45/85

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

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

RECORD OF PROCEEDINGS
VOLUME FOUR

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

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

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

RECORD OF PROCEEDINGS
VOLUME FOUR

INDEX OF REFERENCE

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

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

RECORD OF PROCEEDINGS
VOLUME FOUR

NOTICE OF MOTION

In the Full Court
No.161
Notice of Motion
dated 15th August
1983

IN THE SUPREME COURT
OF VICTORIA
FULL COURT

1983 No. Co. 13015

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. LTD. HALLMARK MINERALS N.L. AND L.S.D. HOLDINGS LIMITED

Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

NOTICE OF MOTION

TAKE NOTICE that the Full Court will be moved on the 18th day of August, 1983 at 10.30 o'clock in the forenoon or so soon thereafter as Counsel may be heard on the hearing of an application on behalf of the Respondents for orders that:-

1. There be an expedited hearing of this Appeal.
2. The Appellants provide security for the Respondents' costs of this appeal.

3. Such other orders and directions may be given as may be just.

DATED the 15th day of August, 1983.

(sgd) Hallinan

Solicitors for the Respondents

TO: The Prothonotary,
Supreme Court,
Melbourne.

AND TO: The Appellants.

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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. LTD. HALLMARK MINERALS N.L. AND L.S.D. HOLDINGS LIMITED.

Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

NOTICE OF MOTION

MALLESONS,
Solicitors,
St. James Building,
121 William Street,
MELBOURNE. 3000.

TEL: 62 0761
REF: PJH

No. 162

ORDER OF HIS HONOUR MR. JUSTICE TADGELL dated 22nd August 1983

IN THE SUPREME COURT)
OF VICTORIA)

1983 No. Co. 13015

IN THE MATTER of the Companies (Victoria) Code

and

IN THE MATTER of BRINDS LIMITED

BEFORE THE HONOURABLE MR JUSTICE TADGELL
MONDAY THE 22ND DAY OF AUGUST 1983

UPON the Petition herein coming on for hearing before the Court on Thursday the 7th day of April 1983 and UPON the Court ordering that the above-named Company Brinds Limited be wound up by the Court under the provisions of the Companies (Victoria) Code and that the hearing be adjourned sine die for further argument on the question of costs and UPON argument on the question of costs coming on for hearing before the Court on Monday the 22nd day of August 1983 and UPON HEARING Mr Heerey of Counsel for the Petitioner and for Jackson, Graham, Moore and Partners (a firm) and for Mercantile Mutual Life Insurance Company Limited and for Martin Corporation and UPON HEARING Mr Neesham of Counsel for the Company.

THIS COURT DOTH ORDER:

1. THAT the taxed costs of the Petitioner and the supporting creditors including the costs of and incidental to the appointment of the Provisional Liquidator and of the appeal against such appointment together with all reserved costs be paid out of the assets of the Company as costs of the Petition.

2. THAT the taxed costs of the Company of the Petition as to one half thereof be costs in the winding up.

BY THE COURT

(J.E.) Evan W. Fray

MASTER

ENTERED the 19th day of September 1983.

(J.G.) J.G. Jost

PROTHONOTARY

No. 163

ORDER OF THE FULL COURT
dated 25th August 1983

IN THE SUPREME COURT)
)
OF VICTORIA) 1983 No. Co. 13015
)
FULL COURT)

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. LTD., HALLMARK MINERALS N.L., and L.S.D. HOLDINGS LIMITED

Appellants

AND

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

BEFORE THE HONOURABLE CHIEF JUSTICE, SIR JOHN YOUNG K.C.M.G., THE HONOURABLE MR. JUSTICE MURRAY AND THE HONOURABLE MR. JUSTICE O'BRYAN
THURSDAY THE 25TH DAY OF AUGUST, 1983

UPON the Notice of Motion of the Respondents dated the 15th day of August, 1983, coming on for hearing before the Court on Thursday the 25th day of August, 1983 and UPON READING the Affidavits of KENNETH GEORGE WILSHIRE sworn the 15th day of August, 1983, ALAN EDWARD MERVYN GEDDES sworn the 15th day of August, 1983, KEN HOUSE sworn the 15th day of August, 1983, PETER JOHN PARSONS sworn the 16th day of August, 1983 and JAMES WILLIAM ANTONY HIGGINS sworn the 24th day of August, 1983 and the several exhibits thereto and all filed herein on behalf of the Respondents and the Affidavits of BORIS ANDREW GANKE sworn the 23rd day of August, 1983 and FRANCIS JULIAN RICHARD HUNT two sworn the 25th day of August, 1983 and the several exhibits thereto and all filed

herein on behalf of the Appellants and UPON HEARING Mr. Forsyth, one of Her Majesty's Counsel and Mr. Heerey of Counsel for the Respondents and UPON HEARING Mr. Hooper, one of Her Majesty's Counsel and Miss Davis of Counsel for the Appellants.

THIS COURT DOTH ORDER:

1. THAT the motion that the Appellants provide security for the Respondents' costs of the appeal herein be dismissed.
2. THAT the appeal herein be given such expedition in hearing as the Listing Master considers appropriate.
3. THAT the Respondents pay the Appellants' costs of this day.

BY THE COURT

STAMP
SUPREME COURT
VICTORIA

This order was taken out by MALLESONS, Solicitors for the Respondents.

In the Full Court

No. 163
Order of the Full Court
dated 25th August 1983
(continued)

IN THE SUPREME COURT)
OF VICTORIA)
FULL COURT)

1983 No. Co. 130

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. LTD., HALLMARK MINERALS N.L. AND L.S.D. HOLDINGS LIMITED

Appellants

and

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED AND JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

O R D E R

MALLESONS,
Solicitors,
121 William Street,
Melbourne 3000

Tel.62-0761 (PJH:JWH)

No. 164

NOTICE OF MOTION dated 29th September 1983

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

IN THE MATTER of the Companies (Victoria) Code

and

IN THE MATTER of Brinds Limited

B E T W E E N :

BRINDS ANDREW GANKE,
GULF RI ALEXANDERS
SECURI .HAPMANS LIMITED,
NORTHE :NTS PTY. LTD.
and H S N.L. Appellants

10

OFFSH MARTIN CORPORATION
LIMITED, MERCANTILE MUTUAL LIFE INSURANCE
COMPANY LIMITED and JACKSON GRAHAM MOORE
AND PARTNERS (a firm) Respondents

NOTICE OF MOTION

TAKE NOTICE that the Full Court will be moved on Thursday the 6th day of October 1983 at 10.30 o'clock in the forenoon or so soon thereafter as Counsel may be heard on the hearing of an application on behalf of the first seven abovenamed Appellants for orders that :-

20 A. The said Appellants have leave to amend the Notice of Appeal herein by the addition thereto of the following grounds of appeal :-

5. That the learned Judge was wrong in holding that the debt owing by Brinds Limited to the petitioner was presently due and payable.

6. That the learned Judge was wrong in holding that such arrangement as there may have been between Brinds Limited and the petitioner as to the repayment by Brinds Limited to the petitioner of monies owing by it had been overtaken by events.

In the... Full Court

No.164 Notice of Motion dated 29th September 1983

(cont'd)

7. That in holding that the word "claim" in clause 20 of the Moratorium Agreement dated the 25th day of November 1982 being Exhibit A to the Affidavit of the said Alexander Robert MacKay MacIntosh sworn the 14th day of February 1983 meant a money claim the learned Judge was wrong in law.

8. That the learned Judge in holding that the said clause 20 did not preclude the petitioner from relying upon Clause 10.1 (i) of the said Moratorium Agreement to establish that the monies owing by Brinds Limited to the petitioner were payable on demand was wrong in law.

