Privy Council Appeal No. 30 of 1984

Brinds Limited and Others *Appellants*

v.

Offshore Oil N.L. and Others *Respondents*

FROM

THE FULL COURT OF THE SUPREME COURT OF VICTORIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH DECEMBER 1985

Present at the Hearing:

LORD ROSKILL
LORD BRANDON OF OAKBROOK
LORD BRIGHTMAN
SIR ROGER ORMROD
SIR ROBERT MEGARRY

*[Delivered by **Lord Brightman**]*

This appeal from a decision of the Full Court of the Supreme Court of Victoria concerns the validity of a company winding up order. In 1983 Offshore Oil N.L. ("Offshore") presented a petition for the winding up of Brinds Ltd ("Brinds") based on a debt of some $3.5M. Brinds opposed the petition broadly on the grounds that the debt was disputed, that the company was not insolvent and that the petition was not presented in good faith. The trial judge rejected these defences and made a winding up order, which was sustained on appeal to the Full Court. Brinds now appeals to Her Majesty in Council, seeking to discharge the order. There are subsidiary appellants and respondents to whom their Lordships will refer in due course.

The background facts are fully set out in the judgment of the Supreme Court at first instance. For present purposes they can be given in summary form. Offshore is a company engaged in oil and gas exploration and production. Its shares are listed on the Australian stock exchanges. Brinds is a finance company which was associated with Offshore for a number of years, the Brinds group of companies having
[45] a substantial holding of shares in Offshore.

Mr. Boris Ganke was the Chairman, Chief Executive and principal shareholder of Brinds. He was also the Chairman and Chief Executive of Offshore until an event hereafter related. Although Brinds was incorporated in the State of Victoria, its head office was in Sydney, New South Wales, in premises next door to and communicating internally with the head office of Offshore. Brinds rendered management services to Offshore, and Offshore's books were kept on the premises of Brinds. The close association between the two companies had led Mr. Ganke to place with Brinds a substantial amount of money belonging to Offshore which he considered to be in excess of Offshore's requirements. At the beginning of 1982 and for some time prior thereto Brinds and other members of the group were heavily indebted to FAI Insurances Limited ("FAI") and companies associated with it. These loans were secured on shares in Offshore held by the Brinds group, a proportion of which were only partly paid. In March 1982 Offshore (at that time still managed by Mr. Ganke) called up the amount unpaid on its shares. The call amounted to some $1.7M in respect of the Offshore shares belonging to the Brinds group which were held as security by the FAI group. FAI paid the call, and as a result Brinds and its subsidiaries became indebted to the FAI group in an aggregate sum of about $4,370,000. The FAI group, of which Mr. L.J. Adler was the Chief Executive, demanded repayment of this amount by the end of June. This was beyond the resources of the Brinds group, and as an alternative FAI accepted the transfer of a 20% shareholding in Offshore in part satisfaction of the debt. The effect of this transfer was that the Brinds group lost effective control of Offshore and Mr. Adler became Chairman and Chief Executive of Offshore in the place of Mr. Ganke.

By the end of June 1982 the total indebtedness of Brinds to Offshore stood at about $3.4M representing Offshore's money which Mr. Ganke had caused or permitted to be placed with Brinds. This large indebtedness was unsecured. On 27th August Offshore, then managed by Mr. Adler, demanded repayment. Brinds' response was to assert that the money was not due on demand but only on twelve months' notice. This view was not accepted by Offshore, and on 7th September Offshore served a statutory notice demanding repayment within three weeks under section 364 of the Companies Code (Victoria) 1981.

Shortly thereafter Mr. Adler and Mr. Ganke and their respective companies became involved in litigation which came before His Honour Mr. Justice Sheppard. It mainly concerned the composition of the Offshore board. The learned judge proposed as a temporary expedient that an independent Chairman of Offshore should be appointed. This suggestion appealed to the parties. In the result Mr.

Macintosh, a member of the Sydney branch of Messrs. Peat, Marwick, Mitchell & Co., Chartered Accountants, was appointed Chairman and Chief Executive of Offshore in October 1982.

