D. 259; Re Concrete Pipes & Cement Products Ltd. (1926) V.L.R. 34; Re Belmont Land Co. (1913) 32 N.Z.L.R. 864) provides an additional source of discretionary power to refuse a winding up order, even though an individual creditor may have succeeded in establishing his prima facie right thereto; for as Buckley J. once explained it -

RECORD

"the order which the petitioner seeks is not an order for his benefit but an order for the benefit of a class of which he is a member. The right ex debito justitae is not his individual right but his representative right." (Re Crigglestone Coal Co. (1906) 2 Ch. 327, 331-2. This so-called "class rights" doctrine was possibly foreshadowed by Jessel M.R. in Re St. Thomas's Dock Co. (1876) 2 Ch. D. 116, 120. See also Re P & J Macrae Ltd. (1961) 1 W.L.R. 229, 232).

137. Where the petition is presented by one or more of a number of unsecured creditors, the court in exercising its discretion is not restricted to making an order which will give effect to the prima facie right of an unpaid creditor to have the company wound up. According to Buckley J. in Re Crigglestone Coal Co. (1906) 2 Ch. 327. See also Re North West Abattoir Pty. Ltd. (1971) C.C.H. 40-009 (N.S.W. Sup.Ct.) the right to have an order made is really that of the class of creditors to which the petitioner belongs and since all the members of that class will be equally affected by the winding up, all are entitled to be consulted on the desirability of such a course.

In calling meetings of creditors for the purpose of ascertaining their wishes, the court is required to have regard to the "value of each creditor's debt". The phrase "value of the debt" has been held to refer to the amount of the debt and not what it may ultimately prove to be worth; Re Manakau Timber Co. (1895) 13 N.Z.L.R. 319).

138. Both Tadgell J. and the Full Court failed to consider and determine the appeal before them in respect of the appointment of the provisional liquidator: A provisional liquidator should not have been appointed: In additional consequence, Tadgell J.'s order as to costs was incorrect.

139. The appointment of the Provisional Liquidator

The appointment had the effect of displacing the directors (Re Oriental Bank Corporation, ex parte Guillemin (1884) 28 Ch. D.634) and putting the company's affairs under the control of the provisional liquidator. From a commercial point of view its practical effect was to paralyse the company (See Re London, Hamburg & Continental Exchange Bank, Emmerson's Case (1866) 2 Eq. 231, 237). An order would not ordinarily have been made ex parte (Re Q.R.P. Construction Pty. Ltd. (1973) Qd. R. 157).

140. Costs

The court has a discretion as regards the costs of the petition (Re Criterion Gold Mining Co. (1889) 41 Ch.D. 146, at p.148) but there are certain well-settled principles which ordinarily govern the award of costs in the absence of special circumstances.

Where a winding up order is made, both the petitioner and the company are ordinarily entitled to have their taxed costs paid out of the assets of the company.

Re Humber Ironworks Co. (1866) 2 Eq. 15; Re Gibson Radio & Electrical Ltd. (1962) N.Z.L.R. 353; Re Leonard Spencer Ltd. (1963) Qd. R. 230 at p.237.

141. The findings by Tadgell J. of "irregularity" against Mr. Ganke (p. 685) without those matters being in issue or without a definition of an issue relating thereto or without Mr. Ganke being informed of the risk of the making of an adverse finding in relation to such matters were made contrary to the rules of 'natural justice".

142. The principles adopted by the Judicial Committee in Mahon v. Air New Zealand Ltd. & Ors. (1984) 3 W.L.R. 884 ("Erebus") and by the New Zealand Court of Appeal in Re Erebus Royal Commission: Air New Zealand Ltd. v. Mahon (No. 2) (1981) 1 N.Z.L.R. 618 should be applied in this case.

THE "TERMINATION" OF THE MORATORIUM DEED AND THE "OPINION OF MR. MACINTOSH

143. Tadgell J. and the Full Court failed to correctly construe the "Moratorium Deed" and also failed to assess correctly the "opinion" of Mr. Macintosh (hereinafter called "Macintosh"). In particular, they should have taken into account the fiduciary duties of Macintosh and the penal nature of the 'termination' of the Moratorium Deed.

144. In relation to Tadgell J.'s analysis of the Moratorium Deed, a more adequate statement of the position would have

(i) related the nature of the Moratorium Deed to the pre-existing disputes between Ganke and Adler

and would have

RECORD

(ii) indicated that, in certain cases (e.g. the two Fijian companies), certain of the corporate entities bound by the Moratorium Deed were given longer than 30th November 1983 in relation to the payment of debts.