9. 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.

10. 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.

11. That the learned Judge failed to consider the evidence of the Firstnamed Appellant and Martin Antony Tosio concerning their dealings with the witnesses Alexander Robert MacKay MacIntosh and Charles Antony Chandlin Fear and the whole of the evidence of the said MacIntosh and the said Fear concerning their dealings with the Secondnamed Appellant and the said Tosio before deciding that Brinds Limited should be wound up.

12. That the learned Judge was wrong in holding that if Brinds Limited was not wound up but allowed to continue in business the only result would be that of allowing it to realise its assets as best it could with a view to satisfying creditors and then not entirely satisfy them.

13. That the learned Judge misdirected himself in holding that he could properly and safely find without having heard evidence from Lawrence Adler that the said MacIntosh had not been incited by the said Adler to express the opinion delivered by him on the 10th day of February 1983 to the creditors of the said Brinds Limited among others (and being Exhibit B to the said Affidavit) without reasonable cause.

14. That since the date of the said judgment the Appellants have discovered fresh evidence touching upon

(i) the question whether the said petition was an abuse of the process of the Court, and/or was not presented in good faith;

(ii) the issue of the solvency of the Appellant Brinds Limited;

(iii) the contention put by the Appellants that those responsible for the management of Offshore Oil N.L. designedly acted and induced others to act with a view to depressing the value on the market of the issued shares in Offshore Oil N.L.

(iv) the terms upon which loans by Offshore Oil N.L. to Brinds Limited have been made;

(v) the opinions formed by the learned Judge in relation to the present and prospective financial position of Offshore Oil N.L.

which evidence could not have been discovered before the trial with reasonable diligence and which would have resulted or is likely to have resulted in the said petition being dismissed had such evidence been available at the hearing thereof.

15. The addition as grounds of appeal of matter arising from a Schedule to be provided separately detailing a number of criticisms of the decision delivered by the learned Judge.

In the Full Court

No.164
Notice of Motion dated 29th September 1983

(continued)

B. That the said Appellants have special leave at the hearing of this Appeal to adduce in addition to the evidence before the Court below the following evidence :-

(i) the affidavits of Phillip Kevin Smith sworn the 23rd and 29th days of September 1983;

(ii) such other evidence as may become available to the said Appellants in support of the above grounds or any additions thereto for which leave to add may be given.

AND TAKE NOTICE that the grounds of the second said application reference B are that

(i) at the date of the hearing of the said peititon the Appellants did not know and could not by the exercise of reasonable care and diligence have discovered the facts deposed to in the said Affidavit.

(ii) the nature of the evidence which the Appellant now seeks leave to adduce is such that the said evidence if believed would have resulted or is likely to have resulted in the said petition being dismissed.

C. That such other Orders be made in the circumstances as may be just.

AND TAKE FURTHER NOTICE that the Appellants may seek leave to add to the above grounds of appeal.

DATED this 29th day of September, 1983.

.....
Solicitors for the Appellants

TO: The Prothonotary,
Supreme Court,
William Street,
MELBOURNE, 3000.

AND TO: The Respondents

AND TO: Their Solicitors,
Messrs. Mallesons,
St. James Building,
121 William Street,
MELBOURNE, 3000.

12.

In the Full Court
No. 164
Notice of Motion
dated 29th September
1983
(continued)

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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. LTD. and HALLMARK MINERALS N.L.
Appellants

and

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)
Respondents

NOTICE OF MOTION BY APPELLANTS

[$7]

Filed 29/9/83

2 copies served on Malleson's 3.15 pm.

GODFREY & GODFREY,
Solicitors,
358 Lonsdale Street,
MELBOURNE. VIC. 3000
Tel: 67 5694
Ref: 663/83 MF-/BA

No. 165

NOTICE OF MOTION dated 10th October 1983

IN THE SUPREME COURT
OF VICTORIA
FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS and L.S.D. HOLDINGS LIMITED Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

NOTICE OF MOTION

TAKE NOTICE that the Full Court will be moved this day the 10th day of October 1983 at 10.30 o'clock in the forenoon or so soon thereafter as Counsel may be heard on the hearing of an application on behalf of the first seven abovenamed Appellants for Orders that :-

1. The date fixed for the hearing of the Appeal against the Orders of His Honour Mr. Justice Tadgell on the Petition herein, namely the 14th day of October 1983, be vacated

2. Such other Orders as to the Court seem meet.

DATED this 10th day of October 1983.

14. .....
Solicitors for the Appellants

In the Full Court
No.165
Notice of Motion
dated 10th October
1983
(continued)

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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. LTD. HALLMARK MINERALS N.L. and L.S.D. HOLDINGS LIMITED Appellants

and

OFFSHORE OIL N.L. MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

---

NOTICE OF MOTION DATED 10th OCTOBER 1983

GODFREY & GODFREY,
Solicitors,
358 Lonsdale Street,
MELBOURNE. VIC. 3000
Tel: 67 2547
Ref: G63/83 WRH:

No. 166

ORDER OF THE FULL COURT dated 10th October 1983

IN THE SUPREME COURT
OF VICTORIA
FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS and L.S.D. HOLDINGS LIMITED Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

BEFORE THE HONOURABLE MR. JUSTICE STARKE, THE HONOURABLE MR. JUSTICE MURPHY AND THE HONOURABLE MR JUSTICE MARKS MONDAY THE 10TH DAY OF OCTOBER, 1983

Upon the Notices of Motion of the first seven abovenamed Appellants dated the 29th day of September 1983, and the 10th day of October 1983 coming on for hearing on Monday the 10th October 1983 and UPON READING the two Affidavits of PHILLIP KEVIN SMITH sworn the 29th day of September 1983 and the 30th day of September 1983 and the several exhibits thereto and the Affidavit of WILLIAM RICHARD HUNT sworn the 10th day of October 1983 and all filed herein on behalf of the Appellants last abovementioned and UPON HEARING Mr. Gruzman one of Her Majesty's Counsel and Mr. Hodgekiss and Mr. Neesham for the said Appellants and UPON HEARING Mr. Chernov one of Her Majesty's Counsel and Mr. Heerey for the Respondents

THIS COURT DOTH ORDER:-

1. THAT the said Appellants have leave to amend the Notice of Appeal herein by the addition thereto of the grounds numbered 5 to 14 inclusive in the Notice of Motion.

2. THAT the Appeal be adjourned from the date fixed to a date to be fixed by the Listing Master and placed first in the List of Civil Appeals for the month of November subject to the directions of the Full Court hearing Civil Appeals.

3. THAT any further Affidavits of the Appellants be filed served and delivered on or before the 17th day of October 1983.

4. THAT any Affidavits in reply by the Respondents be filed served and delivered on or before the 24th day of October 1983.

5. THAT the Appellants pay the Respondents' costs of this day.

BY THE COURT

This Order was taken out by Godfrey and Godfrey Solicitors for the Appellants.

In the Full Court

No.166
Order of Full
Court dated
10th October
1983

(continued)

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS N.L. and L.S.D. HOLDINGS LIMITED Appellants

and

OFFSHORE OIL N.L. MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

---

O R D E R

GODFREY & GODFREY,
Solicitors,
358 Lonsdale Street,
MELBOURNE. VIC. 3000
Tel: 67 2547
Ref: 663/83 WRH:

No.167
NOTICE OF MOTION

In the Full Court
No.167
Notice of Motion
dated 26th
October 1983

IN THE SUPREME COURT
OF VICTORIA
FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS and L.S.D. HOLDINGS LIMITED

Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

NOTICE OF MOTION

TAKE NOTICE that the Full Court will upon this appeal coming on for hearing be moved by Counsel for the first seven abovenamed Appellants for Orders that :-

1. The hearing of the Appellants' appeal herein be adjourned until after judgment is given in Action No. 4254 of 1983 in the Supreme Court of New South Wales in its Equity Division wherein Southern Cross Exploration N.L., Alexanders Securities Limited, Chapmans Limited, Alexanders Discounts Pty. Limited and Aviva Holdings Limited are Plaintiffs and Offshore Oil N.L. Lawrence James Adler, Fire and All Risks Insurance Company Limited, Nationwide Resources Pty. Limited and David Harry Lance are Defendants.

