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IN THE PRIVY COUNCIL No.30 of 1984

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 RESPONDENTS

RECORD

INTRODUCTION

1. This is an Appeal from a decision delivered on 16 December, 1983 by the Full Court of the Supreme Court of Victoria unanimously dismissing an Appeal by the prsent Appellants against the judgment and Order made by the Honourable Mr. Justice Tadgell of the Supreme Court of Victoria on 5 May, 1983 that the Appellant Brinds Limited (hereinafter called "Brinds") be wound up. The Appeal is pursuant to leave granted by the Full Court under s.218 of the Supreme Court Act on 2 February, 1985. (The Full Court took the view that in the circumstances the Appellants were entitled

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RECORD

to leave as of right).

2. The Respondents were also the respondents to the appeal before the Full Court. Offshore Oil N.L. (hereinafter called "Offshore Oil") was a creditor of Brinds that on 17 February,
1/1 1983 petitioned the Supreme Court of Victoria that Brinds be wound up under the Companies (Victoria) Code. The
1/131 Respondents Martin Corporation Limited and Jackson Graham Moore and Partners
1/141 were creditors of Brinds that supported the petition of Offshore Oil.

3. Apart from Brinds, the Appellants are Boris Andrew Ganke (hereinafter referred to as "Ganke") who was the Chairman of Brinds and its largest shareholder and four companies which were creditors of Brinds and all of which
2/95 Ganke swore to be members of the
2/99 "Brinds Group of Companies", the structure of which Ganke deposed to by reference to a chart. Each of these companies and Ganke opposed the petition
3/127.17 to wind up Brinds. Ganke is a director of each Appellant.

4. Offshore Oil petitioned to wind up Brinds on the basis that Brinds had failed to repay to Offshore Oil on demand
1/1 the sum of $3,513,236.00 which sum was due and owing. The debt was unsecured.
3/124.8 Offshore Oil also alleged that Brinds was indebted to Jackson Graham Moore &
1/2 Partners in the sum of $1,426,658.70 and was further indebted to Martin Corporation Limited in the sum of $446,974.39 each
1/2 of which sums was due and owing and that in each case more than three weeks had passed since the relevant creditor had caused to be served on Brinds a Notice of Demand for payment of the respective debt pursuant to Section 364(2) of the Companies (Victoria) Code.

5. Brinds did not deny the existence or amount of any of the debts alleged in the petition of Offshore Oil. However, Brinds denied that any of the debts due to the Respondents was
3/124.20 presently due and payable.

CIRCUMSTANCES OF THE CASE

3/128.13 6. Offshore Oil is a company listed on

the Australian Associated Stock Exchanges. At the time of the petition to wind up Brinds, Offshore Oil had an issued capital of $37,947,042.40 and approximately 23,600 shareholders.

7. Ganke was the holder of 45% of the issued capital of Brinds. 3/123.16 1/176.7

8. Ganke was the Chairman and Managing Director of Brinds. 1/176.3

9. Ganke was the Chairman of Offshore Oil from 1973 to June 1982. 1/101.7

10. Prior to 30 June, 1982 the Brinds Group of Companies held approximately 30% of the then issued capital of Offshore Oil. 1/177.24

11. Brinds and two subsidiaries borrowed monies from a group of insurance companies. By June 1982 the debts were $4.3 million. The shareholding of Brinds (and the relevant subsidiaries) in Offshore Oil shares was provided as security for the loan. In the end the debt was extinguished by Brinds and the subsidiaries selling to the lenders a 20% shareholding in Offshore Oil. A further 9% was held by companies which were subsidiaries of or associated with Brinds: almost all of these shares were encumbered. 3/131.3 3/132.9 3/131.10 3/133.14 3/125.20 1/177.28

12. Thereafter disputes ensued between Offshore Oil and the Brinds Group of Companies as to the terms of repayment by the Brinds Group of companies of loans (exceeding $10.5 million) from Offshore Oil. 3/136.28 3/134.5

13. On 25 November, 1982 Offshore Oil and Brinds (among others) entered into a deed (hereinafter called the "Moratorium Deed"). Jackson Graham Moore & Partners and Martin Corporation were not and did not become parties to the Moratorium Deed. 3/163.14

14. The Moratorium Deed provided for the administration of various members of the Brinds Group of Companies, including Brinds, for the purpose of progressively discharging its liability to creditors. Mr. Alexander Macintosh was designated the "Examining Accountant" to supervise the business activities of Brinds and the other debtor companies and report thereon to the creditors specified in the Moratorium Deed. 3/163.30 1/18.23 1/19.14 1/26.10

RECORD

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15. Pursuant to Clause 10.1 of the Moratorium Deed Brinds acknowledged to Offshore Oil that the sum of $3,513,236 was "unconditionally repayable .....on demand" to it. Pursuant to Clause 10.2 of the Moratorium Deed, Offshore Oil agreed not to demand repayment of the debt acknowledged by Brinds to be due to it during a period described as "the moratorium". The moratorium is defined in Clause 1 of the Deed to be a period of time ending on November 30, 1983 or upon the happening of any of the events specified in Clause 29. One of such events (Clause 29(b)) is if any of the creditors gives a notice to the debtors (as defined in the Moratorium Deed), which term included Brinds, pursuant to Clause 22 of the Deed. A creditor is only entitled to give such notice if the Examining Accountant issued an opinion pursuant to Clause 22.

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16. On 10 February, 1983 the Examining Accountant issued an opinion pursuant to the Moratorium Deed.

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17. On 16 February, 1983 Offshore Oil (and the other creditors, as defined in the Moratorium Deed) gave notice of termination of the moratorium and demanded from Brinds payment of the debt it acknowledged in the Moratorium Deed to be due to Offshore Oil.

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18. The documents provided by the Examining Accountant to Offshore Oil with his opinion pursuant to Clause 22 of the Moratorium Deed revealed that Brinds had sought permission to pay a call of 5 cents per share on 20,000,000 Southern Cross Exploration N.L. which in aggregate would amount to $1,000,000.00. Brinds had previously been entitled to such shares but had forfeited them for non-payment of this call. The shares could be redeemed by payment of the call. The Examining Accountant had advised Brinds that given the circumstances of Southern Cross Exploration N.L. he could not understand any commercial basis to pay such call. Southern Cross Exploration N.L. is a member of the Brinds Group of Companies and its board of directors consisted of the same persons who were directors of Brinds.