145. The burden of attack on Macintosh lies in the holding by Macintosh of the secret meetings with Adler on 19th January, 1983 and the secret meetings with Adler and certain of the creditors on 21st January, 1983; the keeping secret of these facts from the Moratorium debtors, and in particular, from Ganke and Mr. Tosio (Ganke's accountant) as representing such Moratorium debtors. There is also the serious question of keeping secret the "opinion", especially in the circumstances where there were a number of letters written by Macintosh to Ganke on 9th February, 1983 without reference to "the opinion", which apparently was drafted on the same date, i.e. 9th February, 1983. There is also the question of the secret involvement of Macintosh with the drafting of the application for the provisional liquidator appointment in Brinds in Melbourne at a time when the Moratorium Deed had not yet been terminated and the subsequent peremptory and secret purported termination of that Deed.

146. A general attack was lodged on the content and supporting material of the conclusions reached in the Macintosh "opinion" of 10th February, 1983 and in relation to its correctness.

It is submitted that the law is that any error or omission in the reasons given in the Macintosh "opinion" of 10th February, 1983, being unnecessarily a 'speaking' opinion, may invalidate it or, at least, permit its examination.

147. The second ground of attack in relation to the "opinion" was that the opinion was given in bad faith, and in particular in the circumstances of the failure to Macintosh to inform Ganke of the meetings with Adler and the other creditors and his failure to inform the debtor companies of his having stated a purported opinion. It is not a question of the propriety or impropriety of the meeting between Macintosh and Adler; it is the impropriety alleged in not advising Ganke and the debtor companies of that meeting and of the subsequent meetings.

148. It is submitted that Macintosh was under a fiduciary obligation to the corporate debtors which he failed to observe. It is submitted that one determines whether a person has a fiduciary duty by looking at the requirements which are imposed on him in all the

circumstances as to how he should act. If you find that he has a duty to act in accordance with the Deed and to act bona fide in the exercise of his powers, then ex hypothesii, you find that he is a fiduciary because he has a fiduciary type duty (see Finn, "Fiduciary Duties") (and infra).

Macintosh, unlike a receiver and manager, had no management role to perform and no control over the disposition of the assets of the several debtor companies to which he was appointed. His role was simply to monitor the management, monitor the fulfilment by the debtor companies to which he was appointed of their obligations under the Deed and to report certain matters to the creditors.

The duty of Macintosh in relation to the issue of an opinion under clause 22 of the Deed required him to act fairly and in a fiduciary role having regard to the interests of the debtor companies and the creditor companies.

149. Macintosh's Fiduciary Duty

It will be submitted that Macintosh was under a fiduciary duty by virtue of the Moratorium Deed and that his failure to observe such duty rendered nugatory his purported opinion. See P.D. Finn, "Fiduciary Obligations" (1976); Brian Pty. Ltd. v. United Dominions Corporation Ltd. (1983) 1 N.S.W.L.R. 490; United States Surgical Corporation v. Hospital Products International Pty. Ltd. (1983) 2 N.S.W.L.R. 157, on appeal to High Court of Australia 55 A.L.R. 417.

A fiduciary relationship exists where one person reposes trust or confidence or reliance in another.

A fiduciary relationship exists wherever there is established an inequality of footing between the parties. This inequality of footing can be of two types; de jure, that is, as the result of particular defined relationships such as trustee and beneficiary, or de facto, that is, as the result of the dominion by one person over the other.

A fiduciary relationship exists where one person relies on or trusts another, and such reliance or trust has been accepted by that other person. As part of his more general theory of fiduciaries, Professor Finn (Finn, P.D. Fiduciary Obligations (Sydney, 1977) p.9) points out :

RECORD

"for a person to be a fiduciary he must first and foremost have bound himself in some way to protect and/or advance the interests of another."

Similarly, Dr. L.S. Sealy, writing in 1962 (Sealy, L.S. "The Fiduciary Relationship" (1962) Camb. L.J. 69,73) includes an undertaking to act on behalf of another as one of his four (or perhaps five) classifications of fiduciary relationships.

A fiduciary relationship exists where one person has (a) the power to change the legal position of another, and (b) a discretion in the exercise of that power.