In the Full Court

No.167 Notice of Motion dated 26th October 1983 (cont'd)

2. Alternatively, that the abovenamed Appellants have special leave at the hearing of this appeal to adduce in addition to the evidence before the Court below the following evidence :

(i) the documents discovered by the said Defendants in the said Action No. 4254 in the Supreme Court of New South Wales,

(ii) the answers of the said Defendants given in answer to the interrogatories delivered by the said Plaintiffs for their examination in the said Action,

(iii) the documents produced by F.A.I. Insurances Ltd., Metropolitan Executors and Nominees Pty. Ltd., Fire and All Risks Insurance Co. Ltd., National Companies and Securities Commission, Melbourne Stock Exchange, Sydney Stock Exchange, Corporate Affairs Commission (N.S.W.), Jackson Graham Moore & Partners, Roach Tilley and Co., D.D. Tolhurst, Bain & Co. and J.M. Bowyer & Co. in response to subpoenas entitled in the said Action and served upon them on the 17th day of October 1983.

AND TAKE NOTICE that the grounds of the second said application are that :-

(i) at the date of the hearing of the petition to wind up Brinds Limited the Appellants did not know and could not by the exercise of reasonable care and diligence have discovered the said evidence,

(ii) the nature of the evidence which the Appellants now seek leave to adduce is such that the said evidence if believed would have resulted or is likely to have resulted in the said petition being dismissed.

And for such further or other order as may be just.

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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 GAN. GULF RESOURCES N.L., ALEXANDERS SECURITIES LIMITED, CHAPMANS LIMI NORTHERN STAR INVESTMENTS, PTY. L HALLMARK MINERALS N.L. and L.S.D. HOLDINGS LIMITED Appellants

and

OFFSHORE OIL N.L. MARTIN CORPORAT LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

---

NOTICE OF MOTION

---

47 Filed and served 26/10/83

GODFREY & GODFREY,
Solicitors,
358 Lonsdale Street,
MELBOURNE. VIC. 3000
Tel: 67 2547
Ref: 663/83 WRH:

No. 168

NOTICE OF MOTION dated 10th November 1983

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS and L.S.D. HOLDINGS LIMITED Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

NOTICE OF MOTION

TAKE NOTICE that the Full Court will upon this Appeal coming on for hearing be moved by Counsel for the first seven abovenamed Appellants for Orders that:-

1. Court Recording Services Pty. Ltd. of 63 Kingsway South Melbourne in the State of Victoria provide to the Appellants (and - if so requested by the Respondents - to the Respondents) an unedited transcript of the original tape recording of the Judgment of His Honour Mr. Justice Tadgell made herein on the 5th day of May, 1983.

2. Such further or other order as may be just.

DATED this 10th day of November, 1983.

Godfrey & Wolfen

Solicitors for the Appellants

TO: The Prothonotary,
Supreme Court
William Street
Melbourne

AND TO: The Respondents

AND TO: Their Solicitors
Messrs. Mallesons
121 William Street
Melbourne

In the Full Court

No.168
Notice of Motion
dated 10th
November 1983

(continued)

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS N.L. and L.S.D. HOLDINGS LIMITED Appellants

and

OFFSHORE OIL N.L. MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

---

NOTICE OF MOTION

GODFREY & GODFREY,
Solicitors,
358 Lonsdale Street,
MELBOURNE. VIC. 3000
Tel: 67 2547
Ref: G63/83 WRH: AM

No. 169

ORDER OF THE FULL COURT dated 28th November 1983

IN THE SUPREME COURT
OF VICTORIA
FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS and L.S.D. HOLDINGS LIMITED

Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

BEFORE THE HONOURABLE MR. JUSTICE STARKE,
THE HONOURABLE MR. JUSTICE MURRAY AND
THE HONOURABLE MR. JUSTICE SOUTHWELL
MONDAY THE 28TH DAY OF NOVEMBER, 1983

UPON the Notices of Motion of the first seven abovenamed Appellants dated the 26th day of October, 1983 and the 10th day of November, 1983 coming on for hearing on the 16th day of November, 1983 and UPON READING the seven Affidavits of PHILLIP KEVIN SMITH sworn respectively the 23rd day of September, 1983, the 29th day of September, 1983, the 30th day of September, 1983 the 10th day of October, 1983, the 17th day of October, 1983 and two sworn the 11th day of November, 1983 and the several exhibits referred thereto, the Affidavit of WILLIAM RICHARD HUNT sworn the 10th day of October, 1983, the four Affidavits of DANNY MELECH UNGAR sworn respectively the 3rd day of November, 1983, the 10th day of November, 1983, the 16th day of

In the Full Court

No.169 Order of the Full Court dated 28th November 1983 (cont'd)

November, 1983 and the 18th day of November, 1983 and the several exhibits referred to, and the two Affidavits of MARTIN ANTHONY TOSIO both sworn the 16th day of November and the exhibits referred to and all filed herein on behalf of the said Appellants and UPON HEARING Mr. Gruzman one of Her Majesty's Counsel and Mr. Hodgekiss and Mr. Neesham of Counsel for the said Appellants and UPON HEARING Mr. Forsyth one of Her Majesty's Counsel and Mr. Finkelstein of Counsel for the Firstnamed, Secondnamed and Fourthnamed Respondents :

THIS COURT DOTH ORDER :

1. That the Motions be dismissed.

2. That the Appellants pay the Respondents' costs.

BY THE COURT

This Order was taken out by Godfrey and Godfrey, Solicitors for the Appellants.

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS N.L. and L.S.D. HOLDINGS LIMITED Appellants

and

OFFSHORE OIL N.L. MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL ~~LIFE~~ INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

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O R D E R

GODFREY & GODFREY,
Solicitors,
358 Lonsdale Street,
MELBOURNE. VIC. 3000
Tel: 67 2547

No.170
Judgment
of the
Full Court
dated 16th
December
1983

IN THE SUPREME COURT 1983 No. Co.13015

OF VICTORIA

BEFORE THE FULL COURT

MELBOURNE

BEFORE THE HONOURABLE MR. JUSTICE STARKE
THE HONOURABLE MR. JUSTICE MURRAY and
THE HONOURABLE MR. JUSTICE SOUTHWELL

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, and NORTHERN STAR INVESTMENTS PTY. LTD., HALLMARK MINERALS N.L. and L.S.D. HOLDINGS LIMITED

Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

J U D G M E N T

(Delivered 16th December, 1983)

STARKE, J.:
MURRAY, J.:
SOUTHWELL, J.:

On 5th May, 1983 Tadgell, J. made an Order for the winding up of the first named Appellant Brinds Ltd. (Brinds) on the petition of the first named Respondent Offshore Oil N.L. (Offshore), the other three Respondents joining the proceedings as supporting creditors.

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 the petitioner Offshore;

$1,426,658 (secured or partly secured) to Jackson Graham Moore & Partners; and

$ 446,974 (secured or partly secured) to Martin Corporation Ltd.

There was also evidence from another supporting creditor Mercantile Mutual Life Insurance Co. Ltd. that a debt of $1,624,367 became payable by Brinds on the day after the hearing commenced.