RECORD

19. By the terms of the Moratorium Deed, the Examining Accountant was only appointed to Brinds "during the Moratorium". Therefore, once the moratorium was terminated, Brinds no longer required his approval to enter into any transaction. An auction of the forfeited contributing shares of Southern Cross Exploration N.L. was scheduled to be held on 18 February, 1983. 1/19.21 3/120 F/1652.21

20. On 17 February, 1983 Offshore Oil filed in the Supreme Court of Victoria a petition to wind up Brinds and applied to a Master of the Supreme Court of Victoria for an Order that a Provisional Liquidator be appointed to Brinds until the hearing and determination of the winding up petition. Offshore Oil relied upon - 1/1

(a) the failure of Brinds Limited to repay the debt of $3,513,236 demanded by Offshore Oil; 1/103.29

(b) the failure of Brinds to repay a debt of $1,463,830 due to Jackson Graham Moore & Partners; 1/141.20

(c) the expiry of more than three (3) weeks after the service in October 1982 on Brinds by Jackson Graham Moore and Partners of a notice pursuant to Section 364(2) of the Companies Victoria) Code in respect of the debt referred to in (b) (which therefore gave rise to a statutory presumption that Brinds was insolvent); 1/144.19

(d) the failure of Brinds to repay a debt of $446,974.39 due to Martin Corporation Limited; 1/132

(e) the expiry of more than three (3) weeks after the service in October, 1982 on Brinds by Martin Corporation of a notice pursuant to Section 364(2) of the Companies (Victoria) Code in respect of the debt referred to in (d) (which therefore gave rise to a statutory presumption that Brinds was insolvent); 1/132

(f) the opinion of the Examining Accountant issued on 10th February, 1983 concerning the conduct of the affairs of Brinds since the execution of the Moratorium Deed including the numerous 1/49.18

breaches of that deed and the conclusion of the Examining Accountant that Brinds was not making sufficient progress in discharging its liabilities to its creditors in accordance with the
1/50.14 Moratorium Deed;

(g) the documents accompanying the opinion of the Examining Accountant which revealed proposals by Brinds to enter into transactions with other members of the
1/60 Brinds Group of Companies, the
1/69 commercial rationale of which was not
1/10.26 explained to the satisfaction of the Examining Accountant;

1/9.30 (h) the opinion of the Examining Accountant
1/13.3 and his assistant Mr. Charles Fear that
1/160.7 Brinds Limited was unable to pay its
1/104.1 debts, and similar views of officers
1/144.29 of the Respondents.
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1/4 21. On 17 February, 1983 the Supreme Court of Victoria ordered that a Provisional Liquidator be appointed to Brinds. The Provisional Liquidator remained continuously in office until the making of the winding up order on 5 May, 1983, and, in consequence
3/222 of the staying of that Order pending the determination of the Appeal to the Full Court, thereafter continued in office until the appeal was dismissed by the Full Court on 16
3/62 December, 1983. On that date the Full Court refused to stay the winding up order and the Liquidator took office, displacing the Provisional Liquidator. Another attempt was made to stay the winding up order before leave to appeal to the Judicial Committee was granted on 2 February, 1984. It also failed. When leave was granted to appeal to the Privy Council the Presiding Judge raised with counsel for the Appellants the question of a stay, saying that it would be difficult on short notice thereafter to reassemble a Full Court consisting of the same members as had heard the appeal and the application for leave. Counsel for the Appellants stated that he did not wish to apply then for a stay and would face the difficulty to which the Presiding Judge had referred when and if it arose. Thereafter a Notice of Motion for a stay of the winding up was taken out dated 14 March, 1984 and returnable on 29 March, 1984.

On its return the Notice of Motion was not proceeded with, but was adjourned by consent sine die. Until 29 July, 1985 the Notice of Motion was not further proceeded with and there were no other proceedings to stay the winding up order. Between the end of July, 1985 and the middle of October, 1985 various attempts were made by the Appellants to stay the winding up order and remove the Liquidator, all of which failed.

The final failure was on 2 October, 1985 when the Full Court refused to stay the winding up order.

INITIAL GROUND FOR DISMISSING APPEAL

22. (1) None of the petitioning creditor Offshore Oil and the supporting creditors Jackson Graham Moore & Partners and Martin Corporation Limited have yet been paid anything.

(2) Brinds has been under the control of liquidators since 14 February, 1983, a period of 2 3/4 years and for almost 2 full years no stay of any kind has been in operation.

(3) The liquidation is, not unnaturally, considerably advanced: the attempt to obtain a stay in July/October, 1985 was provoked by attempts by the Liquidator to recover monies owing to Brinds by one of the Appellants, Chapmans Limited. What the Liquidator had done was deposed to by him in the stay applications.

(4) The Trial Judge held: 3/201.31

"It was said I should exercise a discretion in favour of the company because in truth there is, if the company is allowed to go about its business, a prospect of its realisation within a reasonable time sufficient to enable it to repay its debts. The proposal, as I understand it, really amounts to no more than allowing Mr. Ganke to act by way of realizing assets instead of a liquidator's so

acting. It is said to be important that the company be allowed to carry on its business. As Mr. Macintosh said in effect in one of his letters to Mr. Ganke, it is very difficult to discern what the business of Brinds Limited is or has been for some time. Indeed it seems to me that its business, whatever it once was, cannot now be said to be that of a merchant bank. If it were allowed to continue it seems to me that the only purpose of allowing it to do so would be that of allowing it to realise its assets as best it could with a view to satisfying creditors, and then not entirely satisfying them".

(5) Whatever the merits of the appeal, it is submitted that the winding up order should not be disturbed. The liquidation has progressed so far that it ought not to be disturbed, especially when the Appellants made no attempt to stop it between 2 February, 1984 and 29 July, 1985 a period of almost 18 months: Ripon Press and Sugar Mill Company Limited v. Gopal Chetti [1931] L.R. 58 Ind. App. 416.

CENTRAL ISSUES IN THE APPEAL

23. Much of the evidence in chief in the case was put on affidavit. The Respondents objected to the admission of some parts of the Appellants' affidavits. As best as the Respondents can now ascertain it appears that objection was taken to:

(1) Ganke affidavit sworn on 14 March 1982: paragraphs 3, 4, 8, 10 (as to what was understood) 18, 20 (last four lines), 22 (second sentence), 23, 24, 25, 43, 48.

(2) Tosio affidavit sworn on 14 March 1982: paragraphs 4 (second last sentence), 5, 8.

(3) Scott affidavit sworn on 15 March, 1983.

(4) Kippist affidavit sworn on 16 March 1983, paragraph 8.

(5) Ganke affidavit sworn on 7 April 1983: paragraphs 4 (last sentence), 5.

By arrangement the objections were taken in final address. The Trial Judge did not find it necessary to rule on the objections. It is submitted that the passages to which objection was taken were plainly inadmissible.

(a) Exercise by the Trial Judge of the Court's Discretion to determine the dispute alleged by Brinds as to the terms of its indebtedness to Offshore Oil.