Where a person is obliged, by nature of the arrangements - whether it be under contract or otherwise - to take into account the interests of another party in the carrying out of obligations, whether specified in contract or elsewhere, this was a matter that would be relevant in determining the existence of a fiduciary relationship.

Where a person was in a particularly vulnerable position in the sense that he had entrusted to the other person his interests, and there was a chance that that person's position could be "abused" by the failure to discharge the trust vested in the second person, then similarly a fiduciary relationship would result.

(United States Surgical Corporation v. Hospital Products International Pty. Ltd. (1983) 2 N.S.W.L.R. 157, esp. 208); Pollnow v. Garden Mews-St. Leonards Pty. Ltd. & Ors. (1984) 9 A.C.L.R. 82; Parkes Management Ltd. v. Perpetual Trustee Co. Ltd. (1977) 3 A.C.L.R. 303.

150. It will be submitted that the Moratorium Deed cast upon the debtor companies an additional or different liability upon the early termination of the Moratorium period which was in the nature of a penalty.

151. The early termination of the Moratorium operated as a penalty in respect of which relief should have been granted against that penalty. The appellants submit that the object of the agreement was to achieve a stated result, namely the controlled realisation and/or refinancing of the debtor companies' assets with a view to discharging an acknowledged indebtedness to certain of the creditors. If it would be harsh and unconscionable to strictly enforce the terms of the Deed so as to permit the Moratorium period to be prematurely shortened, i.e. if relief could be granted which would still permit

the results intended by the agreement to be achieved, equity will relieve against the strictness of the terms. The underlying principle is the same whether the specific application is described as the conferral of an equitable right to redeem, relief against forfeiture or relief against a penalty.

152. There is difficulty in the instant case in determining whether what was involved was in fact a "relief against forfeiture" or "relief against penalty". There had been a general blurring in the authorities of the two bases of relief and it did appear that in general, "forfeiture" related to the case where an interest had been achieved or where there was an existing situation which had to be preserved and that "penalty" might be properly said to apply to the case where a liability was to be increased or accelerated and therefore might be regarded as relief from a later imposed burden. There has been blurring of the situation when authorities speak of "relief from forfeiture in the nature of the penalty" or "relief from forfeiture in terms of the loss of deposit involved". In the instant case by the operation of the early determination of the Moratorium Deed there was an advancing of either the obligation of the debtor entities to make payment or of the possibility of their being subjected to litigation or winding-up procedures.

153. The principles are set out in Halsbury, 4th ed. Vol. 16 paras. 1444 et seq. and in Storey's "Commentaries" and in the authorities of Barton Thompson & Company Ltd. v. Stapling Machines Company (1966) Ch. 499; Shiloh Spinners Ltd. v. Harding (1973) A.C. 691; Mardorf Peach & Company v. Attica Carriers Corporation of Liberia (1977) A.C. 850 especially at p.873; Chandless v. Nicholson (1942) 2 K.B. 321; Starside Properties Ltd. v. Mustapha (1974) 1 W.L.R. 816; The Afavos (1980) 2 Ll.R. 469 and Scandinavian Trading Tanker Company A.B. v. Flota Petrolera Ecuatoriana (1983) 2 W.L.R. 248. Reliance will be placed upon the decision of the High Court in Legione v. Hateley (1983) 152 C.L.R. 406 and the High Court decision of O'Dea v. All States Leasing System (WA) Pty. Ltd. (1983) 152 C.L.R.359. The right to terminate the Deed early should be characterised as a "penalty" or a "forfeiture". It imposed an additional or different liability so as to attract the additional penalty. There was an estate or interest in property or a proprietary right of the debtors lost or determined so as to attract the jurisdiction in relation to forfeiture.

RECORD

154. There is an analogy in the instant case with withdrawal clauses in time charter parties. The common clause occurring in time charter parties is one which confers on ship owners the right to withdraw the services of their vessel from the charterers for the late and failure to pay hire in accordance with the terms of the charter party. The right of withdrawal is intended as a spur to timeous payment and not as a punishment for late payment. By analogy it is said that the right to terminate on the non-compliance when the terms of the Moratorium Deed such as a provision of accounting information and the like must also be regarded as intended as a spur to the timely provision of such material. It is noted that there is no provision in the Moratorium Deed making time of the essence and certainly in the absence of such a provision late provision of the information would in the absence of the termination provisions rarely amount to a repudiation justifying termination of the Moratorium Deed. Examination of the charter party cases also indicates a distinction which is drawn between cases where compliance has been made albeit late and, in particular, where compliance has been made before the right to termination has been asserted. There are strong parallels with the present case because of the provision of material by the debtor companies later than the date provided and the acceptance, and, indeed, reliance upon and utilisation of material by the creditor companies, prior to communicated assertions of right to terminate. The charter party cases requiring analysis are The Owners of SS. Langfond v. Canadian Forwarding and Export Company (The Langfond) (1907) 96 L.T. 559 (PC) and Tank Express A/F v. Compagnie Financiere Belge Des Petroles SA: (Petrofina) (1949) AC. 76. This decision certainly decides that contractual methods of payment (to be equated in this case with the contractual method of complying with a moratorium) may be decided by a course of dealing.