The existence of each of these four debts, which aggregate over $7 million, was not disputed by Brinds but Brinds did dispute that the debts were due for payment.

The hearing of the petition was strenuously contested and occupied some four weeks of evidence and argument. 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 creditor, was not acting bona fide in bringing the petition and was actuated by ulterior and collateral motives with the result that the Court should, in the exercise of its discretion dismiss the petition.

The Appellants, all of whom opposed the petition, lodged notice of appeal on 18th May and thereafter obtained an Order for a speedy hearing of the appeal. However, before the date fixed for the hearing

a notice of motion was served whereby the Appellants sought leave to amend the notice of appeal by adding various new grounds and by a second notice of motion the Appellants sought an Order adjourning the hearing of the appeal until after Judgment is 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 notice of motion.

It is not necessary, in our opinion, to consider in detail the terms of Order 58, rule 12 of the Rules of this Court and to debate whether the Appellants require special leave of the Court in order to be able to adduce fresh evidence. In the present case the fresh evidence sought to be adduced relates 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 due diligence. Mr. L. Gruzman, Q.C., Senior Counsel for the Appellants, while not conceding that the burden upon the Appellants in relation to the introduction of fresh evidence was necessarily as heavy as this Court laid down in Young v. Symons (1972) V.R. 611, nevertheless submitted that the evidence he sought to introduce would meet those requirements. We proceed therefore 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.

Before Tadgell, J. a great deal of time was spent in the cross-examination of witnesses called on behalf of the petitioning creditor. The burden

of the cross-examination was, in very broad terms, to demonstrate that by various means Mr. Adler, the Managing Director of Offshore, 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. Mr. Gruzman referred to various matters which he submitted 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 and he referred to other matters, such as issues of shares at par, which he claimed were directed to the same end.

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.

The fresh evidence sought to be introduced relates 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 Mr. Ganke, the Managing Director of Brinds, be wound up. In the course of those proceedings it appears that Counsel appearing for F.A.R. announced on 28th July 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 alleges that the market price of Offshore shares had been depressed by certain operations and that the shares had been sold at this temporarily depressed price to a company, Nationwide Resources Pty. Ltd., in which company Adler owned a substantial interest.

Mr. Gruzman submitted that the evidence he could adduce and which would 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.

Mr. Gruzman submitted that if this evidence had been called in the proceedings before Tadgell, J. 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.

Having heard the submissions advanced on behalf of the Appellants and the reply to those submissions by Mr. Forsyth, Q.C., Senior Counsel for the Respondents, this Court, on 28th November, dismissed the motions with costs and we then stated that we would give our reasons for doing so when we had heard the appeal. Having heard the submissions of the parties on the appeal we now, accordingly, state our reasons for dismissing the motions for an adjournment and for special leave to

the Appellants to adduce fresh evidence.

In our opinion the evidence falls far short of achieving the purpose for which it is desired to adduce it. If the evidence is to be admitted it must be relevant and probative. It would not be admissible as fresh evidence simply because it might affect the credit of Adler. It is not, however, sought to advance it for this purpose. If it is relevant and probative 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 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. 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. 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.

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.

Upon close analysis in our opinion 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.

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 His Honour observed, events overtook the question and the basis of His Honour's decision was the result of his consideration of the moratorium agreement entered into by the parties. His Honour's decision in this regard is the subject of a number of grounds in the notice of appeal. It is clear in our opinion that His Honour's decision turns 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 our opinion leave should not 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 should be dismissed with costs.

We turn now to the appeal. It is here appropriate to set out some of the chronology of events. By mid 1982 Brinds was in a parlous financial state: Adler and Ganke were business acquaintances: Adler offered large loans to Brinds, upon conditions which are now said by Ganke to have revealed the commencement of attempts by Adler to gain complete control of Offshore. Ganke felt forced to accept the offer:

the acquisition by Adler of shares at that time, with further acquisitions by new issues and other means, left Adler and companies controlled by him with over 100 million Offshore shares out of a total of 390 million shares: Brinds and associated companies owned 53 million shares.

It was not to be long before Adler and Ganke fell out. The first of about twenty litigous proceedings between them came before Shepherd, J. in the A.C.T. Supreme Court. His Honour persuaded the parties to appoint an independent Chairman of Offshore. In October 1982 Mr. Alexander Macintosh, a senior partner in the accounting firm of Peat Marwick Mitchell & Co., was appointed.

After lengthy negotiations Macintosh persuaded Adler and Ganke, and creditors of Brinds, to enter into a moratorium deed, designed to enable Brinds to be saved. That deed gave Macintosh virtual complete control, including the power to terminate the deed if in his opinion Brinds failed to adhere to certain obligations imposed upon it, particularly in relation to the preparation of accounts.

On 10th February 1983 Macintosh formed the opinion that Brinds was indeed in breach of its obligations, and the deed was terminated (Brinds now argues that the termination was invalid): at the same time a provisional liquidator of Brinds was appointed.

Offshore purported to call up the loans: Ganke argued that they were not repayable upon demand, but at twelve months' call. On 17th February, 1983 this petition was presented. It is not suggested that there is any dispute about the debts owing to the supporting creditors.

There was a number of grounds of appeal which were not argued and we shall not refer to them. Others were given little more than passing mention and we shall refer to them only in part. The principal grounds pressed before this Court were grounds 9 and 10 which read:

> "9. 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.
>
> 10. 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."

In support of those grounds Mr. Gruzman at one point 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 day of 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 throws no light on the substance of any submission by Mr. Sher, and it appears that His Honour made no ruling. The parties then made enquiries of Mr. Heerey, Junior Counsel for the petitioner, and of Mr. Sher. The 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 His Honour 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, in this 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 the 2nd May. Then he 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.

Accordingly, on the second day of the hearing, senior Counsel elected to proceed without making any submission that the petition should there and then be dismissed. He cross-examined Mr. Macintosh for four days and others of the petitioner's deponents at length. 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 (Rule 4 of the Companies Rules permits such interlocutory process): Ganke was cross-examined at length, but no complaint was made that he was unfairly treated.

Nevertheless, it is now said that the learned trial Judge 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.

It is however necessary to consider the position which faced His Honour at that stage of the proceedings. By virtue of clause 10 of the moratorium deed the debts due by Brinds and by the other Respondents were acknowledged to be due and presently payable. A petition was before His Honour for an Order that Brinds be wound up by the Court. Without more, the petitioner was entitled to an

Order for the winding up of Brinds ex debito justitiae. Counsel for Brinds stated that such an Order was resisted upon the grounds that there was a bona fide dispute as to whether the debts were presently payable and secondly, that it was alleged that the petition was brought for a collateral and improper purpose and should be dismissed as a matter of discretion. The bona fide dispute was as to whether the debts were presently payable and involved allegations that the moratorium deed had not been terminated bona fide or validly by Macintosh and that consequently the moratorium provided for was still on foot. Another submission advanced was that upon its proper construction even if the deed had been validly terminated the parties reverted to the position which existed before the deed came into operation and it was alleged that the debt then owing by Brinds was subject to twelve months' notice if payment was required. His Honour, if he was to be persuaded of either of the two grounds alleged, would obviously need to be satisfied of their existence by evidence. It would not have been proper for him to have stayed or dismissed the petition simply because he was informed of the allegations by Counsel for the debtor company. Consequently Counsel took the considered course of embarking upon what was clearly going to be a lengthy hearing, in the hope that he could persuade His Honour to make one at least of the two findings.