24. In addition to seeking leave to be permitted in the Full Court to rely on "fresh evidence" not called before the Trial Judge, the Appellants pressed two principal grounds of appeal before the Full Court. These were: 4/37.1

(i) that the learned Trial Judge should have found that there was a bona fide dispute between Brinds and Offshore Oil as to the terms of repayment by Brinds of its indebtedness to Offshore Oil which precluded the making of a winding up order; and that

(ii) the learned Trial Judge misdirected himself in proceeding to determine the dispute between Offshore Oil and Brinds concerning the terms as to repayment of the indebtedness of Brinds to Offshore Oil.

25. The standing of Offshore Oil to petition to wind up Brinds was established before the Trial Judge. Offshore Oil proved the Moratorium Deed. Offshore Oil relied upon the acknowledgment of indebtedness of Brinds in Clause 10 of the Moratorium Deed and the failure of Brinds to repay the said debt of $3,513,236 upon demand. At this stage

of the proceedings, as the Full Court
4/38.27 held, "without more, the petitioner
4/52.4 was entitled to an order for the winding up of Brinds ex debito justitiae".

4/38.2 26. However, Brinds contended that the moratorium provided for in the Moratorium Deed had not been validly terminated. Brinds further sought to argue that even if the moratorium provided for in the Moratorium Deed had been validly terminated, as a matter of construction of the Moratorium Deed the termination of the moratorium did not cause the debts acknowledged therein to become immediately due and payable but merely resulted in such debts being repayable upon the same terms as they had been prior to the Moratorium Deed which Brinds alleged was "12 months call".

4/44 27. It is submitted that the Full Court correctly held that the principles to be applied by the learned Trial Judge in such circumstances were those enunciated by the Board in Bateman Television Limited (In Liquidation) v. Colerige Finance Co. Limited [1971] N.Z.L.R. 929 especially at pages 931-932. In that case, Lord Upjohn, for the Board, stated that an argument identical to that made by Brinds in the present proceedings "can be dealt with very shortly". His Lordship stated when on the hearing of a winding up petition it was claimed that there was a dispute as to the indebtedness upon which the petitioner relied, the Trial Judge had a discretion whether or not to proceed with the hearing of the petition, such discretion being one "to be exercised judicially, which is not open to review unless it is shown to be exercised on some wrong principle".

28. In Bateman Television Limited (In Liquidation) v. Colerige Finance Co. Limited (supra) the Board in reaching the conclusion that the trial judge in that case had correctly exercised his discretion to proceed to hear the winding up petition specifically adverted (at p.932) to the fact that

the alleged dispute was investigated in a lengthy hearing before the trial judge, with both oral and documentary evidence. Furthermore, their Lordships also regarded it as significant that no application had been made to the trial judge to dismiss or stay the petition on the ground that the debt relied upon by the petitioning creditor was disputed. The decision of the Board in that case is indistinguishable from the decision under appeal.

29. It was conceded before the Full Court that no application was made by Counsel for the Appellants to the Trial Judge to dismiss or stay the proceedings on the basis that the debt due to Offshore Oil was disputed until the Appellants' Counsel's closing address. This was therefore after over 500 pages of affidavit material had been placed before the Court and after four weeks of oral evidence and argument. 4/37.31 4/39.29

30. The Respondents respectfully adopt the conclusion of the Full Court 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. In reality he had no alternative but to proceed to determine the matter. To do otherwise would have caused injustice to both parties". 4/46.10

31. It is also pertinent to recognise that unlike what is believed to be the position in other jurisdictions, the Supreme Court of Victoria does not consist of separate divisions for the hearing of winding up petitions and commercial cases. There was therefore not available another division of the Court that was even arguably more appropriate to hear and determine the contentions of Brinds concerning its indebtedness to Offshore Oil.

32. It was also accepted, and considered significant by the Full Court, that Brinds at first instance did not seek to exercise any of its rights under the Supreme Court (Companies) Rules which would have permitted requests for pleadings and discovery. 4/38.12 4/39.25

33. As Gibbs J. (as he then was) stated

RECORD

in Re QBS Pty. Limited [1967] Qd.R.218 at page 225 "A debt is not bona fide disputed simply because the respondent company says that it is disputed." His Honour also stated that in some cases "it may be difficult to determine whether or not the dispute is bona fide without determining the merits of the dispute itself". This was such a
3/150.16 case.

34. The case for Offshore Oil was essentially quite simple, as both the
3/127.23 learned trial judge and the Full Court found, Brinds defence depended largely
4/52.4 on the speculative allegations of Ganke. The Trial Judge would have been wrong
4/46.10 in law to have accepted such assertions in themselves as evidencing a bona fide dispute. Necessarily the allegations of Ganke had to be tested after the reading of affidavits and the Appellants elected to proceed with the hearing of the petition without making any submission that it should be dismissed.

35. The Appellants chose to present all evidence thought by them to be relevant to the terms of the indebtedness of Brinds to Offshore Oil to the Trial Judge. Brinds also chose to spend several weeks cross-examining the
3/127.20 Respondents' witnesses at length over an
3/177.26 extraordinarily wide range of subjects.
3/148.19

4/41.7 36. Counsel for the Appellants before the Full Court was also unable to identify any evidence or potential evidence which might have been tendered in a trial for an action in debt which was not, in fact, tendered before the Trial Judge or any subject that could have been the subject of cross-examination in an action for debt which was not the subject of cross-examination before the Trial Judge. In these circumstances the Trial Judge was in a position not only to determine whether there was a bona fide dispute but also to determine
3/179.10 the alleged dispute. His Honour found
3/150.31 the allegations of Ganke to be without substance.

4/41.15 37. It is submitted that it was correct

for the Full Court to also take into account the consequences to the parties if the submission of Brinds that the Trial Judge should have dismissed the petition on the basis that the debt was disputed was correct. The result would have been a multiplicity of litigation involving the same issue that had been before the Trial Judge for 4 weeks. As the Full Court stated "Unless we felt bound by authority so to hold, we would resist any finding that brought about such a startling and unsatisfactory result" and also "As we have endeavoured to show, the law is clear that the Judge has a discretion to decide how far the case should go. He was not invited to exercise that discretion until Counsel's final submission. At that time, as the transcript shows, it must have been apparent to His Honour that neither party wished to adduce any further evidence. If His Honour felt he was in a position to reach conclusions it would have been absurd for His Honour to have refrained from doing so."

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38. It has also been suggested that even if the Trial Judge was justified in deciding the "dispute", His Honour should not have done so without informing the Appellants that he proposed to do so and giving them an opportunity to call such further evidence as they wished on the question. However, not only was no such evidence available to them (see paragraph 36 above), strictly speaking none existed. For His Honour's determination turned on the construction of the Moratorium Deed. Evidence was only relevant to the terms of the debt before the Moratorium Deed was entered into and the question whether the moratorium had been terminated. Even on these (irrelevant) subjects the Appellants had no evidence which they might have presented, and did not. And in any case, the course His Honour took was that urged on him by the Respondents. For the Appellants now to say that they did not have a fair opportunity to present evidence on the question suggests that they were entitled to conduct their case wholly without regard to the very case

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they were being asked to meet. It is true that natural justice requires that a litigant be informed what case he has to meet and be given the opportunity of meeting it. It is submitted that it does not require that he be given that opportunity twice.

