IN THE FIJI COURT OF APPEAL

Appellate Jurisdiction

Civil Appeal No. 29 of 1984

Between:

OFFSHORE OIL N.L. Appellant

- and -

INVESTMENT CORPORATION OF FIJI LIMITED Respondent

P.G. Hely Q.C., P.M. Jacobsen (of the New South Wales bar) and R. Patel for the Appellant
P. Young Q.C., W.G. Hodgekiss (of the New South Wales bar) and M.D. Benefield for the Respondent

Date of Hearing : 21st July, 1984
Date of Judgment : 25th July, 1984

JUDGMENT OF THE COURT

Barker, J.A.

The proceedings in the Supreme Court on which this appeal is based represent the Fiji sector of a forensic battle waged largely in Australia: on the one side are interests controlled by the appellant and its representative, a Mr. Adler and on the other those of the respondent controlled by a Mr. Ganke. Litigation between the two factions abounds in various Australian jurisdictions: appeals are currently pending in both the High Court of Australia and the Judicial Committee of Privy Council. The fact that the respondent happens to

be registered in Fiji necessitates litigation in this country over the appellant's desire to wind-up the respondent.

Although much evidence, resulting in difficult factual findings, has been necessary elsewhere - notably before the Supreme Court of Victoria - the essential facts for this present appeal are uncontested and can be stated relatively simply.

It will be convenient to refer to the appellant as "Offshore" and to the respondent as "ICF".

On 25th November, 1980, the Reserve Bank of Australia gave Offshore authority to remit $F437.500 out of Australia to ICF as an unsecured loan for three years with interest at Fiji bank overdraft rates. On the 14th January, 1981, authority was given on similar terms for a further loan of $F317.500. On 31st May, 1982, Offshore allegedly wrote to ICF the following letter :

"31st May 1982

The Secretary
Investment Corporation of
Fiji Limited
82 Elizabeth Street
Sydney NSW 2000

Dear Sir

This is to confirm that the shareholder's loans advanced to your company from time to time are repayable on notice of not less than two years, at a variable interest rate related to the Fiji bank overdraft rate.

Interest will be allowed to accrue for the first three years and thereafter will be payable half-yearly in arrears or as may be otherwise agreed.

Yours sincerely

Offshore Oil N L "

Mr. Hely advised that, if the point ever became material, it would be disputed that this letter was written by Offshore: however, he acknowledged that, for the purposes of these proceedings, the letter demonstrated an arguable case for holding that there was an agreement between the parties on the terms contained in that letter as at the date of the letter i.e. prior to the execution of the moratorium deed to which we shall refer later.

Minutes of a directors meeting of ICF, held on 21st June, 1982, referred to a "shareholders advance", repayable on notice of not less than two years with interest at the Fiji bank overdraft rate (Offshore was a shareholder in ICF). Another such meeting on 10th September, 1982, referred to this kind of loan being "longterm". Further letters were produced - from Offshore dated 27th August, 1982 alleging that the ICF loan was on call; from ICF, dated 31st August, 1982, alleging that the advance was for three years; from Offshore dated 31st August, 1982, again asserting a loan on call and stating that demand had been made on 27th August, 1982: finally, a letter dated 3rd September, 1982 from ICF again asserting a three year loan and referring to the terms of the Reserve Bank approval.

On the 25th November, 1982, there came to be executed a document which we shall call the "moratorium

deed". The parties to that deed were Offshore and other creditors of ICF and associated companies in one group, ICF and other companies (including Brinds Ltd.) controlled by Mr. Ganke, in another group, three individuals associated with ICF, including Mr. Ganke in another group and Mr. A.R.M. Mackintosh, a chartered accountant. The deed is a lengthy one: it has all the hallmarks of having been drafted by a committee, as counsel informed us was the situation. The deed was described by Needham, J., in the Supreme Court of New South Wales, as having been drafted without "conspicuous clarity". With this observation, we are in respectful agreement.