It was submitted that by proceeding with the hearing, Brinds was denied the opportunity of interlocutory investigation afforded in a normal common law action. The short answer to that is that such procedures are provided for by Rule 4 of the Companies Rules, and Counsel for Brinds made no application for any relief under that Rule. It is scarcely surprising that he did not do so. There were some 529 pages

of affidavits and exhibits. It would seem that Counsel had available far more information as to the petitioner's case than he was likely to have gleaned from pleadings and various forms of discovery in an action for debt. One does not need to read the whole of the transcript to see that Counsel was well armed for cross-examination, and he ranged far and wide. It might even fairly be said that the absence of pleadings ensured greater liberty as to the range of cross-examination, for the reason that Counsel was not inhibited by the restraints of relevance imposed by the definition of issues by pleadings.

In written submissions handed to the Court at the commencement of the hearing of the motion for adjournment and for the admission of fresh evidence this paragraph appears:

> "83. 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."

Counsel did not then, or in his initial submissions upon the hearing of the appeal, develop that submission. However, during his reply, Mr. Gruzman referred (in a further written submission) 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. We have studied that document. Many of the matters referred to related to the question of the adequacy of documentation to support the contentions of Ganke that the loans the subject of the alleged debt were not at call, but at twelve months' call.

It should here be observed that the learned trial Judge did not regard it as necessary to decide that question, because, as will be seen, he found that upon its true construction, Clause 10 of the

moratorium deed constituted a clear acknowledgment that the debt was then due and payable, an acknowledgment upon which the petitioner could rely. If His Honour is correct in that finding, the fact that Brinds might have produced some further evidence on the former question becomes irrelevant. None of the other matters referred to by Mr. Hunt could, in our opinion, have affected any finding made by His Honour. Mr. Gruzman, in his submissions, pointed to no evidence or potential evidence which Brinds might have been able to tender upon the trial of an action for debt but which was not in fact rendered. It was said that cross-examination might have gone further: however no attempt was made to indicate where that might have occurred: our attention was not directed to one single topic, which, even with the wisdom of hindsight, might be said to have been a proper subject for further cross-examination had the trial been of an action for debt.

If the submission made on behalf of Brinds is correct, it would seem that this Court should say that Offshore should first have sued Brinds for the debt. If one contemplates the way in which that action would in all probability be pleaded, the following issues would fall for decision:

(a) was the debt repayable at call or upon twelve months' notice;

(b) if it was (before the moratorium deed) repayable upon twelve months' call did the deed operate so as to render the debt immediately payable upon the termination of the deed;

(c) were the bona fides of the opinion of Macintosh that Brinds was in breach of the deed examinable.

(d) If yes to (c) did Macintosh act bona fide in giving his opinions;

(e) was the deed properly terminated.

In our opinion the inclusion of questions (d) and (e) is of very great significance upon this appeal. That is so for a number of reasons. In the first place, the issue in question (a) above, albeit that it was of great importance, was one the relevant evidence concerning which did not occupy a great deal of time before Tadgell, J. That evidence came principally from Miss Pauler and Ganke. Questions (b) and (c) concern a question of construction of the deed: the hearing of this appeal demonstrates that the argument in respect of that would be comparatively short. Questions (d) and (e) occupied the greater part of the trial below.

It was Brinds' case that there was here a conspiracy, of which Adler was the ringleader and Macintosh the willing tool, to harm Offshore in various ways, in order the more easily to enable Adler to take control. It was said that Adler's plans began to be put into effect well before Macintosh was perhaps even known to Adler, before Macintosh was appointed Chairman of Offshore, and before Macintosh's appointment as examining accountant under the moratorium deed: that Adler in negotiating to lend money to Brinds so manoeuvred as to force a reluctant Ganke not only to borrow money at abnormally high interest rates, but to issue to Adler 10,000,000 shares at par, an act said to be one of a number designed by Adler artificially to depress the market value of Offshore: that thereafter Adler engineered a 1 for 2 share issue, underwritten by one of his companies: that Adler contrived to make improper use of a mail strike to enable his companies to take up some 53,000,000 shares not taken up by other shareholders: that Adler caused further harm to Offshore by a seemingly reckless re-organisation of management: that Adler corrupted Macintosh when he was examining accountant under the moratorium deed and ultimately succeeded in causing Macintosh to give the opinion as to Brinds' breach which in

turn led to termination of the deed.

That may appear to be an impressive recital of allegations. Yet if the action had been for debt, all the evidence said to be relevant to those allegations would have been admissible, as being relevant to the questions of the bona fides of Macintosh in giving his opinion. Evidence of the activities of Adler before he allegedly recruited Macintosh into the conspiracy could not have been excluded. That would be so for the reason that, so it was said, if the deed was not properly terminated, no debt was owing.

Let it be assumed that, after a lengthy hearing of the debt claim, the trial Judge had found that the debt was payable at call, and upon the proper contruction of the moratorium deed, the opinion of Macintosh was not examinable, or if it was, that there was no proof of fraud on his part and the moratorium was properly terminated.

Let it be further assumed that Offshore then presents its petition for the winding up of Brinds, at the hearing of which Brinds seeks to set up the defence that the petition ought to be dismissed because it was presented for an improper and collatoral purpose,namely, that of Adler to harm Brinds to the extent that he could gain complete control of Offshore. At that hearing, Brinds could not, in our opinion, be estopped from relitigating almost all the allegations already aired at the hearing of the debt claim.

Unless we felt bound by authority so to hold, we would resist any finding which brought about such a startling and unsatisfactory result.

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. At the trial, Tadgell, J. was His Honour said, "acutely conscious" of this, and His Honour referred to authority which His Honour found, and we respectfully agree with him, to be applicable in this case: one authority cited was the case of Re W.B.S. Pty. Ltd. 1967 Qld. R218 at p.225 where Gibbs, J. (as he then was) said:

> "Of course a debt is not bona fide disputed simply because the respondent company says that it is disputed. The court hearing the petition can go into evidence to consider whether or not the dispute is bona fide, that is whether the claim is disputed on some substantial ground: Re Welsh Brick Industries Ltd. (1946) 2 A.E.R. 197.
>
> It seems to me that in every case it becomes necessary for the Court to exercise its discretion as to how far it will allow the question whether or not the dispute is bona fide to be explored. In some cases it may be very easy to decide this question on the petition and the affidavits in reply. In other cases, however, it may be difficult to determine whether or not the dispute is bona fide without determining the merits of the dispute itself. In some such cases convenience may require that the Court decide the question whether or not a debt exists, but in other such cases it may appear better to allow that question to be determined in other proceedings before the petition for winding up is heard."

In this Court it was not suggested that His Honour misdirected himself in accepting those principles as applicable.

Nor could that have been suggested. In Bateman Television Ltd. (In Liquidation) v. Colerige Finance Co. Ltd. 1971 N.Z.L.R. 929 at p.931 Lord Upjohn, speaking on behalf of the Board said at p.932:

> "One matter argued before their Lordships can be dealt with very shortly. It was argued that as the debts in question were disputed debts no winding up order should have been made, and for this purpose their Lordships are prepared to

assume that the debts were genuinely disputed debts.

In such cases the general rule is, no doubt, that no order will be made on a petition founded on such debts. But each case must depend upon its own circumstances and it is a question for the discretion of the Judge; a discretion to be exercised judicially, which is not open to review unless it is shown to be exercised on some wrong principle, or that the Judge relied on some fact irrelevant for the purpose, or omitted consideration of a relevant fact or finally that he was wholly wrong. As their Lordships have already pointed out, the disputed questions of indebtedness were fully investigated in a lengthy hearing before the learned Judge with oral and documentary evidence and he held that both the appellant companies were insolvent. Their Lordships add the very important fact that from start to finish neither side ever suggested to Macarthur J. that the petitions should be dismissed or even stayed on the ground of disputed debts pending the bringing of appropriate proceedings at law to determine these matters."