39. For the information of the Judicial Committee, it is noted that prior to the hearing of the petition of Offshore Oil before the Trial Judge, Brinds, together with other parties described as "debtors" under the Moratorium Deed (including all the Appellants other than Northern Star Investments Pty. Limited) commenced proceedings in the Supreme Court of New South Wales seeking a declaration that the moratorium provided for in the Moratorium Deed had not been validly terminated. Offshore Oil (but not the other Respondents) was a defendant to those proceedings and entered a cross claim for a declaration that the moratorium provided for in the Moratorium Deed had been validly terminated. The proceedings before the Supreme Court of New South Wales were adjourned until the hearing of the Brinds winding up petition in the Supreme Court of Victoria on the submission of the present Appellants (other than Northern Star Investments Pty. Limited) that the determination of the winding up proceedings would probably dispose of the issues between the parties in the proceedings in the New South Wales Supreme Court.

40. In the result, notwithstanding that the Supreme Court of Victoria ordered Brinds be wound up, the action in the New South Wales Supreme Court proceeded to trial. The Plaintiffs' claims in such proceedings were dismissed with costs and the Court made the declaration sought by Offshore Oil namely that "the Moratorium provided for in the (Moratorium) Deed has terminated". Acron Pacific Limited v. Offshore Oil N.L. (1983) 8 Australian Company Law Reports 233. This declaration was identical to the finding of the Trial Judge on the same issue in the

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proceedings under Appeal. An Appeal from the New South Wales proceedings referred to was unanimously dismissed by the New South Wales Court of Appeal. An Appeal as of right from that decision to the High Court of Australia was dismissed unanimously by the Full High Court on 3 October, 1985.

(b) Interpretation of Clause 20 the Moratorium Deed

41. It was contended for the Appellants before the Full Court that upon termination of the moratorium provided for in the Moratorium Deed, the terms for repayment of the debt of Brinds to Offshore Oil reverted to what it had been immediately prior to execution of the Moratorium Deed. It was contended by Brinds that such loans were repayable upon twelve months call rather than upon demand. This contention was solely based upon the proper interpretation of clause 20 of the Moratorium Deed. 4/48.15

42. In material part, clause 20 of the Moratorium Deed provides 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...". 4/47

43. The Full Court held that the Trial Judge was "plainly correct" in holding that the word "claim" as used in clause 20 of the Moratorium Deed 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 acknowledgment in clause 10 may accordingly be relied on by Offshore against Brinds." 4/49.6 4/48.27

44. The foregoing interpretation of the Moratorium Deed is further supported by reference to Recital F which expressly recognises the deed was entered into to finally resolve certain disputes between the parties. The construction of clause 20 of the Moratorium Deed urged by the Appellants would contradict this purpose 1/18.6

and produce a commercially peculiar result; that is, that during the moratorium period, the debt of Brinds to Offshore Oil was acknowledged to be unconditionally repayable upon demand but upon the determination of the moratorium the terms of the repayment of the loan could again become the subject of dispute.

45. The Trial Judge's construction of clause 20 of the Moratorium Deed is now supported by the reasons for decision of Mason A.C.J., Wilson, Brennan and Dawson JJ. of the High Court on appeal from the New South Wales proceedings referred to in paragraph 40 above in which their Honours held: "Whatever the terms of the debts may have been before the Moratorium deed took effect, thereafter the debts are owed on the terms therein set out" (Acron Pacific Limited v. Offshore Oil N.L., 3 October, 1985, p.4).

46. This conclusion highlights a further difficulty in the Appellants' submissions. If the acknowledgment in the Moratorium Deed might not be relied on after the termination of the moratorium to establish that the debt owing by Brinds was repayable on demand, by parity of reasoning it could not then be relied upon to establish the amount of the debt. This would leave it open to both Brinds and Offshore Oil to say that the debt was either more or less than that acknowledged in the Moratorium Deed, even if the debt acknowledged had been fully discharged during the moratorium. Such a result is, it is submitted so improbable and unreasonable that a Court should not give effect to a submission which requires it: Australian Broadcasting Commission v. Australasian Performing Right Association Limited (1973) 129 C.L.R. 99, at p.109 (per Gibbs J.).

47. Alternatively, even if "claim" is not limited to "pecuniary claim", the words "as a defence or counter" show that the parties were not to be precluded from pleading or raising the provisions of the Moratorium Deed as the basis of a claim: otherwise the words "as a defence or counter" would be otiose. If the creditors could not rely on the acknowledgment in this

way after the moratorium, it would mean that they had gained nothing from the compromise and that there was no effective sanction for the debtors' covenants during the moratorium.

48. The interpretation of clause 20 of the Moratorium Deed by the learned Trial Judge, which was upheld by the Full Court, made it unnecessary for the Trial Judge to investigate what were the terms as to repayment of the Brinds debt to Offshore existing prior to commencement of the Moratorium Deed. However, while the trial judge found "it unnecessary to form a conclusion on the matter, for such arrangements as there were have been overtaken by events" (i.e. the execution of the Moratorium Deed), His Honour reviewed at length the evidence of this subject and found that "in truth, the evidence raises in my mind a grave doubt whether there was between the two companies any commercial arrangement or agreement of that kind which was worthy of the name" and that "the mode by which large amounts of money were moved from Offshore to Brinds over a period of years is justly to be described as exceedingly irregular". The Trial Judge found that the only documentary evidence tended by Brinds as to the pre-existing terms of the loan from Offshore to Brinds was "singularly unconvincing" and that money was moved "on terms alterable virtually at Ganke's whim". His Honour suggested that absent the Moratorium Deed the money moved from Offshore Oil to Brinds "was recoverable as money had and received to the use of Offshore Oil". The Respondents will (if necessary) submit that the winding up order should be upheld on this ground as well as for the reasons indicated by His Honour.

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(c) The manner in which the learned Trial Judge expressed his conclusions on the evidence and submissions of the Appellants

49. The Appellants' complaint that the learned Trial Judge failed to examine the evidence concerning the contentions of the Appellants and to give his findings upon and his reasons for such findings is without foundation.