We agree with Mr. Hely that, in summary, the moratorium deed achieved: (a) settlement of the terms and conditions under which certain debts were acknowledged and were to be paid; (b) a moratorium of 12 months against actions by creditors against the debtors; (c) certain restrictions on and requirements for the running of the business of debtor companies and (d) the appointment of Mr. Mackintosh as an examining accountant.

Most of the provisions of the deed need not be reproduced in this judgment. However the following parts must be recorded :

"Recital A. The parties of the sixth to eighth, tenth and twelfth to fifteenth parts (inclusive) hereto are indebted to Offshore or Aureole (a wholly owned subsidiary of Offshore) in the amounts set out opposite the names of such parties in the First Schedule hereto. Offshore has issued notices pursuant to Section 364 of the Companies (New South Wales) Code (or a corresponding statute) and disputes have arisen between the Debtors, Offshore and Aureole about the terms and other conditions of the indebtedness.

Recital E. Each of the Debtors has requested the Creditors to whom it is indebted to extend to it certain indulgences and the Creditors have agreed to grant such indulgences on the terms and conditions including the covenants on the part of all the Debtors as well as Ganke, Tosio and Kippist hereinafter set forth.

Recital F. Offshore, Aureole, Metropolitan, FAI and FAR have at the request of the Debtors and in consideration of the Debtors covenants as well as those of Ganke, Tosio and Kippist hereinafter contained agreed to enter into this Deed and settle various disputes and litigation to which they and certain of the Debtors and such persons are parties.

Clause 1. From the date of this Deed and until and including November 30, 1983 or until terminated in accordance with the provisions hereof, whichever shall first occur (hereinafter called the "Moratorium"):

A. Each of the Debtors shall and it hereby separately covenants with each Creditor to whom it is indebted as set forth in the First and Second Schedule hereto:

.....

Clause 10.1 Each of the Debtors acknowledges :

(i) to each of Offshore and Aureole that it is indebted in the amounts set out opposite its name in the First Schedule to the party therein specified and that such indebtedness is unconditionally repayable by such Creditor on demand and shall bear interest at the rate of 16% per annum from the 30th November, 1982 except in the case of the indebtedness of each of Acron, Fiji and Nadi Bay which we shall bear interest at the rate referred to in the mortgage documents contemplated by Clause 20."

Counsel agree that clause "20" referred to above should read "19" and that the word "creditor" should read "debtor".

In the First Schedule, the amount owing by ICF to Offshore as at 30th November, 1982, is stated at $A871.927. Clause 10.2 states that, during the Moratorium no creditor should demand repayment of the debts, details of which were set forth in the Schedule. Other provisions of the deed detailed specific proceedings in various Australian Courts which were to be discontinued.

Clause 20 states :

"20. 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 deed 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 this 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.

Without limiting the generality of the foregoing each of Chapmans and Alexanders Securities agrees with and acknowledges to FAR that FAR may hereafter while such Debtor remains in default to FAR exercise all its rights powers and authorities conferred by the respective deed pursuant to which the Securities were mortgaged in favour of FAR."

Clause 29 listed the events on the happening of any one of which the Moratorium would be terminated.

Clause 30 is important and reads :

"30. 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 enure to the benefit of each party hereto and its successors."

Clause 10.1 (cit.supra) alters the interest rate for the indebtedness of, inter alia, ICF from whatever it had been previously to the interest rate referred to in the mortgage documents contemplated by clause 19. Reference to that clause gives a reference to the Fourth Schedule which provides that the interest rate is to be the maximum permitted by the Fiji Moneylenders' Act but with a ceiling of 14% per annum. Interest is to be paid "without compounding" before 31st December, 1985. It will be seen that this interest rate is different from that contained in the previously quoted correspondence which referred to the Fiji bank overdraft rate.

On the 16th February, 1983, notice of termination of the moratorium was given to the Ganke interests: this was followed on the 1st March, 1983, by a demand from Offshore addressed to ICF, at its office in Sydney, demanding immediate repayment of the amount of $A871.927.