In Re Nickel Mines Ltd. 1978 3 A.C.L.R. 686 at p. 687

Needham, J. said:

"Were it not that I was satisfied that Nickel Mines was, at the date of the petition, indebted to Laverton, the question would have arisen whether the alleged debt asserted in the petition was disputed on substantial grounds and whether that dispute should be determined either in these injunction proceedings or at the hearing of the petition, or whether the petition should be stayed or dismissed and the petitioner left to establish its debt in proceedings brought solely for that purpose. The principles upon which the court determines these questions, as I understood them, are set out in Re Horizon Pacific Ltd. (1977) 2 ACLR 495 at 498, I would merely add a reference to Mann v. Goldstein (1968) 2 All E.R. 769; (1968) 1 WLR 1091. 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 no, as I have said, that it appears plain that Laverton is a creditor of Nickel Mines in an amount amply sufficient to support a petition, 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 of the evidence relevant to the issue was presented by the parties in the course of litigating the question whether the debt existed. The calling of that evidence occupied several days."

The question whether the debt was due and payable was, in this case, 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; nevertheless, as we have endeavoured to show, 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.

Accordingly we are 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. In reality he had no alternative but to proceed to determine the matter. To do otherwise would have caused injustice to both parties. It follows that in our opinion these grounds fail.

We turn now to a consideration of the grounds of appeal which relate to the construction of the moratorium deed.

The deed (entered into on 25th November, 1982, by Offshore, companies associated with it, a number of their creditors, Ganke and two other directors of Brinds, with Macintosh as examining accountant) provided for a moratorium for up to twelve months with a view to enabling the debtors to carry on business for the purpose of discharging their debts.

By Clause 10 each of the debtors acknowledged that the debts here relevant were "unconditionally repayable ... on demand".

By Clause 20, it was provided in part:

"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 and authorities which subsist in such party pursuant to the terms of 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."

By Clause 22 it was provided:

"If during the Moratorium the Examining Accountant in his absolute opinion considers that:

(a) the interest of the Creditors could be prejudiced by compliance by 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;

(c) without affecting the generality of sub-clause 22(b) above any Debtor is not having regard to the provisions of Clause 1A 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."

By Clause 30 it was provided:

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

As the learned trial Judge found, Macintosh experienced considerable difficulty in obtaining relevant information from Ganke, and ultimately, on 10th February, 1983, he wrote to the Chairman of creditors expressing the opinion that Brinds was in breach of the deed. On 16th February, 1983, Offshore, in purported exercise of its rights under Clause 22 of the deed, gave notice to Brinds of the termination of the Moratorium, and thereafter contended that the Moratorium was thereby terminated. On 17th February, 1983, a provisional liquidator of Brinds was appointed.

Mr. Gruzman scarcely touched upon the question of construction during his initial submissions. However, during his reply, he provided the Court with a further written submission. In that he acknowledged the force of Mr. Forsyth's submission that a literal interpretation of the first part of Clause 20 would make nonsense as it would destroy the effectiveness of the whole deed. It was then said 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, it was said, 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. Since His Honour had made no finding on this aspect there was no proven debt, and thus no basis for a winding-up Order.

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 acknowledgment of the present indebtedness by Brinds is now raised as a 'defence or counter'." 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 acknowledgment in Clause 10 may accordingly be relied on by Offshore against Brinds". We believe it to be unnecessary to say more than that we are of the respectful opinion that His Honour was plainly correct.

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. However, it was said that this issue, in itself, raised a bona fide dispute or substantial grounds as to the existence of the debt, upon the ground that if Macintosh acted in bad faith, the termination of the deed by Offshore lacked any valid basis. This submission must be considered together with similar submissions concerning the other issue said to create a bona fide dispute.

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, we are of opinion that the answer must be "yes".

However, in our opinion, that is not the only question. As we have endeavoured to show, the law is clear that the Judge had 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 that he was in a position to reach conclusions it would have been absurd for His Honour to have refrained from doing so. In Re King's Cross Industrial Dwellings Company 1870 L.R. 11 Eq. 149 at p. 151 Sir R. Malins, V.C. said: "... I entertain no doubt that this is a

debt of the company, and I should be doing the greatest possible injustice if I allowed any further litigation". We regard those words as apt in this case. Brinds ought not to be permitted to relitigate these matters; a dismissal of this petition would launch the parties into two more prolonged hearings.

As already pointed out the main and basic submission made to this Court by Mr. Gruzman in support of this appeal was that the learned Judge embarked on the determination of a dispute upon which he should not have embarked. However in developing this argument he submitted that the learned Judge having accurately identified the area of the dispute failed to examine the evidence in respect of it and to express his conclusions upon it. The passages in His Honour's reasons for judgment upon which Mr. Gruzman founds this argument are at p. 661:

> "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 share 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."

In support of this argument Mr. Gruzman 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 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 findings 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."

This principle is well recognised in Victoria. See Brittingham v. Williams 1932 V.L.R. 237. But that does not mean that every peripheral issue need be expressly referred to, still less that every piece of evidence be set down. The crux of the judgment of Asprey, J.A., in our opinion, lies in the words "... the judge has a duty ... to state his findings and the reasons for his decision adequately for that purpose" (i.e. for the purpose of enabling a proper understanding of the basis upon which the verdict entered has been reached). What is or is not adequate must depend upon the circumstances of each case and no general rule can be laid down. In this case the hearing occupied a period of four weeks. There were 529 pages of affidavits and exhibits

and seven volumes of transcript. To summarise the evidence in detail would in our opinion be impossible or if possible, undesirable and confusing. To put Mr. Gruzman's argument in perspective it is necessary to consider the issues before the Judge. They were in reality very simple. There was before him a winding up petition. All the petitioner had to prove was (a) the debt (which was undisputed), (b) that it was unpaid (which was undisputed), (c) the Moratorium Deed in which Brinds acknowledged its indebtedness to Offshore and that the debt was unconditionally repayable on demand and (d) the termination of the Moratorium pursuant to the opinion of the Examining Accountant. Thereupon unless some other matter was raised the petitioner would have been entitled to a winding up Order. However the company did raise another issue. As was recognised by the learned Judge it was alleged that Offshore had deliberately depressed Offshore shares so that it might force Brinds into insolvency and acquire Brinds' Offshore shares and that it was not a genuine attempt by Offshore to recover a debt but part of a vendetta by Adler against Ganke. It was also alleged that Macintosh the Examining Accountant acted in bad faith at Adler's directions. These matters were really the only issues in the case. The evidentiary burden in respect of these matters was plainly on the company and it was to these matters His Honour addressed himself. We have not overlooked the question of whether the original loan was on call or at 12 months' call. This issue was as His Honour said overtaken by events (viz. the Moratorium Deed) and plainly ceased to be an issue at the hearing. Nor have we overlooked the question of the construction of the Moratorium Deed which we have dealt with elsewhere.

At this point it should be noted that the attack made on Macintosh's bona fides principally depended on the evidence of Macintosh himself and of Ganke. His Honour's findings appear at pp.712-715 of the transcript. He said:

"Before dealing with the principal bases of opposition seriatim I want to make some more general remarks about Mr. Macintosh and about the criticism that was levelled at him. Macintosh made two affidavits, one in support of the application for the appointment of the provisional liquidator and a second which was relied on by the petitioner, together with the first, in support of the petition. I saw and heard Mr. Macintosh in the witness box for over a week, during which time he was subjected to wide and searching and, at times, vigorous and thoroughly challenging and attacking cross-examination. In the course of that and during the final address of senior Counsel for Brinds, he was charged with professional incompetence and absence of commercial judgment, want of good faith and with duplicity and deception. It was alleged against him that he approached his task as examining accountant under the deed with calculated unfairness and a designed lack of independence. It was further alleged against him that he was a willing participant in a plot to obtain the appointment of the provisional liquidator 'by stealth'.