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50. As the Full Court decided, the judgment of the Trial Judge plainly sets forth the five principal bases upon which Brinds opposed the winding up petition, in addition to Brinds' contention that the petition should be dismissed because there was a dispute about the terms of repayment of its debt to Offshore Oil (which last contention the Trial Judge rejected on the basis of the execution and terms of the Moratorium Deed). In each case, His Honour clearly made findings of fact where relevant and expressed his conclusions on the arguments made. A trial judge is not under any obligation to set forth every argument that may have been raised by counsel at trial especially when the Trial Judge finds some of counsel's arguments "Not dignified by ... restraint" or "absurd".

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51. The "five principal bases" were:

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"First, that the moratorium has not been duly terminated and is still on foot, thus providing a bar to the presentation of the petition to wind up. Secondly, that in any event its acknowledgment in the moratorium deed of its present indebtedness cannot now 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 claim". Thirdly, that it has not been shown to be unable to pay its debts. Fourthly, (perhaps this is merely an extension of a third basis) that the non-payment of its debts is attributable not to its own short comings but to the conduct of the creditors being parties to the deed and Macintosh and some of its secured or partly secured creditors, notably Martin Corporation Ltd. and Jackson, Graham, Moore and Partners. Fifthly (and this is associated with the fourth basis) that it is, having regard to the circumstances referred to, entitled to the exercise of the court's discretion in its favour not to make a winding-up order."

(i) First basis: That the Moratorium had not been duly terminated

52. It was not disputed before the Full Court that Macintosh, the Examining Accountant, had delivered to Offshore Oil (among others) an opinion pursuant to clause 22 of the Moratorium Deed and that pursuant to clause 29 of the Moratorium Deed this was a ground upon which Offshore Oil could terminate the moratorium. However, the Appellants contended that the opinion of the Examining Accountant could not be relied upon because it had not been formed in good faith and was contrary to the facts. 3/181.26

53. The Trial Judge found that the argument that the moratorium was still on foot was "unsustainable on the evidence". 3/181.26

54. There was overwhelming evidence before the Trial Judge to justify his conclusion of fact. The allegations concerning the bad faith of the Examining Accountant were not supported by any documentary evidence but instead entirely relied upon the speculative assertions of Ganke supported by anything obtained in the cross-examination of the Respondent's witnesses. But the cross-examination of Macintosh and the other evidence was held by the Trial Judge not to provide a foundation for the criticism made by the Appellants of the conduct of the Examining Accountant and indeed His Honour held that in general, "where his [Ganke's] evidence of facts was in conflict with that of Mr. Macintosh I have no hesitation in preferring the latter". 4/52.27 4/53.47

55. For the claims of Ganke did not survive cross-examination. The Trial Judge found that Mr. Ganke "refuses or is unable to come to grips with reality". Many of his attitudes and opinions were shown to be "fanciful", that he had an "unreal appraisal of events and circumstances" and that some of his evidence was "the product of fantasy in the true sense of the word" and "many of the grounds relied on for the criticism [of Mr. Macintosh] were absurd". 4/53.50 3/179.27 3/180.5 3/181.21 3/179.21

RECORD

56. In the Full Court it was conceded that the Trial Judge's findings on the credit of Macintosh and Ganke could not be attacked:

4/49.7

> "Mr. Gruzman conceded that no attack could be made upon the learned trial judge's findings as to the credit of Macintosh and Ganke: nor with respect to His Honour's findings concerning the motivation of Macintosh."

57. The evidence before the Trial Judge clearly revealed numerous breaches of the Moratorium Deed, including

3/183.10
1/12.28
2/15.23
F/1539.10

(a) none of the quarterly accounts required by clauses 4.2(a) and (b) of the Moratorium Deed were provided to the Examining Accountant.

F/1536.23

(b) Ganke admitted in cross-examination that the accounts for September 1982 as required by the Moratorium Deed did not exist.

(c) Ganke's claims that the relevant accounts had not been produced because of indulgences given by the Examining Accountant was contrary to Ganke's

1/75.11

written statements. On 30 December 1982 Brinds sought to be exempted from complying

1/77.11

with clause 4.2(a) of the Moratorium Deed. The Examining Accountant replied on 12 January 1983 stating that he was not empowered to grant an exemption from compliance with the Moratorium Deed but that he would grant an extension of time to 31 January 1983 for production of the accounts required by clause 4.2(a). The Examining Accountant also expressly

1/77.16

advised Brinds that he would not grant an extension of time for production of the accounts required under clause 4.2(b) of the Moratorium Deed.

(d) On 19 January 1983 Ganke wrote to the Examining Accountant stating that he expected to provide the September 1982

1/84.3
2/30.1

quarter accounts "very shortly". However, on 28 January 1983 Brinds sought a further extension of time to produce the required accounts, which request was refused by the Examining Accountant on

1/92

2 February, 1983.

(e) On 2 February 1983 Brinds wrote to the Examining Accountant and admitted "it is agreed that the full financial information is still to be made available. However, these are finer details". 1/91.11

(f) The Examining Accountant, prior to issuing his opinion pursuant to clause 22 of the Moratorium Deed gave numerous warnings to Brinds and Ganke that breaches of the Moratorium Deed had occurred. 1/78.21 1/82.10 1/87.30 1/89.15 1/89.15 2/32.11

58. There was therefore ample evidence of facts which justified the Examining Accountant's opinion under clause 22 of the Moratorium Deed. It was accordingly unnecessary to examine the present Respondents submissions that even if the opinion of the Examining Accountant could not be relied on to terminate the moratorium, the facts themselves (i.e. the breaches by Brinds of the terms of the Moratorium Deed) formed a sufficient basis for termination of the Moratorium. It is submitted that although throughout the proceedings Offshore Oil has relied upon the issuance of an opinion by the Examining Accountant as grounds to terminate the moratorium, it could in any case also have relied upon the subsequently established breaches of the Moratorium Deed which themselves were a ground for termination of the moratorium pursuant to clause 29(c). Shepherd v. Felt and Textiles of Australia Limited (1931) 45 C.L.R. 359; Poort v. Development Underwriting (Victoria) Pty. Ltd. (No.2) [1977] V.R. 454.(F.C.)

59. Moreover, the High Court has now held that the moratorium was properly terminated on 16 February, 1983 in proceedings in which all the Appellants except Northern Star Investments Pty. Limited were parties. It is submitted that the Appellants (except Northern Star Investments Pty. Limited) are accordingly now bound by an issue estoppel from denying that the moratorium was properly terminated on 16 February, 1983.

(ii) Second basis: The effect of Clause 20 of the Moratorium Deed

60. This is dealt with above in above paragraphs 41-48.

(iii) Third basis: That it had not been shown that Brinds was unable to pay its debts

61. It was not contended before the Full Court that the Trial Judge was wrong in law in holding that the test as to a company's inability to pay its debts was as set forth in Re Tweed Garages Limited [1962] Ch. 406 (see also Sandell v Porter (1966) 115 C.L.R. 666 at p.670). At best, Brinds sought to demonstrate that it had substantial assets, in comparison with its liabilities. Not only was Brinds unable to establish this contention by evidence, but even if it had it was precisely a situation that had been adverted to in Re Tweed Garages Limited (supra)as not being sufficient to prevent a conclusion that a company was unable to pay its debts. The Trial Judge dealt with this question at pages 188 and 189 of Volume 3 of the Record of Proceedings.