The next case is (The Georgios C.) Empressa Cubana de Fletes v. Lheonisi Shipping Company Limited; (The Georgios C.) (1971) 1 Q.B. 488. The next case is (The Brimnes) Tenax Steamship Company Limited v. The Brimnes (Owners); (The Brimnes) (1975) Q.B. 928. Also see The Zhographia M. Astro Amo Compagnie Naviera S.A. v. Elf Union S.A. and First National City Bank; (The Zhographia M.) (1976) 2 Ll.R. 382. The matter was considered by the House of Lords in (The Laconia) Mardorf Peach Co. Ltd. v. Attica Carriers Corporation of Liberia; The Laconia (1977) 2 W.L.R. 286.

It is clear that in the Court of Appeal in The Laconia Case Lord Denning MR. had adopted the practice of

many judges in treating withdrawal clauses as forfeiture clauses because of their nature. See Sir Arthur Wilson in The Langfond (supra) at page 560 and Lords Wright and Uthwatt du Parcq in the Tank Express Case at pages 99, 100, 106 respectively. Although Lord Wilberforce joined the House of Lords in reversing the decision of the Court of Appeal, Lord Denning's attitude to the forfeiture clauses was partially influenced by dicta of Lord Wilberforce and Lord Simon of Glaisdale in Shiloh Spinners Limited v. Harding (1973) A.C. 691 at pages 723 and 727 respectively. It would appear that the right to terminate may in fact be lost once one untimeous provision of material had occurred and been accepted and this certainly occurred in this case. See Lord Wilberforce in The Laconia (supra) p.293B. For example, in Tropwood A.T. v. Jade Enterprises Limited (1977) Ll. R. 397 (The Tropwind) Mr. Justice Kerr limited the right to withdraw on any breach of a charter party to unremedied breaches. Adopting any other interpretation of the matter means that a breach cannot be made to have never existed but rather that it cannot be put right.

155. In a situation such as the present where the debtor companies continued to attempt performance in the absence of any waiver by the creditors, it might be thought justifiable to reduce the contractual right to terminate to accord more closely with the common law right. See Hong Kong Fir Shipping Company Ltd. v. Kawasaki Kisen Kaisha Ltd. (1962) 2 Q.B. (The Hansar Nord). See also Bridge v. Campbell Discount Company Ltd. (1962) A.C. 600.

It may well be that recent developments in relation to unconscionability in the law are appropriate to a situation such as this. See Waddams "Unconscionability in Contracts" 39 Modern Law Review (1976) 369.

On the kernel question of relief against penalties reference should be made to Re Dagenham (Thames) Dock Company; ex parte Hulse (1873) 8 Ch. App. 1022 and Kilner v. British Columbia Orchard Lands Ltd. (1913) A.C. 319 PC.

156. In "relief from forfeiture" it would seem that one of the heads of jurisdiction is an ability of the Court to intervene on the ground of fraud, accident, mistake or surprise. See Shiloh Spinners Limited v. Harding (supra).

RECORD

157. It does seem that Courts of Equity in appropriate limited cases may relieve against forfeiture for breach of covenants or conditions for the primary object of the bargain is to secure a stated result which can effectively be obtained when the matter comes before the Court. Now where the forfeiture provisions act by way of security for the production of the result, see Shiloh Spinners (supra) at pages 723, 726 and 727. Of course, the word "appropriate" involves consideration of the conduct of the applicant for relief, in particular of applying the tests as structured in the judgment of Mason and Deane JJ. in Legione v. Hateley. The general rule and contractual rule is that where a beneficial right is to rise upon the performance of some act or stated matter, then the act must be performed accordingly to obtain the enjoyment of the right. In the absence of fraud, accident, mistake or surprise, equity will not relieve against the breach of the terms. It should be remarked that in the present case the beneficial right does not rise on the performance by the beneficiary or by the debtors of the provisions of the deed but the deed itself is brought closer to an early conclusion by the non-performance.