On the 3rd October, 1983, a demand was made in Fiji at ICF's registered office in terms of what is now section 221(a) of the Fiji Companies Act 1983 - requiring payment of the sum of $A871.927: the notice was in standard form: it threatened winding-up proceedings if the sum were not paid within 21 days.

ICF thereupon sought an interim injunction in the Supreme Court to restrain the issue of a winding-up petition based on the notice; this was granted by Kermode, J. on the 20th October, 1983.

On the 24th February, 1984, ICF sought a further extension of the injunction which was opposed by Offshore; the learned Judge heard full argument on whether Offshore should be restrained permanently from presenting a winding-up petition based on the notice. Counsel agreed before Kermode, J. that the application be treated as one for permanent injunction.

On the 6th April, 1984, Kermode, J. delivered a reserved judgment which he found in favour of ICF and made the following order.

> "It is ordered that the defendant company by itself or by its servants or agents or otherwise whatsoever is hereby restrained from presenting a petition for the winding up of the plaintiff company based upon its alleged failure to comply with the notice dated the 3rd day of October, 1983, or any notice given hereafter by it to the plaintiff company pursuant to section 221(a) of the Companies Act demanding payment of the alleged debt of A$871.927 until such debt becomes due and owing or is held by the Court in any action hereafter brought by the defendant company against the plaintiff company to be due and owing by the plaintiff to the defendant but this order shall not extend to or be deemed to restrain the company from pursuing action through the Court to wind up the plaintiff company on any other grounds provided in section 220 of the Companies Act."

Offshore now appeals to this Court against that judgment.

The learned Judge held that clause 20, and the correspondence between the parties prior to the Moratorium Deed, indicated that ICF had a right to notice of demand of not less than two years and that this agreement was unaffected by Moratorium Deed because of the provisions of clause 20. He stated :

> "The portion of Section 20 which has been earlier quoted is in express and specific terms and the intention is clear. Except for the moratorium period it was not intended by the Deed to affect or alter the rights of any party which were subsisting at the time that Deed was entered into.
>
> There would appear to be a conflict between Clauses 10.1 and 20 unless Clause 10.1 can be interpreted in such a way as to resolve that conflict."

Mr. Hely for Offshore submitted that, prior to the moratorium deed, there was a dispute between the parties as to the terms and conditions on ICF's indebtedness to Offshore. He submitted that reference in recital F of the deed was made to certain disputes between the parties: the clear intention of the moratorium deed was to settle the dispute between Offshore and ICF as well as other disputes on the basis of an acknowledgment from ICF as to quantum and a further acknowledgment that, subject to the moratorium, the debt would be unconditionally payable on demand.

Mr. Young for the respondent submitted that the clear intention of the clause 20 was to preserve prior agreements such as that evidenced by Offshore's letter of 31st May, 1982: if there was a clear conflict between the two provisions of the agreement, clauses 10.1 and 20, he

submitted that the latter had to prevail. We have no doubt, looking at the deed as a whole and at the pre-deed correspondence as a whole, that the intention of the parties was clear. We accept for present purposes that there was a real dispute as to the terms and conditions of the repayment of ICF's loan to Offshore prior to the making of the deed - ICF maintaining that there was a three year loan payable on two years notice - Offshore claiming a loan repayable on demand. The provisions of the Deed quantified the amount of the indebtedness and stated that it was to be repayable on demand except during the moratorium.

We here note that no point was taken of the fact that Offshore's notice was issued in Fiji before the expiry date of the moratorium deed but after the deed had been determined other than through effluxion of time in circumstances held appropriate by the New South Wales Court of Appeal.

Mr. Young submitted that, the deed, having referred in recital F to 'disputes and litigation' applied only to those items of litigation specifically mentioned in the deed or to those instances where notices under section 364 of the New South Wales Companies Act had been issued (i.e. notices similar to those under section 221(a) of the comparable Fiji Act). We reject this submission. The word 'disputes' clearly encompasses the dispute between these parties which was evidenced by the pre-deed letters. What we consider as fatal to this submission is the express reference to ICF in the deed whereby the interest rate for its loan from Offshore is changed from the current Fiji overdraft rate to the current maximum under the Fiji Moneylenders' Act with a ceiling of 14% per annum.