Among the problems which faced Mr. Macintosh after his assumption of office was what to do about the large indebtedness of Brinds to Offshore. Mr. Macintosh, as the trial judge found, persuaded Mr. Adler to afford Mr. Ganke time to get his house in order by entering into a Moratorium Agreement.

The Moratorium Agreement was dated 25th November 1982. The parties included Offshore and other creditors of the Brinds group, Brinds and associated companies, Mr. Ganke and Mr. Macintosh. It is a long and intricate document of some thirty pages. It is sufficient for present purposes to outline its effect. The Agreement recited that the creditors had agreed to give time to the debtors; also that a purpose of the Agreement was to settle various disputes between the parties. The period of the moratorium was to be just over twelve months, expiring 30th November 1983. During this period the debtors were placed under an obligation to reduce their indebtedness progessively. They were to appoint Mr. Macintosh "examining accountant" to go into their affairs, and to monitor on behalf of the creditors the due and punctual performance by the debtors of their obligations under the Agreement. By clause 10 each of the debtors acknowledged the state of its indebtedness. So far as Brinds and Offshore were concerned, Brinds admitted that it was indebted to Offshore in the sum of $3,513,236 "unconditionally repayable by such creditor [clearly a mistake for 'debtor'] on demand". Each of the creditors agreed not to demand repayment of its debt during the moratorium period. By clause 22 it was provided that if Mr. Macintosh should give his opinion that any debtor was not fulfilling its obligations under the Agreement, or that certain other unsatisfactory circumstances existed, any creditor should be entitled within seven days to give notice terminating the moratorium.

On 10th February 1983, after warnings by Mr. Macintosh to Mr. Ganke, Mr. Macintosh gave the opinion for which clause 22 of the Moratorium Agreement made provision. As a result, a creditor had seven days within which to give notice to terminate the Agreement. On 16th February Offshore gave such a notice. On the following day it presented a petition for the winding up of Brinds. A provisional liquidator was appointed *ex parte* with liberty for Brinds to apply to discharge the appointment on forty-eight hours' notice.

The petition asserted that Brinds was indebted to Offshore in the sum of $3,513,236 which was stated to be then due and owing. It will be recalled that Offshore had served a statutory demand in the preceding September for the repayment of the then current debt. The petition also alleged that in October statutory demands had been served by two other creditors, Messrs. Jackson Graham Moore and Partners ("Jacksons"), who were stockbrokers, in the sum of $1,426,000 odd, and by Martin Corporation Limited ("Martin") in the sum of $446,000 odd, and that such debts were unpaid.

The statutory affidavit in support of the petition was sworn by Mr. Wilshire, the Secretary of Offshore. Substantive affidavits were sworn at the same time by Mr. Wilshire, Mr. Macintosh, Mr. Fear, who was a Manager in Peat Marwick and was assisting Mr. Macintosh, and Mr. Atkinson, a Director of Offshore. They were the principal witnesses cross-examined by counsel for Brinds. Mr. Adler swore no affidavit, and therefore was not cross-examined.

At the hearing of the petition there were three supporting creditors, Jacksons, Martin and a company called Mercantile Mutual Life Insurance Co. Limited. The last of these creditors seems to have withdrawn its support shortly before the case reached the Full Court. There were five opposing creditors, all being companies associated with Brinds and having Mr. Ganke as Chairman. Mr. Ganke himself also appeared to oppose a winding up order, presumably in his capacity as a shareholder of Brinds.

Brinds raised six grounds of opposition to a winding up order:-

(1) that the debt to Offshore was disputed as a debt due on demand; it was not in dispute that the debt was prospectively payable;

(2) that the moratorium had not been duly terminated because, in effect, Mr. Macintosh's opinion was wrongly given;

(3) that as a matter of the construction of the Moratorium Agreement, because the moratorium had ended Offshore was not entitled to rely on the acknowledgement therein contained that the debt was due on demand;

(4) that it was not shown that Brinds was unable to pay its debts;

(5) that the non-payment of the company's debts was attributable to the wrongful conduct of the creditors and of Mr. Macintosh;

(6) that in the circumstances the court should exercise its discretion not to make a winding up order.