62. Evidence before the Trial Judge that Brinds was unable to pay its debts included:

3/124.5 (a) Failure of Brinds to pay debts demanded by each of the Respondents.

F/1470.16
F/1471.10
F/1492.5
F/1504.20
G/1867.10 (b) Ganke and Tosio (the Brinds group accountant) admitted Brinds did not have sufficient funds to pay the debts due to Jackson Graham Moore and Partners and Martin Corporation Limited or the interest due to Offshore Oil in October 1982.

1/144.16
1/131.4 (c) Failure by Brinds to comply with notices pursuant to Section 364 of the Companies (Victoria) Code served on it in October 1982 by Jackson Graham Moore and Partners and Martin Corporation Limited.

(d) The failure of Brinds to comply with the statutory notices of demand served on it by the Respondents (other than Offshore Oil) pursuant to S.364(2) of the Companies (Victoria) Code created a statutory

presumption that Brinds was unable to pay its debts. Offshore Oil was entitled to the benefit of the statutory presumption that arose upon the failure of Brinds to comply with a statutory demand served on it by another creditor, Ex parte Owen, Re The Island of Anglesea Coal and Coke Company (Limited) (1861) IV L.T. 684. The statutory presumption continues "so long as the company against whom a petition is lodged neglects to pay the sum set out in the notice". Club Marconi v. Renat Constructions (1980) 4 Australian Company Law Reports 883, 887.

(e) The 1981 published accounts of Brinds qualified the statement that there were reasonable grounds to believe that the company would be able to meet its debts as and when they fell due by the statement "providing lenders of the company continue to give support". — Brinds 1981 Annual Report - "Statement by Directors" Para. (b)

(f) An affidavit was filed in which Ganke swore that subject to a number of pre-conditions Brinds would be able to procure repayment of the debts owing to Jackson Graham Moore & Partners and Martin Corporation Limited "within 3-4 months". The affidavit was entirely silent as to when Offshore may be repaid. In testimony Ganke swore that it would take Brinds "a few weeks" to repay just the creditors supporting the petition. — 2/70.20 F/1502.4

(g) It was shown in evidence that Brinds' expenses during 1982 were approximately three times its income and that most of Brinds income was fees "accrued", as distinct from received, and that such fees were payable by members of the Brinds group of companies. — G/1837.14 3/194.2 G/1839.2

(h) The loss of Brinds for the year ended 31 December 1981 was $605,000 and for that ending December 1982 was $1,543,771. — 3/194 G/1837.4 1/249

(i) An Appellant, Gulf Resources N.L., of which Ganke was chairman, had made provision of $449,652 in its 1982 accounts because of non-receipt of interest from Brinds. — 3/190

RECORD

63. Brinds relied upon not only its balance sheet but the "group balance sheet" for the Brinds Group of
1/198 Companies. Numerous drafts of such
1/211 balance sheets were filed in the proceedings. Cross-examination of the
2/3 Brinds' accountant, Martin Tosio, revealed that values ascribed to assets
2/116 in the Brinds' balance sheets did not
3/196 survive objective examination.

64. A company's ability to pay its debts is not to be judged by comparison of assets with liabilities Re Tweed Garages Limited (supra) and Mann v. Goldstein (1978) 2 All ER 769, at p.778.

65. Before the Full Court it was not contended that the Trial Judge was not justified in finding that Brinds was unable to pay its debts within the meaning of s.364 of the Companies (Victoria) Code.

(iv) & (v) Bases four and five: Conduct of the Petitioner/Discretion of the Court: that any inability of Brinds to repay its debts was attributable to the Respondents and Macintosh and that for this reason and the other reasons alleged by the Appellants the discretion of the Court should be exercised in the Appellants' favour.

66. A notable feature of the case at first instance was that according to Ganke, Brinds' failure to pay debts due to each of the Respondents was because of the conduct of the Examining Accountant under the Moratorium Deed, the Respondents in general and in particular the chairman of the petitioning creditor. These assertions were unsupported by any documentary evidence and the speculative assertions of Mr. Ganke did not survive cross-examination.

3/199.9 67. The Appellants' allegations included ("remarkably", as the Trial Judge thought) allegations of disqualifying
3/200.19 behavour by the supporting creditors Jackson Graham Moore and Partners and

Martin Corporation. The Trial Judge simply could see no basis for these allegations. Macintosh had already been exonerated by the Trial Judge. This carried with it an exoneration of the Petitioner, its associates and its chairman, Mr. Adler. For what was involved was "a criticism of Mr. Adler and Mr. Macintosh, each of whom was said to have acted, the latter under the influence of the former, with a view to ensuring that the moratorium would not work and with a view to accomplishing the destruction of the Brinds Group". As has already been pointed out, (in paragraphs 54 and 55 above) the Trial Judge accepted the evidence of Macintosh, preferring his evidence to the "fanciful" and "unreal" evidence of Ganke, and accepted Macintosh's good faith in giving his opinion under clause 22 of the Moratorium Deed. Mr Adler had accordingly been acquitted by the Trial Judge of improperly influencing Macintosh, because Macintosh was not improperly influenced. Mr. Adler was not called as a witness and it was urged that without his evidence the Appellants allegations against him should not be rejected. But the Trial Judge, after considering this suggestion, rejected it:

3/177.11

3/185.19

> "It was argued for Brinds that it would be improper and unsafe to reach the conclusion I have without having heard evidence from Mr. Adler having regard to the allegations which are now made that he incited Mr. Macintosh to act as he did and acted in combination with him to destroy the moratorium. Having carefully considered this submission I feel unable to accede to it. The allegations to which it was said Adler sought to provide an answer, or in respect of which he ought at least to have submitted himself for cross-examination, are largely speculative. ..."

3/184.3

> "What is clear is that a party cannot, upon a failure of his opponent to call such a witness as I have described, rely on the failure in order to plug the holes in his own case by

3/185.5

> speculation about what the uncalled witness might have said. That, in effect, is in my opinion what Brinds seeks to do here in placing so much emphasis upon the failure of Mr. Adler to give evidence by affidavit or present himself for cross-examination. I do not, having regard to the positive evidence called on behalf of the petitioner and to the relative paucity of evidence on the subject called on behalf of the opponents to the petition, feel inhibited on account of Mr. Adler's absence in reaching the conclusion I have that Macintosh had good grounds for the opinion he expressed, at least in part. On the other parts of the opinion, that is to say those not related to the failure of the debtors to provide accounts under clause 4.2(a) and (b), I think it is unnecessary to dwell and I do not propose to do so."