158. A Court in its equitable jurisdiction can grant relief against forfeiture under what is in this case a condition subsequent where the condition is in the nature of a penalty (Wallis v. Crimes (1667) 1 Cas. in Cha. 89; Priestley v. Holgate (1857) 3 K. & J. 286 and 288). Basically reliance will be placed on the statement of principles in the Shiloh Spinners Case (supra), Lord Wilberforce p. 722A, 723F and Lord Simon of Glaisdale (ibid.) pages 726 and 727. Reliance is also placed on the speech of Lord Simon of Glaisdale in The Laconia (supra) see pages 873 and 874.

Chandless v. Nicholson (supra) is authority for the proposition that in granting relief against forfeiture such relief might, in terms of the Court's jurisdiction, be given by the extension of time if circumstances are brought to the Court's notice which would make it just and equitable that the extension should be granted. See Lord Greene MR. p.323.3. The case was approved and commented upon in Starside Properties Ltd. v. Mustapha (supra) see Edmund Davies LJ. 821, 822, 823 and 824. On the question of whether in fact forfeiture is occurring, reliance is placed upon the judgment of Lloyd J., at first instance, in The Afavos (1980) 2 LL. R. 465 especially at pp. 477, 478, 479 and 480. That matter is also dealt with in the Court of Appeal in Afavos Shipping Company S.A. v. Romano Pagnan & Anor. (1982) 1 W.L.R. 848. See Lord Denning MR. p.854D and was again considered in The Scaptrade: Scandinavian

Trading Tanker Company A.V. v. Flotta Petrolera Ecuatoriana (1983) 2 W.L.R. 248. There the Court of Appeal considered the question of relief from forfeiture in the context of Charter Parties. (See Sir Robert Goff L.J. pp.254-257). The appellants rely on the joint judgment of Gibbs C.J. and Murphy J. and the joint judgment of Mason and Deane JJ. in the High Court decision of Legione & Anor. v. Hateley (supra) and additionally, on the decision of the High Court in O'Dea & Ors. v. All States Leasing System (WA) Pty. Ltd. & Ors. (1983) supra.

159. There is a question of whether the principles applicable proceed from the basis of "relief from forfeiture" or "relief from a penalty". The basic definition which the appellants would seek to attribute to these respective matters are that "forfeiture" is wherever, because of a breach (serious or trivial) under a contract, a party is in danger of losing the benefit for which such party has already provided consideration. For distinction, "penalty" is conceived of as wherever, because of a breach (serious or trivial) of a contract, a party is being required to provide further consideration notwithstanding that party has already provided consideration and will lose the benefit of the contract for which he has already provided consideration. The line between "penalties" and "forfeiture" is, as has been said, blurred. The word "forfeiture" carries an implication of deprivation of something previously owned as distinguished from subjection to a liability. The word "penalty" as distinct from "forfeiture" involves the enforcement of an obligation to pay a sum which by law or agreement of the parties is a punishment for the failure to fulfil some primary obligation. A "forfeiture" deprives a man of what he has previously possessed, or at least prevents him from acquiring what he has substantially paid for. A "penalty" subjects him to a liability beyond the actual damage caused by his breach of the primary obligation. The blurring of distinction is observable in the case law. For example of a case in which the condition of forfeiture is designated as in the nature of a penalty from which the appellant was entitled to be relieved under certain conditions, see Kilner v. British Columbia Orchard Lands Ltd. (1913) A.C. 319. The Alberta Supreme Court considered the matter in Oil City Petroleum (Leduc) Ltd. v. American Leduc Petroleums Ltd. (1951) 3 D.L.R. 835.

160. In the present case the Ganke interests provided substantial consideration to the Adler interests in the releasing of claims against the Adler interests,

RECORD

including claims in the midst of litigation; the payment of substantial costs orders or relinquishment of substantial cost orders, an agreement that the Ganke representatives should not stand for re-election to the Board of a major public company, Offshore Oil N.L., and should desist from exercising their rights to requisition meetings are all matters of a substantial nature. The effect of the implication of the termination provision based on this is to render the corporate appellants liable to a multiplicity of legal proceedings.