The hearing lasted for some four weeks, with extensive cross-examination. The cross-examination of Offshore's witnesses was intended to demonstrate that Mr. Adler had tried to depress the market price of the Offshore shares so as to embarrass Brinds financially and force it into liquidation, with the object of his ultimately being able to obtain a large parcel of shares in Offshore held by Brinds which would need to be realised in the course of the liquidation; and that Mr. Macintosh had acted as the tool of Mr. Adler.

Mr. Macintosh was cross-examined over a period of four days. He was charged, in the words of the trial judge, with professional incompetence, absence of commercial judgment, want of good faith, duplicity and deception, calculated unfairness and designed lack of independence. He was completely exonerated by the judge, who stated that he had no hesitation in preferring the evidence of Mr. Macintosh to that of Mr. Ganke.

During the course of the learned judge's examination of the origins and status of Brinds' debt to Offshore prior to the Moratorium Agreement, the judge made certain observations about Mr. Ganke which counsel for the appellants submitted to their Lordships were highly damaging to his business reputation; for example, that the mode by which large amounts of money were moved from Offshore to Brinds over a period of years was justly to be described as exceedingly irregular; that the remuneration paid by Offshore to Brinds was a "so called management fee"; that Brinds was using Offshore's money in order to finance the operations of the Brinds group; that money was "abstracted" from Offshore by Brinds; that it was not disclosed to Offshore's shareholders that large unsecured advances, on terms virtually alterable at the whim of Mr. Ganke, were being made by Offshore, of which Mr. Ganke was Chairman, to a company in which Mr. Ganke held a large interest; and that there was much to be said for the view that no consensus was reached between creditor and debtor and that the money was recoverable as money had and received to the use of Offshore. The learned judge then stated that, had it been necessary to form a conclusion, he would have been disposed to find that there was no *bona fide* dispute on substantial grounds that the debt to Offshore was repayable on demand. It was not however necessary to make a finding, because the alleged dispute was set at rest by the terms of the Moratorium Agreement, wherein Brinds acknowledged that the debt was due on demand.

The learned judge held that the opinion of Mr. Macintosh had been properly given under the Moratorium Agreement, and that the moratorium was properly terminated; that there was telling and ample evidence that Brinds was unable to pay its debts; and he rejected the claim that the inability of Brinds to repay its debts was attributable to the conduct of its creditors and of Mr. Macintosh. He held that there was incontestable evidence that the debts due to Jacksons and to Martin, the existence of which was not in dispute, were then payable. He rejected a submission that these two creditors had in some way waived compliance with the statutory notices because of an alleged "association" with the Moratorium Agreement (to which they were not parties) and because of their forbearance in not presenting their own petitions. By necessary implication the judge accepted that the petition was presented in good faith, and that there were no discretionary grounds for refusing a winding up order.

Accordingly, on 5th May 1983, the learned judge ordered that Brinds be wound up by the court. The question of costs was reserved for later argument. On the same day the learned judge formally dismissed an appeal against the order appointing a provisional liquidator. On 22nd August the judge dealt with the question of costs by directing that the costs of Offshore and of the supporting creditors, but only one-half of the costs of the company, should be paid out of the assets of the company.

Brinds, the opposing creditors and Mr. Ganke appealed. In their notice of appeal they sought leave to adduce further evidence arising out of proceedings to wind up another company associated with Mr. Ganke, on the petition of Fire and All Risks Insurances Limited, a company controlled by Mr. Adler. The evidence was said to be required for two purposes. First to support the contention that the petition was not presented for the legitimate purpose of recovering monies due to Offshore but for a subsidiary and malicious purpose. Secondly, to show that it was a common practice, in companies controlled by Mr. Ganke, for inter-company advances to be made informally on the basis that they were repayable on twelve months' notice. Leave was refused. On the first point, the evidence was not relevant and probative. On the second point, the decision of the trial judge was not based on the proposition that the indebtedness was in its inception repayable on demand, but on the proposition that Brinds' debt to Offshore became payable on demand as a result of the acknowledgment contained in Moratorium Agreement. The status of the debt before the Agreement was therefore, as the judge recognised, strictly irrelevant having regard to his construction of the terms of the Agreement. Their Lordships agree with the decision of the Full Court on this aspect.