In our view, the parties clearly turned their mind to this particular debt and to its terms of repayment. Indeed we see no reason, if this debt were to be repayable only upon two years' notice, why it should have been included in the moratorium deed at all. The moratorium was to have lasted for only one year and would have expired long before any notice demanding payment in two years' time.

Kermode, J. declined to interpret the deed in the same way as the Full Court of the Supreme Court of Victoria in winding-up proceedings brought by Offshore against another company controlled by Mr. Ganke (i.e. Brinds Ltd.).

In Brinds Limited & Others v. Offshore Oil N.L. & Others, the judgment of Starke, Murrary and Southwell J.J. was delivered on 16th December, 1983. The Full Court upheld a winding-up order made by Tadgell J. in the Supreme Court of Victoria on the 5th May, 1983. That learned Judge had heard extensive evidence and had interpreted the moratorium deed in a manner favourable to Offshore. In that case, there was no antecedent agreement, such as the letter relied upon by ICF in these proceedings. The Full Court stated, on the question of the interpretation of clause 20 :

> "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."

For the sake of completeness; we record the finding of Tadgell, J. in the Court below :

"The second principal basis for opposition to the petition, to which I have referred, involves the interpretation of clause 20 of the deed. The 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'.

It was argued on behalf of the petitioning creditor that clause 30 of the deed, which provides that clauses 10 and 20, among others, 'shall survive the termination of this deed and shall be binding upon and ensure to the benefit of each party hereto', is an answer to the company's contention. For myself, I cannot understand why that should be thought to throw light on the meaning in clause 20 of the word 'claim'. Even so, I am of opinion 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 to another 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. It is for that reason that I thought it unnecessary to pursue more than I did the original arrangements, if any, which were made between the parties as to repayment."

Kermode, J. had this to say on the Victorian Full Court decision :

"Clause 10.1 cannot be interpreted in my view as it appears to have been done by the full Court of the Supreme Court of Victoria in Action 1983 No. Co. 13015 (not reported) Brinds Ltd. & Ors. v. Offshore Oil N.C. & Ors. This was an appeal from a winding up order affecting Brinds Ltd. The Court considered Clause 10 of the Moratorium Deed and stated "by virtue of Clause 10 of the Moratorium Deed the debts of Brinds and by the other respondents were acknowledged to be due and presently payable." With respect to the views of the learned Judges of that Court I cannot agree that there is such an acknowledgment in Clause 10."

Mr. Hely pointed out that, at various stages of the overall litigation, Mr. Ganke had sought to interpret the deed as having the same meaning as that now submitted by Offshore; in an affidavit filed in the High Court of Australia dated 2nd September, 1983, his solicitor stated that he had been informed by Mr. Ganke of the consequences of the alleged premature termination of the deed: viz. "by virtue of clause 10.1 of the said deed certain debts terms and payment of which were in dispute and acknowledged to be unconditionally repayable on demand".

In the judgment of the Court of Appeal of New South Wales dated 19th July, 1983, there is a reference to a submission made on behalf of Mr. Ganke's interests in other litigation i.e. that there was a penalty in the deed, namely, that upon its termination, the debts unconditionally

payable in full survive.

In our respectful view, the Victorian Full Court was correct in its approach. Mr. Young submitted that the first part of the clause 20 assisted ICF whereas it had been argued before Kermode, J. that the second part assisted ICF.

We cannot agree with the learned Judge that an agreement to give two years notice of repayment was not a condition. In our view, the clause 20 is a general provision which in the case of ambiguity must give way to a particular provision regarding this particular loan to which the parties clearly turned their attention when they varied the interest rate.

The interpretation we have placed on it as Deed (which happens to accord with that of the Victorian Court) gives commercial sense to the deed. It is unlikely in the extreme that the parties would have entered into this deed which had, as one of its aims, the resolution of many disputes and the avoidance of litigation, unless the liability of ICF and other debtors were to become fixed and certain and unless all impediments for suing were removed, save only for the moratorium deed.