161. The necessity for a full analysis of the nature of the impact imposed by the advancement of the date for the termination of the Moratorium Deed still remains notwithstanding the decision of the House of Lords on the appeal in The Scaptrade (1983) 2 A.C. 694 principally because Lord Diplock in his speech (with which the other Law Lords concurred) made it clear that what was under consideration there was the peculiar case of a time charter which was made not by demise and heavy emphasis must be given to the fact that the primary emphasis lies in the peculiar nature of a charter party and in particular, a time charter party. See the decision in B.I.C.C. v. Burndy Corporation & Anor. (1985) 2 W.L.R. 132 (and note 59 A.L.J. 571).

162. It is submitted that

(1) Clause 22 of the Deed of 25th November 1982, whereby a creditor may terminate the moratorium consequent upon the delivery of an opinion as therein provided by the Examining Accountant, is void as a penalty.

(2) The Moratorium Deed was therefore not validly terminated pursuant to that clause.

(a) By the Deed of 25th November 1982 the debtors obtained the benefit of covenants by the creditors not to seek to recover (cl. 7(i) and to demand repayment during the moratorium of the respective debts (cl.10.2). They thus were in the position of not having to pay the debts for the period of the moratorium.

(b) The consequence of termination of the moratorium pursuant to cl.22 was that the debtors were liable to pay the debts forthwith, and thus liable to pay money earlier than otherwise; they lost effectively the entire benefit of the Deed.

(c) (i) Termination pursuant to cl.22 was automatic consequent upon the delivery of Examining Accountant's opinion in the sense that the creditors then became entitled to give notice of termination;

(ii) delivery of the opinion was obligatory once formed;

(iii) the opinion could relate to a matter not involving breach by the debtors (cl.22(a), possibly (c)), or a matter involving breach by one or more of the debtors (cl.22(b), possibly (c)), and in the case of a matter involving breach could be a matter of significance or a trifling matter.

As examples of trifling matters -

- give the Examining Accountant only 40 hours notice of a meeting of directors (cl.1B(iv))
- deliver lists of cheques on the third day after the end of a week (cl.1B(vii))
- deliver its report of progress in realisation of assets one day late (cl.1B(viii))
- deliver other documents a day later than required (cl.3)(37-8)
- give a guarantee for $10,000 (cl.5(b));

(iv) the opinion could relate to a trifling default by one debtor only yet entitle notice of termination as to all.

(d) The provision enabling termination in these circumstances is penal. The consequence of termination of the moratorium as regards all debtors by reason of trifling breach by one debtor in just the same way as in the case of a serious breach is unreasonable and cannot be regarded as a genuine reflection of the detriment to the creditors justifying termination.

Dunlop Pneumatic Tyre Co. Ltd. v. New Garage & Motor Co. Ltd. (1915) A.C. 79 at 86-88

RECORD

O'Dea v. All States Leasing System (W.A.) Pty. Ltd. 152 C.L.R. 359.

(e) The equitable relief sought is not against payment of a penal sum as such, but relief from a penal acceleration of the time for payment. There is jurisdiction to grant such relief.

Shiloh Spinners v. Harding (1973) A.C. 691 at 726-7

Forestry Commission v. Stefanetto (1975-6) 133 C.L.R. 507 at 519 (Mason J.) 524 (Jacobs J.).

O'Dea v. All States Leasing System (W.A.) Pty. Ltd. supra.

(f) The principle of cases such as Thompson v. Hudson (1869) L.R. 5 H.L.1 and The Protector Loan Co. v. Grice (1880) 5 Q.B.D. 592 does not apply. Those are cases where (O'Dea v. All States Leasing System (W.A.) Pty. Ltd. supra, per Gibbs C.J.) there is a present debt which by reason of an indulgence given by the creditor is payable either in the future or in a lesser amount provided that certain conditions are met, and it is said that the failure of the conditions does not mean only that the sum always owed becomes recoverable at once or in full. It is otherwise where the debtor as consideration for the indulgence acknowledged the present debt, since but for the transaction of which the conditions are part there would not have been a present debt. That is the present case:

Judgment of Tadgell J. pp.14a-19a
Deed of 25th November 1982 recitals A, F, cl.1.10.1, 12-16, 18