It appears that the principal grounds pressed before the Full Court were, first, that the judge should have found that the right of Offshore to be repaid on demand was *bona fide* disputed by Brinds on substantial grounds, and secondly that the judge misdirected himself in that he purported to determine the dispute, for which the appellants were not prepared and to which their evidence was not directed, instead of confining himself to the question of good faith and substance.

Counsel for the appellants conceded before the Full Court that no attack could be made upon the trial judge's findings as to the credit of Mr. Macintosh and Mr. Ganke; nor with respect to his findings concerning the motivation of Mr. Macintosh. This concession, which was inevitable, virtually disposed of any argument before the Full Court that the petitioning creditors were not acting *bona fide* in bringing the petition but were actuated by ulterior and collateral motives; and also of any argument that the moratorium was wrongly terminated.

With regard to the first point there was some discussion before the Full Court as to the manner in which the case had proceeded before the Supreme Court, there having been a change of counsel for the appellants. It was however finally agreed that it was not until after the evidence was closed that counsel for the appellants submitted that the hearing ought to be confined to the genuineness of the dispute and the petition dismissed on that basis alone.

Counsel for the appellants alleged before the Full Court and before their Lordships that, upon a hearing which ought to have been confined to the existence of a genuine dispute, it was not necessary for the appellants to be equipped with all available evidence bearing on the question of the repayment date of the debt. But the Full Court observed that counsel could point to no evidence or potential evidence which Brinds might have been able to tender upon the trial of an action for debt which was not in fact tendered on the hearing of the petition, nor any point at which the cross-examination of Offshore's witnesses might have gone further. "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".

It is a matter for the discretion of the judge whether a winding up order should be made on a disputed debt, and it is also a matter of discretion whether he decides the substantive question of debt or no debt. Their Lordships agree with the observations of Gibbs J. in *Re Q.B.S. Pty. Ltd.* (1967) Qd. R. 218, at page 225:-

> "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 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."

The same line of reasoning was adopted by this Board in an appeal from New Zealand, *Bateman Television Ltd v. Coleridge Finance Co. Ltd.* [1971] NZLR. 929 at page 932:-

> "... 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 the instant case, having regard to the nature of the dispute and the course which the proceedings took, it was almost inevitable that the trial judge should determine the question whether the debt was repayable on demand or only on twelve months' notice. As the Full Court observed, "the question whether the debt was due and payable was ... inextricably interwoven with the questions of the motives and purposes of Adler, and in turn, with the bona fides of Macintosh ... 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". This conclusion, with which their Lordships are in entire agreement, answers the two main points upon which the appeal proceeded before the Full Court.

The Full Court then turned to the construction of the Moratorium Agreement. Put shortly, the submission of the appellants was that under the terms of the Agreement the acknowledgment that the debt to Offshore was repayable on demand did not survive the term of the moratorium, so that when the moratorium ended the nature of the indebtedness of Offshore reverted to its state prior to the agreement, unaffected by the express acknowledgment contained therein. The debt therefore reverted, it was said, to its prior position as a debt payable on twelve months' notice. This submission is, as a matter of construction of the Agreement, totally unsustainable, as the trial judge and the Full Court held, and it is not necessary to make any further reference to it.

At this stage in their judgment the Full Court made the following observation:-

> " 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, as the trial judge had proceeded to determine the dispute in favour of Offshore, upon grounds with which the Full Court agreed, the appeal was dismissed.

Their Lordships turn to the submissions made on behalf of the appellants to the Board. These were wide-ranging. Counsel again insisted that the trial judge should have confined himself to the question whether there existed a genuine dispute as to the time for repayment of the debt to Offshore, and ought not to have embarked upon a substantive determination of that dispute. Their Lordships consider that the judge properly exercised his discretion. They agree with the reasoning of the Full Court and have nothing to add.