It was this conclusion which led His Honour to say:

3/127.23

> "Numerous issues have been canvassed but those central to the case appear to me to be and always to have been these: (a) Has Offshore standing to present the petition? (b) Is Brinds unable to pay its debts? (c) If yes to (b) should a winding up order be made on the petition?"

68. The Trial Judge thus regarded evidence of the alleged conspiracy as either unacceptable or speculative, and accordingly did not accept the allegation. The Full Court agreed.

4/53.50

69. The other grounds relied on in relation to discretion were the possibility that Brinds under Ganke's management might be able to realise sufficient to pay its debts and the wishes of opposing creditors. The Trial Judge rejected each suggested ground.

3/192
3/203

An Alternative View

70. Although the course that the Trial Judge took was, it is submitted, perfectly proper and even perhaps preferable in view of the stand taken by the Appellants, it is submitted that the Trial Judge could have resolved the petition much less elaborately and to the same effect, for it is submitted:

(1) It is undeniable that Offshore Oil had standing to petition. Its debt was not disputed. All that was disputed was whether it was due. A contingent or prospective creditor can petition for the winding up of a company - Companies (Victoria) Code, s.363(1)(b) and (3).

(2) It was not denied that the debts claimed were owing to the supporting creditors Jackson Graham Moore and Partners and Martin Corporation. The grounds on which it was denied that these debts were not due were described by the Trial Judge as "unreal". 3/180-181 3/200-201

(3) Brinds was undeniably unable to pay its debts within the meaning of s.364(1)(e) of the Companies (Victoria) Code - see paragraph 63 above.

(4) In these circumstances, if Offshore Oil's standing to petition was in doubt, one of the supporting creditors could have been (and could now be) substituted as Petitioner and a winding up order made Rules of the Supreme Court Ch.V,0.1, rule 27, Ch.V,0.2, rule 22.

(5) And in any case, it is submitted that the rule that a debt disputed on bona fide grounds will not found a petition does not apply where the company is obviously insolvent and to dismiss the petition would be simply to throw costs away: Niger Merchants Co v. Capper (1881) 18 Ch.D. 557, Community Development Pty. Ltd. v.

Engwirda Construction Co. [1968] Qd.R.541; contra Mann v. Goldstein [1968] 1 W.L.R.1091.

THE SIGNIFICANCE OF THE ALLEGED "BAD FAITH"

71. Even if the allegations of Ganke had been established, it is submitted they would not have established bad faith on the part of the petitioning creditor in a sense relevant to winding up proceedings. As Gibbs J. (as he then was) stated in IOC Australia Pty. Ltd. v. Mobil Oil Australia Ltd. (1975) 49 A.L.J.R. 176, 182 "It is not the law that only a creditor who feels good will to his debtor is entitled to a winding up order." So too Bryanston Finance Ltd. v. De Vries (No.2) [1976] Ch. 63, 75 (C.A.); Re First Western Corporation Limited [1970] W.A.R. 136, Re Metropolitan Fuel Pty. Limited [1969] V.R. 328.

CONCURRENT FINDINGS OF FACT

3/181.26 72. There have been concurrent findings of a single judge of the Supreme Court of Victoria and of the Full Court that the moratorium was duly terminated. In the Full Court this was dealt with at pages 52 to 53 and 55 to 56 of the Record. Whether the moratorium was duly terminated or not depended on the allegation that Macintosh (the Examining Accountant) did not act in good faith in giving his opinion under clause 22 of the Moratorium Deed on 10 February 1983. This was a pure issue of fact which was resolved against the Appellants both at first instance and on appeal. It is submitted that the Judicial Committee should not in these circumstances re-examine this question of fact: Srimati Bibhabati Devi v. Kumar Ramendra Narayan Roy [1946] A.C. 508. No fact exists in the present case for making an exception to the rule that the Board will not review concurrent findings of fact. For the same reason, the question of the alleged conspiracy to depress the price of Offshore Oil shares should not be re-examined. Once it is concluded that these questions cannot be raised before the Judicial Committee, the only "dispute" worthy of the name was

the construction of the Moratorium Deed. It is submitted that its proper construction is plain. It is further submitted that insofar as the Trial Judge's findings were not attacked before the Full Court, they cannot be attacked before the Board.

DISMISSAL BY FULL COURT OF APPELLANTS' MOTION TO ADDUCE FRESH EVIDENCE

73. It is submitted that:

(1) it is not open to the Appellants to contest before the Judicial Committee the decision of the Full Court to dismiss the Appellants' motion for special leave to adduce fresh evidence before the Full Court; but

(2) that if such decision is a proper subject of this Appeal, the decision of the Full Court thereon was correct.

74. The Respondents submit that it is not open to the Appellants to argue before the Judicial Committee the issue of whether the Full Court was correct to deny the Appellants leave to adduce fresh evidence for the following reasons.

75. The issue of special leave to adduce fresh evidence was raised separately from the appeal to the Full Court. The Full Court heard and determined the issue prior to hearing the appeal. The Appellants thereafter applied for special leave to appeal to the High Court of Australia from that decision. That leave was refused by consent. The details are as follows:

(1) The appeal to the Full Court was pursuant to a Notice of Appeal dated 18 May 1983; 3/220

(2) By Notice of Motion dated 26 October, 1983 the Appellants sought special leave of the Full Court to adduce before the Full Court on the hearing of the appeal fresh evidence of three descriptions specified in the Notice of Motion. That Notice of Motion was 4/20 4/26

dismissed with costs by Order of the Full Court on 28 November 1983.

(3) Thereafter, on 16 December, 1983 the Full Court by Order unanimously
4/62 dismissed the appeal and on that day delivered a judgment which not only contained the Full Court's reasons for such decision but also commenced with reasons for dismissing on 28 November 1983 the Appellants' Notice of Motion seeking special leave to adduce fresh
4/28 evidence.

(4) On 16 December 1983 the present Appellants by Notice of Motion filed in the Melbourne Registry of the High Court of Australia made:

> "application for special leave to appeal from the judgment, and orders delivered and made by the Full Court of the Supreme Court on 28 November, 1983 wherein the Full Court refused to grant the Applicants herein special leave to adduce, in addition to the evidence before the Trial Judge, His Honour Mr Justice Tadgell, certain fresh evidence and dismissed the Notice of Motion with costs."

On 12 April 1984 the Full High Court, by consent, made an Order that the foregoing application "be refused".

76. It is submitted that in these circumstances no appeal lies to the Judicial Committee from the decision of the Full Court of the Supreme Court but if it does leave to appeal was required because such decision could not be characterised as involving any matter of any amount or value that could be described in money terms. The Appellants have not made the required application to appeal to the Judicial Committee. Rather, as stated in paragraph 75(4), they sought special leave to appeal on such subject to the High Court of Australia.