Mr. Hely also submitted that Kermode, J. was wrong in the following paragraph in his judgment :

> "It is my belief that whoever framed the clause believed that all debts were immediately due and payable. The defendant company on 27th August, 1982, a few months before the Moratorium Deed was executed believed the loan was 'repayable

> at call' (vide letter of that date annexed to Mr. Tosio's affidavit MAT 8) and presumably its lawyers were so advised."

We agree with counsel there was no evidence as to what was the state of knowledge of the draftsmen of the deed. However, in our view, their belief was immaterial: the clear intention of the deed was to replace prior arrangements. Moreover, it would have been quite pointless to have included in the deed a debt in respect of which the moratorium would have had no meaning.

Mr. Young submitted, rather faintly, that the learned Judge was right in the exercise of his discretion to have declined to deal with a winding-up petition based on a defended debt: the effect of his decision, according to counsel, required the parties to litigate ICF's indebtedness to Offshore in a Court of competent jurisdiction - probably in New South Wales.

There was no suggestion in Kermode J.'s judgment that he expressly turned his mind to the exercise of such a discretion, although we are informed by Mr. Young (who did not appear in the Court below) that certain submissions were made to him in this regard.

The law is clear that there is a discretion on a Court seized of a winding-up petition, to decline to hear the petition where the debt is contested on substantial grounds. In the context of the broader litigation between these parties, Tadgell, J. in Victoria exercised his discretion to hear a petition: he had to endure a very lengthy hearing: he was upheld by the full Court.

Well-known cases such as Re Q.B.S. Pty. Ltd. (1967) Qd.R. 218, 225: Bateman Television Ltd. (in liquidation) v. Coleridge Finance Co. Ltd. (1969) NZLR 794, 810, 817 (Court of Appeal) and (1971) NZLR 929, 932 (Privy Council) deal with the exercise of a discretion to proceed or not at the hearing of a winding-up petition.

We do not know of any case where such a discretion becomes exercisable on a motion to restrain the filing or prosecution of a petition, although we conceive that the likelihood of genuine factual contest on the existence of a debt could be material; however, the Judge would need to have evidence that the grounds of contesting the debt were substantial. Kermode, J. was not given any such evidence in this case: he had only the correspondence, the moratorium deed and particulars of various aspects of the litigation in Australia. So far as he was aware, the only ground upon which sensibly, the debt would be contested on a winding-up petition was an interpretation of the Deed which resurrected a requirement for two years' notice of demand.

The interpretation of the deed is not a matter which required evidence: indeed such evidence would be inadmissible under the parol evidence rule.

In our view, the question of the exercise of the discretion to hear a winding-up petition simply did not arise before Kermode, J. For the sake of further guidance for the Supreme Court, we think that this is likely to be one of those cases where it would be difficult not to entertain a winding-up petition: now that the deed has been interpreted in favour of Offshore, we think that the issues are even simpler than those before Kermode, J.

It follows therefore that the appeal must be allowed and the injunction dissolved.

Mr. Hely claimed that demand had been made by Offshore of ICF by the notice given in Australia on 1st March, 1983. He acknowledged that a statutory notice must relate to a then existing debt and that, before there is an existing debt in this case, there must have been prior notice seeking payment on demand. There could be some difficulty in basing a winding-up petition on a statutory notice of demand which had not been preceded by a notice of demand made at the registered office of the company. The fact that the March 1983 demand was made at ICF's Sydney office and not at its registered Fiji office could cause difficulties. However, this is a matter to which Offshore's advisers will no doubt give attention.

Finally, we note that counsel agreed that the proper law of the moratorium deed was that of New South Wales: they were happy for this Court to interpret it without any evidence as to the law of New South Wales. This was sensible suggestion because it is highly unlikely that in this area of law there would be any difference between the approaches of the Courts in the two jurisdictions.

The appeal is allowed. Offshore is entitled to costs both in this Court and in the Court below. The injunction made by the Supreme Court is dissolved.

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Vice President

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Judge of Appeal

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Judge of Appeal