Much of this attack was couched in language which was not dignified by the restraint which attends informed and rational criticism of a professional man's activity undertaken in the ordinary course of his professional practice. I must assume that this was done pursuant to instructions upon which Counsel thought it proper to act. Having heard the criticism, and seen and heard the evidence on which it relies, I say at once that in my opinion the evidence does not provide a foundation for it. Indeed I feel obliged to say, with regret but with emphasis, that many of the grounds relied on for the criticism were absurd.

I also saw and heard Mr. Ganke cross-examined at some length on his affidavits and re-examined. In the light of that and the surrounding evidence of the activities of Brinds, I formed the clear impression that he refuses or is unable to come to grips with reality. Many of his attitudes and opinions were shown to be fanciful. In general, where his evidence of facts was in conflict with that of Mr. Macintosh I have no hesitation in preferring the latter."

These findings in our opinion virtually dispose of the allegations by the company that Macintosh was acting in concert with Adler and dispose of the suggestion that Macintosh assisted Adler in the depreciation of the Offshore shares or acted mala fides in the termination of the Moratorium Deed and in so doing plainly refutes

Mr. Gruzman's argument that the learned Judge failed to give reasons for rejecting the company's submissions which he set out at pp.661 and 670 quoted above.

But His Honour went further. At pp. 711 and 712 he identified the issues. He said:

> "Apart from contending that the petition should be dismissed because there was a dispute about the terms of repayment of its debt to Offshore, as initially arranged (a contention which I have already rejected) Brinds has opposed the petition on the following five principal bases. 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 shortcomings 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.
>
> Many of the facts and arguments relied on to support these bases of opposition overlap. In particular, many of them involve 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."

The learned Judge then dealt with the first and second principal bases for opposition which are not relevant for present purposes.

He proceeded elaborately to deal with the evidence relative to the third principal basis of opposition and stated his conclusion at pp.732-734. He said: "It seems to me that, notwithstanding that there might, on one view, if one looks at the whole of the Brinds Group, by a substantial excess of assets over liabilities judging simply be balance sheets, this is not sufficient to override what appears from the other evidence to be the fact that, as at today, as at 17th February this year, and indeed for many months before that, Brinds is and was unable to pay its debts as they fell due. In my opinion, the ground relied upon has been plainly made out."

He then said:

> "I come now to the fourth and fifth principal bases upon which the opposition is founded. To recapitulate, these are 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 under the deed and of Mr. Macintosh and, remarkably, Martin Corporation and Jackson, Graham, Moore and Partners; and that there should, because of these and the other circumstances which have been mentioned, be an exercise of the court's discretion in favour of the company.
>
> I hope I shall not be thought to have failed to understand or appreciate and consider the sustained, and indeed valiant, efforts of Counsel to make these points good if I do not add to these reasons by adumbrating their arguments. I have, I believe, understood them and I have considered them.
>
> I have said sufficient to indicate that in my opinion the evidence does 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.

I shall not canvass the evidence on these matters either. Mr. Ganke proposed plans by way of the company's borrowing further large amounts of money with a view to acquiring further assets which, it was said, would put it in a position to re-finance its existing borrowings. These and other similar proposals, each different in itself, were turned down by Mr. Macintosh.

In my judgment, Mr. Macintosh was entitled to act as he did and it is not through any fault of his that the company is now in the position in which it finds himself."

This passage has been criticised by Mr. Gruzman on the basis that the learned Judge should have dealt with the company's arguments seriatim. In our judgment he was under no oligation to do so particularly as in the passage quoted he found that some of Counsel's arguments were "not dignified by restraint" and many of them were absurd. In any event as we have endeavoured to indicate above in dealing with the evidence of Macintosh and Ganke the learned Judge had in reality disposed of this ground and given his reasons.

If one leaves aside the question of whether or not there was a dispute and whether or not the learned Judge should have determined it on the hearing of a winding-up petition which we have already dealt with, the learned Judge rejected all the grounds of objection and gave his reasons for doing so. He was then left with what were really otherwise undisputed facts namely, the debt, that it was due and payable on demand, the non-payment, and (as he found) that the Moratorium Deed was duly terminated. In those circumstances the learned Judge really had no alternative but to make a winding-up Order. In our opinion this ground fails.

There are we think no other grounds of sufficient substance to merit discussion.

Accordingly the appeal should be dismissed.

Late in the hearing of the appeal, Mr. Gruzman was given leave to file notice of motion seeking leave to appeal against that part of the order for costs made by Tadgell, J. which gave Brinds one-half of the costs of defending the petition. Associated with this question, so it was submitted, was the alleged refusal of His Honour to make any decision in respect of the appeal to His Honour against the order of Master Jacobs made 17th February, 1983, appointing a provisional liquidator of Brinds. We assume but do not decide that this Court has power to grant leave to appeal in respect of costs.

In fact His Honour did make a decision, namely, that the appeal should be dismissed, and in due course a court order to that effect was passed and entered. The reason given by Tadgell, J. for dismissing the appeal was expressed in these terms:

> "It seems to me that the appeal no longer contains an issue which is a live issue, in view of the fact that I propose to order that the company be wound up. I do not therefore propose to deal with the arguments upon the summons and I think the right thing to do is simply to dismiss it."

For Brinds, it was submitted to this Court that the appointment of a provisional liquidator was wrong: that had it not been for that appointment Brinds would have defended the proceedings and paid for its defence out of its own funds: that Ganke had paid for the defence of the proceedings out of his own funds: and that this constituted an injustice resulting from the unjustifiable appointment of the provisional

liquidator, an injustice which should now be rectified by this Court.

Given His Honour's findings, it could not now be held that the appointment of a provisional liquidator was wrong. The irregular method of moving money from one company to another of the Brinds Group would alone have constituted a good ground for that appointment: Brinds then being unable to pay its debts.

Any argument based on the view that the appointment was unjustifiable must accordingly fail.

The general rule is that in clear cases, and where the company is justified in defending the petition, its costs will be paid out of company assets - In Re Humber Ironworks Co. 1866 L.R. 2 Eq. 15; In Buckley on the Companies Acts 14th Ed. p. 550 it is said: "The practice is to give costs to the petitioner and the company if the petition succeeds ... this rule has now been followed for many years."

That long-established rule is an exception to the general rule that the losing party must bear at least its own costs. However, in the Humber Ironworks Case, Lord Romilly, M.R. at p.18 stated another long-established rule in these terms:

> "Where the court grants the prayer of the petition of course it will give no costs to persons who appear to oppose the petition: because in that case the court makes an order against them....".

The notice of motion sought an order "that the costs and expenses incurred by Boris Andrew Ganke of and incidental to the defending of the proceedings in the matter 1983 No. C13015 and of and incidental to

the appeal against the appointment of the provisional liquidator be paid to the said Boris Andrew Ganke out of the assets of the company as costs of the petition."

In the course of argument Mr. Gruzman conceded that no order such as was there sought could properly be made. He however submitted that the order of Tadgell, J. should be varied by ordering that the whole of Brinds' costs be taxed as between solicitor and client and paid out of the assets of the company as costs of the petition.

Tadgell, J. ordered that only one-half of the company's costs be paid out of the assets of the company on the grounds that "...too much time was spent in hearing the petition for the purpose of Ganke pursuing a vendetta against Adler". If authority were needed for the proposition that a trial Judge is entitled to reduce the costs otherwise allowed where there has been unjustifiable opposition to the petition, it may be found in the case of In Re Bathampton Properties Ltd. 1976 1 W.L.R. 168.