77. This Appeal is brought by leave granted pursuant to s.218 of the Supreme Court Act. That leave does not include leave to appeal from the decision of the Full Court on 28 November 1983. 4/65.14

(1) By Notice of Motion dated 23 December 1983 the Appellant applied for "an order pursuant to section 218 of the Supreme Court Act (Victoria) 1958 granting leave to the Appellants to appeal to Her Majesty in Council from the judgment herein of the Full Court of the Supreme Court of Victoria, delivered on the 16th day of December 1983 by which the Full Court dismissed the Appellants Appeal from the judgment of His Honour Mr Justice Tadgell delivered on the 5th day of May, 1983".

(2) On 2 February 1984 the Full Court granted the Appellants leave to appeal "from the Judgment and Orders of the Full Court of the Supreme Court of Victoria pronounced on the 16th day of December 1983". It is submitted that such Order must be read as granting the Appellants leave to appeal in respect of such part of the judgment delivered on 16 December 1983 that relates to the Orders of the Full Court made on that date (dismissing the appeal). 4/64.23

(3) The judgment of the Full Court of 16 December, 1983 is on its face divisible into that part which contains reasons for the Orders made on 28 November 1983 and that part which contains reasons for dismissing the appeal. The judgments on two separate proceedings (the motions to adduce fresh evidence and the appeal) are only in the same document because the Full Court in its discretion chose to give its reasons for the Order made on 28 November 1983 at the same time as it gave judgment on the appeal. The Full Court expressly recorded this fact as follows: 4/29.23 4/35.23

> "Having heard the submissions... this Court, on 28th November, dismissed the motions [for leave 4/32.31

to adduce fresh evidence] with costs and we then stated that we would give our reasons for doing so when we had heard the appeal".

4/65.14

78. In any case, as recorded in the Order of the Full Court made on 2 February, 1984, the Appellants were granted leave to appeal to the Judicial Committee pursuant to s.218 of the Supreme Court Act. An appeal to the Judicial Committee under s.218 only lies (whether as of right or with special leave) from "any decision of the court in any civil proceedings ... by which decision the merits of the case may be concluded ..."

79. The Order of the Full Court dismissing the Notice of Motion of the Appellants seeking special leave to adduce fresh evidence is not a decision "by which the merits of the case may be concluded".

80. If it is open to the Appellants to challenge the Full Court's refusal to permit fresh evidence to be adduced, it is submitted that the Board should not interfere with the exercise by the Full Court of its discretion in this regard for the following reasons.

81/ Whether or not leave should be given to a litigant to adduce fresh evidence is a matter of practice and procedure. The issue was therefore not a matter in respect of which an appeal court should interfere unless the decision of the Full Court was wrong in principle and worked a "substantial injustice" to one of the parties: Adam P. Brown Male Fashions Pty. Limited v. Phillip Morris Inc. (1981) 148 C.L.R. 170, at p.177 (per Gibbs C.J., Aickin, Wilson and Brennan JJ). No such circumstances are present in the instant case.

82. Further, the Privy Council in Leeder v. Ellis [1953] A.C. 52 at p.66 cited with approval the statement by Jessel M.R. in Sanders v. Sanders (1881) 19 Ch.D. 373 that an application for leave to adduce fresh evidence is

an application "for an indulgence". Any such application must meet "a strict standard which is required in the interests of the administration of justice": Wollongong Corporation v. Cowan (1955) 93 C.L.R. 435, at p.446 (per Dixon C.J.). The affidavits of Smith filed on behalf of the Appellants failed grossly to meet the relevant strict standards. Apart from the objections that could be taken to the Smith affidavits concerning their admissibility "in no respect could one be sure of exactly what witness could be called, exactly what that witness would be prepared to say or prove": Wollongong Corporation v. Cowan (1955) 93 C.L.R. 435, at p.447.

83. The Appellants argued before the Trial Judge and the Full Court that each of the Respondents was responsible for the predicament of Brinds. The Trial Judge summarized the general argument as follows:

> "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 the capital [of Offshore Oil] 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." 3/126.5

84. In more detail, the Trial Judge elaborated the Appellants' assertion as an:

> "argument that the opinion was not formed in good faith by Macintosh, it was argued that Macintosh had expressed it because he was coerced by Adler" and that Mr. Adler "incited Macintosh to act as he did and acted in combination with him to destroy the Moratorium". 3/182.5 3/184.7

85. The Full Court described the purpose for which the Appellants sought to adduce

fresh evidence as follows:

4/33.20

> "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."

86. Virtually none of the material contained in the affidavits of Smith had any relevance or probative connection with any of the foregoing assertions of the Appellants. This is apparent from examining the contents of Smith's affidavits.

4/34.1

87. As the Full Court further held:

> "The 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 the 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."

88. (The Full Court deals with the question of the fresh evidence at pages 30 to 35 of Volume 4 of the Record). It is respectfully submitted that their reasons for refusing leave to adduce fresh evidence are compelling. 4/30

89. It is submitted that the Full Court was correct in holding that evidence that only went to discredit Mr Adler was of no relevance in the case. In any case no admissible evidence (as opposed to allegations) on this subject was really suggested. 4/34.20

90. It is submitted that the Full Court was also correct in rejecting the other "fresh" evidence suggested as irrelevant. In any case there was no evidence to suggest that this evidence could not have been discovered by the Appellants by the exercise of due diligence for use at the trial. 4/34.23

91. The Respondents accordingly respectfully submit that the appeal should be dismissed with costs for the following

R E A S O N S

1. BECAUSE the Full Court were right not to disturb the exercise by the Trial Judge of his discretion to proceed with the hearing of the Petition.

2. BECAUSE on the true construction of the Moratorium Deed the Respondents were entitled to rely on the acknowledgments in Clause 10 notwithstanding the terms of Clause 20 and the termination of the Moratorium.

3. BECAUSE there are no grounds on which the Board can be asked to review the findings of fact by the Trial Judge or the concurrent findings by the Full Court.

4. BECAUSE in any event the findings of fact by the Trial Judge and the concurrent findings by the Full Court were

correct.

5. BECAUSE in any event Brinds was insolvent when it was ordered to be wound up and its grounds for disputing the Petitioning Creditor's Debt were shadowy and insubstantial.

6. BECAUSE the decision of the Full Court to refuse leave to adduce the supposed "fresh evidence" cannot be challenged before the Board, and, in any event, was correct.

BRIAN J. SHAW

JOHN B.W. McDONNELL

IN THE PRIVY COUNCIL No.30 of 1984

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

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 RESPONDENTS

COWARD CHANCE
Royex House
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London EC2V 7LD
(Ref: MGGH 443/RA)
Solicitors for the Respondents