See also Scandinavian Tanker Co. A.B. v. Flota Petrolera Ecuatoriana (1983) 2 A.C. 694; Sport International Bussum B.V. v. Inter-Footwear Ltd. (1984) 2 All E.R. 321; O'Dea v. All States Leasing System (WA.) Pty. Ltd. (1983) 152 C.L.R. 359; United Dominions Corporation Ltd. v. Austin (1983) 1 N.S.W.L.R. 636 and (1984) 2 N.S.W.L.R. 612; Citicorp Australia Ltd. v. Hendry (unreported decision of Clarke J. 29th February 1984) (N.S.W. Supreme Court)

163. The Court failed to properly assess the effect of the "Moratorium Deed" provisions as to continuance of prior agreements and the argument that the alleged loan was only repayable "on 12 months' notice" and the appropriate effect of such an agreement if found to exist and to be of a reinstated and continuing character

164. As to the period of the loan, it will be submitted that it is competent for persons to agree that a debt will only be payable on a certain event. (Head v. Kelk (1961) 63 S.R. (NSW) 340, 345; Chasemore v. Turner (1875) L.R. 10 Q.B. 500; Muir v. City of Glasgow Bank (1879) 4 App. Cas. 337, 355; Boag v. Ross (1922) 22 S.R. (NSW) 242, 247; Re Anderson (1927) 27 S.R. (NSW) 296, 300. The question is one of construction of the contract in each case (Ogilvie v. Adams (1981) V.R. 1041, 1043.

165. As to the construction of the moratorium debt, it is respectfully submitted that Tadgell J.'s view of the document (and that of the Full Court) is incorrect. The view on the meaning of clause 20 does not accord with the usual effect of a moratorium which is a mere deferment of rights whilst the Deed remains operative. (Stramit Industries Ltd. v. Gardiner (1970) 92 W.N. (NSW) 433.

The issue essentially is whether the effect of the moratorium deed was to take away the appellants' rights to twelve months' notice. It goes further, is such effect so unarguably plain that the issue should be decided in winding up proceedings.

The deed was prepared by leading solicitors. It is a complex document and it must be assumed that every part has effect. Any construction which "reads out" a clause must be suspect.

Further, the Deed must be read in a spirit of commercial realism; it would be incredible that a debtor owing nothing in praesenti would by a sidewind confess to a large debt.

In the Supreme Court of Victoria, the Full Court for some reason focussed on the word "claim". There is no reason to do this. Nor is there any reason to read down clause 20 because its inclusion affects the effectiveness of the Deed. Clause 20 must have been included for some purpose - it is not to be cast aside as nugatory.

RECORD

166. It is open to the parties to fix a time for repayment, or to agree that the loan will only be repayable on demand.

Where the parties to a contract stipulate that the contract is to continue for a definite period, the contract cannot be terminated before the expiration of that period unless the parties are empowered so to do by the terms of the contract.

167. Where a contract provides that it is to continue for a fixed term and thereafter until determined by notice, the contract cannot be terminated before the specified period expires, but it is a matter of construction of the words used in the contract whether the contract is one that can be terminated at the end of the period by a notice given during that period, or is one which can only be determined after the expiry of the definite term by notice given after the end of the term. (William Jacks & Co. v. Palmer's Shipbuilding and Iron Co. (1928) 98 L.J.K.B. 366, CA, See Brown v. Symons (1860) 8 C.B.N.S. 208; Langton v. Carleton (1873) L.R. 9 Exch. 57; Re An Indenture, Marshall & Sons Ltd. v. Brinsmead & Sons Ltd. (1912) 106 L.T. 460; Costigan v. Gray Bovier Engines Ltd. (1925) 41 T.L.R. 372, CA; Morris Oddy & Co. Ltd. v. Hayles (1971) 219 Estates Gazette 831.

168. If a contract contains a provision that one of the parties thereto may determine the contract by notice, notice must be given in accordance with the terms of the contract (Legg d Scot v. Benion (1738) Willes 43; Re Viola's Indenture of Lease, Humphrey v. Stenbury (1909) 1 Ch. 244; William Jacks & Co. v. Palmer's Shipbuilding and Iron Co. (1928) 98 L.J.K.B. 366, CA: Re Berker Sportcraft Ltd.'s Agreements, Hartnell v. Berker Sportcraft Ltd. (1947) 177 L.T. 420), but the right to notice may be waived. Where it is stipulated that the notice shall be one of a specified length of time, a valid notice is given if the date given in the notice is a fixed and determinable date not less distant than the specified length of time.