The appellants then sought to re-open (1) the findings of the trial judge with respect to the termination of the moratorium, (2) his findings with respect to the motivation for the petition, and (3) his findings as to the relative credit of Mr. Ganke and Mr. Macintosh. All such findings, it was claimed, were invalidated as a result of the unjustified adverse comments made by the trial judge

about Mr. Ganke in relation to the loans by Offshore to Brinds and related matters, which were unfair to him since these matters were not in issue and the charges made against him had never been defined. Counsel relied on the decision of *Mahon v. Air New Zealand Ltd.* [1984] A.C. 808, and in particular on a passage at page 821 where it was said that, in circumstances such as existed in that case, a person who might be adversely affected by a decision to make a particular finding should not be left in the dark as to the risk of the finding being made, and thus deprived of an opportunity to adduce evidence which, had it been placed before the decision maker, might have deterred him from making the finding.

The decision in the *Mahon* case has nothing whatever to do with the instant appeal. The *Mahon* case was concerned with the proper exercise of an investigatory jurisdiction, not with the conduct of litigation between adversaries. Counsel for Brinds, acting no doubt on the instructions of Mr. Ganke, had launched a fierce attack on the integrity of Mr. Macintosh, which the trial judge described as a "wide and searching, and, at times, vigorous and thoroughly challenging and attacking cross-examination ... 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". It can hardly be a matter of surprise or complaint if such an attack, if unsuccessful, is followed by the judge's frank appraisal of what he finds on the other side of the coin. But quite apart from what the trial judge clearly regarded as provocative behaviour inspired by Mr. Ganke, or at any rate behaviour from which he did not seek to dissociate himself, their Lordships see nothing unfair about the judge's observations on the business methods of Mr. Ganke. It is unthinkable that the appellants should be allowed to make use of such comments as an excuse to get round the concurrent findings of fact of the trial judge and the Full Court, or as an excuse to resile from the concession made by counsel to the Full Court in regard to the credibility and integrity of Mr. Macintosh, and as to the credit of Mr. Ganke.

Once the point is reached that the trial judge was entitled to decide the substantive point whether the debt was repayable on demand, that the *bona fides* of the petition could not be impeached, that the construction of the Moratorium Agreement in relation to the acknowledgment of the debt was clear beyond doubt, that the *bona fides* of Mr. Macintosh was unassailable, and that the termination of the moratorium could not be attacked, and at the same time there exist concurrent findings of fact that the company was unable to pay its debts, the dismissal of this appeal becomes inevitable. In fact there is an

even shorter answer to most of the points which have arisen. Under section 363(1)(b) of the Companies Code (Victoria) 1981, as under the corresponding English statute, a prospective creditor has status to present a winding up petition. It is not and never has been in dispute that Offshore is a prospective creditor. Therefore Offshore had, on any basis, a *locus standi* to present the petition. Jacksons and Martin are also indisputable creditors. There is not and never has been any viable challenge to their right to demand immediate repayment. They have each served a statutory demand. Such demands have not been complied with. Therefore, under section 364(2)(a) of the Code, the law deems that Brinds is unable to pay its debts. In the result a creditor, who on the findings of the court below is inevitably to be treated as acting *bona fide*, with an undisputed right to do so presented a petition for the winding up of a company which is deemed by law to be unable to pay its debts.

There is little more to be said. Counsel for the appellants sought to place some reliance on the fact that there were five opposing creditors whose views ought to be taken into account. They were indeed taken into account by the trial judge. He refers to the fact that they were all associated in one way or another with Brinds. Mr. Ganke was Chairman of each of such companies. Two of the companies were subsidiaries of Brinds. The trial judge exercised his discretion rightly when he discounted their opposition.

The appellants sought to argue that Brinds should have been given its full costs of the hearing of the petition, instead of only one half. There was some discussion whether the company was procedurally entitled to appeal against that order which the Full Court declined to review. However that may be, their Lordships see no reason whatever for interfering with the manner in which the trial judge exercised his discretion.

Their Lordships will humbly advise Her Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the respondents before the Board.