Mr. Gruzman submitted that His Honour's reasons for the order he made disclosed a wrong exercise of discretion, and that there was no evidence "that Ganke was pursuing a vendetta against Adler". As we have already stated, Macintosh, other deponents of the petitioner, and Ganke himself, were cross-examined at length. His Honour made a number of adverse findings concerning Ganke. It is sufficient to state that we are not persuaded that the impeached finding was not open to His Honour.

We can find nothing to justify interference by this Court with the undoubted discretion of the learned trial Judge in the order for costs.

In the Full Court

Accordingly leave to appeal is refused.

No.170
Judgment of the Full Court dated 16th December 1983

(continued)

Order of Court:

1. Application for leave to appeal in respect of costs refused with costs.

2. Appeal dismissed with costs.

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No. 171
ORDER OF THE FULL COURT

In the Full Court

No.170 Judgment of the Full Court dated 16th December 1983 (cont'd)

IN THE SUPREME COURT
OF VICTORIA
FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS and L.S.D. HOLDINGS LIMITED

Appellants

- and -

OFFSHORE OIL N.L., MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm)

Respondents

BEFORE THE HONOURABLE MR. JUSTICE STARKE,
THE HONOURABLE MR. JUSTICE MURRAY AND
THE HONOURABLE MR. JUSTICE SOUTHWELL
FRIDAY THE 16TH DAY OF DECEMBER, 1983

UPON the Notice of Appeal of the first seven abovenamed Appellants dated the 18th day of May, 1983 coming on for hearing on Wednesday the 16th day of November, 1983 and UPON the two Notices of Motion of the said Appellants dated respectively the 29th day of September, 1983 and the 29th day of November, 1983 and UPON READING the Affidavit of WILLIAM RICHARD HUNT sworn the 10th day of October, 1983 and the three Affidavits of DANNY MELECH UNGAR sworn respectively the 16th day of November, 1983, the 18th day of November, 1983 and the 29th day of November, 1983 and the several exhibits referred thereto and all filed herein on behalf of the said Appellants and UPON HEARING Mr. Gruzman one of Her Majesty's Counsel and Mr. Hodgekiss and Mr. Neesham

for the said Appellants and UPON HEARING Mr. Forsyth one of Her Majesty's Counsel and Mr. Finkelstein of Counsel for the Firstnamed, Secondnamed and Fourthnamed Respondents

THIS COURT DOTH ORDER :

1. That the Application for leave to appeal in respect of costs be refused with costs.

2. That the Appeal be dismissed with costs.

BY THE COURT

This Order was taken out by Godfrey and Godfrey Solicitors for the Appellants.

IN THE SUPREME COURT

OF VICTORIA

FULL COURT

1983 No. Co. 13015

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. LTD., HALLMARK MINERALS N.L. and L.S.D. HOLDINGS LIMITED Appellants

and

OFFSHORE OIL N.L. MARTIN CORPORATION LIMITED, MERCANTILE MUTUAL LIFE INSURANCE COMPANY LIMITED and JACKSON GRAHAM MOORE AND PARTNERS (a firm) Respondents

---

O R D E R

GODFREY & GODFREY,
Solicitors,
358 Lonsdale Street,
MELBOURNE. VIC. 3000
Tel: 67 2547

In the Full Court

No.172
Order granting leave to appeal to Her Majesty in Council dated 2nd February 1984

No. 172

ORDER GRANTING LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

IN THE SUPREME COURT)
OF VICTORIA)
FULL COURT)

1983 No. Co. 13015

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. LTD. and HALLMARK MINERALS N.L. 10

Applicants

- and -

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

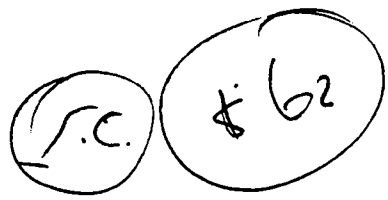
Respondents

BEFORE THE FULL COURT THEIR HONOURS MR. JUSTICE STARKE, MR. JUSTICE MURRAY AND MR. JUSTICE SOUTHWELL THE 2ND DAY OF FEBRUARY 1984 20

UPON MOTION made to this Court by Notice of Motion dated the 23rd day of December, 1983 on behalf of the abovenamed Applicants for leave to appeal to Her Majesty in Council from the Judgment and Orders of the Full Court of the Supreme Court of Victoria pronounced on the 16th day of December, 1983 and UPON HEARING Mr. L. Gruzman one of Her Majesty's Counsel, Mr. D. Graham one of Her Majesty's Counsel and Mr. W.G. Hodgekiss of Counsel for the Applicants and Mr. N.E.M. Forsyth one of Her Majesty's Counsel and Mr. 30 P.C. Heerey of Counsel for the Respondents and UPON READING the said Notice of Motion and the Affidavits of WILLIAM RICHARD HUNT sworn the 23rd day of December, 1983 and the 11th day of January, 1984 and filed herein and the exhibits

referred to therein and the Order of the Honourable Mr. Justice Crockett made the 11th day of January, 1984 THIS COURT DOTH ORDER that if within 3 months from this date security shall be given by the Applicants to the satisfaction of this Court of the value of $20,000 for the prosecution of the said intended Appeal and for the payment of all such costs as may be awarded by Her Majesty in Council to the Respondents and if the Applicants shall within the said period prepare and deliver to the Prothonotary of this Court a copy of the proceedings in relation to the said intended Appeal in accordance with Rule 1 of Order 58B of Chapter 1 of the Rules of the Supreme Court then this application for leave to appeal to Her Majesty in Council shall be granted pursuant to section 218 of the Supreme Court Act 1958. THIS COURT DOTH FURTHER ORDER that the costs of this motion including the costs reserved by the Honourable Mr. Justice Crockett by his said Order be costs in the Appeal and THIS COURT DOTH FURTHER ORDER that each party be at liberty to apply herein.

BY THE COURT



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This Order was taken out by Messrs. Godfrey and Godfrey of 358 Lonsdale Street, Melbourne, the Solicitors for the Applicants.

In the Full Court
No.172
Order granting leave to appeal to Her Majesty in Council dated 2nd February 1984 (continued)

IN THE SUPREME COURT

OF VICTORIA

1983 No. Co. 13015

FULL COURT

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. LTD. and HALLMARK MINERALS N.L.

Applicants

- and -

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

Respondents

O R D E R

GODFREY & GODFREY,
Solicitors,
358 Lonsdale Street,
MELBOURNE. VIC. 3000
Tel: 67 2547
Ref: WRH:AM

No. 173

PROTHONOTARY'S CERTIFICATE

IN THE PRIVY COUNCIL No. of 1984

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF VICTORIA

In the Full Court

No.173
Prothonotary's Certificate dated 10th May 1984

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

CERTIFICATE

I, VINCENT GEORGE STAFFORD Prothonotary of the Supreme Court of Victoria hereby certify that the Applicants have on the 19th day of April, 1984 provided security to the satisfaction of this Honourable Court of the value of $20,000.00 for the prosecution of their Appeal to Her Majesty In Council and for the payment of all such costs as may be awarded by Her Majesty In Council to the Respondents.

Dated at Melbourne in the State of Victoria this 10th day of May, 1984.

Prothonotary of the Supreme Court of the State of Victoria.

IN THE PRIVY COUNCIL No. 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

CERTIFICATE

GODFREY & GODFREY
Solicitors
358 Lonsdale Street
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VICTORIA 3000
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Ref: G94/83 DU:AF

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

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

RECORD OF PROCEEDINGS
VOLUME FOUR

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