169. The appellants submit that the judgment of the Full Court of the Supreme Court of Victoria dated 16th December, 1983 should be reversed, altered or varied and that

(1) The Petition should be dismissed

(2) The respondent should pay the appellants' costs of the Petition and

(3) The respondent should pay the appellants' costs of this Appeal to be taxed

For the following (amongst other)

R E A S O N S

a. The petitioner failed to make out the statutory ground that Brinds Limited was unable to pay its debts.

b. The petitioner failed to make out a case for the trial judge to exercise his discretion to make a winding up order.

c. The trial judge should not have made a winding up order as there was a bona fide dispute as to the debt alleged by the petitioner.

d. The trial judge failed to properly consider the wishes of other creditors in determining whether or not to make a winding up order in all the circumstances.

e. Both the trial judge and the Full Court of the Supreme Court of Victoria failed to consider and determine the Appeal in respect of the appointment of the provisional Liquidator. This was a particularly serious failure in the circumstances where a provisional Liquidator should not have been appointed at all. In the very least and by way of additional consequence, the trial judge's order as to costs was incorrect.

f. The findings of the trial judge of irregularity against Mr. Ganke without those matters being in issue or without a definition of issue relating thereto and without Mr. Ganke being informed of the risk of the making of an adverse finding in relation to such matters were made contrary to the rules of natural justice.

g. The trial judge and the Full Court of the Supreme Court of Victoria failed to correctly construe the Moratorium Deed and also failed to assess correctly the opinion of Mr. Macintosh, the examining accountant appointed pursuant to the Moratorium Deed.

h. The trial judge and the Full Court of the Supreme Court of Victoria failed to take into account the fiduciary duties of Mr. Macintosh as examining accountant.

i. The trial judge and the Full Court of the Supreme Court of Victoria failed properly to recognise the penal nature of the termination of the Moratorium Deed and to give appropriate relief from such penalty.

j. The trial judge and the Full Court of the Supreme Court of Victoria failed to properly construe the effect of the Moratorium Deed provisions as to continuance of prior agreements and to consider the argument that the alleged loan was only repayable on 12 months' notice and the appropriate effect of such agreement, if found to exist, to be of a reinstated and continuing nature.

k. That on the evidence the trial judge should have found that there was a genuine dispute which precluded him from making a winding up order.

l. That in proceeding to determine the dispute as to the terms of repayment by Brinds Limited of its indebtedness to the respondent, the trial judge misdirected himself.

m. The trial judge embarked on a determination of a "dispute" in circumstances were such determination should not have been undertaken by him.

n. That the embarking of the trial judge on the determination of the dispute in the circumstances referred to above amounted to a denial of natural justice to Brinds Limited.

o. The trial judge failed to make proper judicial determination of matters relating to the allegation that improper motives had inspired the presentation of the Petition.

p. The failure of the trial judge to record his reasons for judgment on the initial submission of counsel in relation to the existence of a dispute such as to preclude him from proceedings to determine whether a winding up order sould or should not have been made constituted a failure of the judicial process.

q. The trial judge and the Full Court of the Supreme Court of Victoria failed to correctly construe the Moratorium Deed and in particular clause 22 of the Moratorium Deed.

r. Any decision of the trial judge and of the Full Court of the Supreme Court of Victoria in relation to the Appeal as to the original appointment of the provisional Liquidator was in error in that both the trial judge and the Full Court of the Supreme Court of Victoria failed to determine that matter which was properly the subject of appeal.

s. The Full Court of the Supreme Court of Victoria should have properly granted the application of the appellants to introduce fresh evidence at the hearing of the appeal.

William G Hodgekiss

No. 30 of 1984

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

IN THE MATTER OF THE COMPANIES (VICTORIA) CODE

- and -

IN THE MATTER OF BRINDS LIMITED

BETWEEN:

BRINDS LIMITED, BORIS ANDREW GANKE, GULF RESOURCES N.L., ALEXANDERS SECURITIES LIMITED, CHAPMANS LIMITED, NORTHERN STAR INVESTMENTS PTY. LIMITED AND HALLMARK MINERALS N.L.

Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

CASE FOR THE APPELLANTS

MESSRS. INGLEDEW, BROWN, BENNISON & GARRETT,
International House,
26 Creechurch Lane,
London EC3A 5AL.

Solicitors for the Appellants

MESSRS. COWARD CHANCE,
Royex House,
Aldermanbury Square,
London EC2V 7LD.

Solicitors for the Respondents