IN THE SUPREME COURT OF FIJI
Civil Jurisdiction
ACTION NO. 939 OF 1983.

Between:

INVESTMENT CORPORATION OF FIJI LTD. PLAINTIFF

- and -

OFFSHORE OIL N.L. DEFENDANT

Messrs. Gruzman Q.C. W.G. Hodgekiss and M.D. Benefield for the Plaintiff.

Messrs. P.G. Hely Q.C., H.K. Nagin and P.M. Jacobsen for the Defendant.

J U D G M E N T

The plaintiff commenced this action by writ of summons on the 20th October, 1983.

The Indorsement of Claim on the writ is as follows:

> "The Plaintiff seeks an Order restraining the Defendant by itself or by its servant or agents or otherwise howsoever from taking any action to present a Petition for the Winding Up of the Plaintiff and being particularly the Winding Up action threatened in its notice to the Plaintiff dated 3 October, 1983."

At the same time as the writ was filed the plaintiff sought by ex parte motion an order restraining the defendant from taking any action to present a Petition for the winding up of the plaintiff company and in particular the winding up action threatened in the defendant company's notice dated the 3rd October, 1983, purported to have been given under section 168 of the Companies Act Caput.216 (Now section 221 of the Companies Act 1983).

The notice of motion is defective in that it does not seek an interim injunction until the hearing and determination of this action. It seeks an order in identical terms to that stated in the Indorsement of Claim.

Notwithstanding that defect the application was treated as one for an interim injunction. An order granting an injunction until the 8th November, 1983, was granted. There were several further extensions of the injunction up to the 27th February, 1984.

On the 24th February, 1984, the plaintiff sought a further extension of the injunction which was opposed by the defendant company. Counsel for both parties fully argued the issue as to whether the defendant company should be restrained from presenting a petition for the winding up of the plaintiff company.

Before adjouring to consider the application I asked Mr. Gruzman whether the plaintiff intended to seek any other relief other than that referred to in the indorsement on the writ. No Statement of Claim has so far been filed.

On being informed by Mr. Gruzman that no further relief was being sought it was suggested to counsel that this application be treated as the trial of the action.

Counsel agreed to this suggestion.

A number of affidavits have been filed to which a number of documents have been annexed. The Court has also been furnished with copies of a number of judgments of Australian Courts in actions in which the plaintiff company and associated companies and the defendant and associated companies have been involved. Some of the judgments of Courts of first instance have been taken on appeal and in one case an appeal from an appellate court is being taken

on appeal to the Privy Council.

Some of the issues in this case are the same as issues which have been considered by some of those Australian Courts. They arose out of an agreement dated the 25th November, 1982, entered into by the plaintiff company and nine other companies in the deed referred to as "the debtors" or individually as "the debtor" and the defendant company and three other companies in the deed referred to as "the creditors" or individually as "the creditor". Four individuals were also parties to the deed but are not involved in the present action although one of them, Mr. Martin Tosio, has filed an affidavit in support of the plaintiff's action.

The said deed was referred to in some of those actions as the MORATORIUM Deed and it is convenient to so refer to it in this judgment.

The main issue in this present action is whether an unsecured debt of A$871,927 which is owing by the plaintiff to the defendant is presently due and owing.

The defendant company contends the debt is presently due and owing and that on the 3rd October, 1983, Messrs. Sherani & Co., solicitors for the defendant, gave the plaintiff notice pursuant to section 168 of the Companies Act to pay the said debt to them at their offices in Suva within twenty one days of service on the plaintiff of the notice. The plaintiff was informed in that letter that proceedings would be instituted to wind up the plaintiff company if the said debt was not paid as demanded.

The plaintiff contends that the debt is not presently due and payable. It relies on the contents of a letter dated 31st May, 1982, written by the defendant company to the secretary of the plaintiff company. A copy of this letter is annexed to Mr. Tosio's affidavit sworn

on the 27th January, 1984, marked MAT 5. It is in the following terms :

"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

- ks/953. 114."

That letter however is not the end of the matter. The defendant Company relies on the provisions of the Moratorium Deed in which each of the debtors (including the plaintiff) acknowledges in Clause 10.1 thereof that the indebtedness of each of them set out in the first schedule to the deed was "unconditionally repayable by such creditor on demand". "Creditor" underlined by me is clearly a mistake and should read "debtor". That is not the only mistake in that clause. There is a reference therein to Clause 20 which counsel admit should be Clause 19.

Disputes as to the interpretation of certain clauses in the Moratorium Deed, which I will refer to later, have arisen not only in the present action but also in most of the Australian actions.

This Court is not now concerned with one argument which gave rise to litigation in Australia and that is whether the Moratorium Deed was terminated in accordance with its

provisions before the date provided therein for termination - namely the 30th November, 1983.

The statutory notice given by Sherani & Co. is dated 3rd October, 1983, and was given before the date the Moratorium Deed would normally have been terminated by effluxion of time.

Needham J. in Action 1459 of 1983 between Acron Pacific Limited & Others v. Offshore Oil N.L. & Others (unreported) heard in the Equity Division of the Supreme Court of New South Wales held that the creditors were entitled to terminate the Moratorium Deed.

Notice dated the 16th February, 1983, was given by the defendant to the plaintiff terminating the Deed. This was followed by a notice dated 1st March, 1983, demanding immediate payment of the said sum of $871,927. That notice was not in the form used locally under section 168 of the Companies Act and presumably Messrs.Sherani & Co. were instructed to give the plaintiff the statutory twenty one days notice.

To determine whether the plaintiff is entitled to the relief claimed it is necessary to consider several clauses of the Moratorium Deed and one of the schedules thereto.

I set out hereunder five clauses of the Deed and the Fourth Schedule thereto :

"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 shall bear interest at the rate referred to in the mortgage documents contemplated by Clause 20.

10.2 With respect to each debt details of which are set forth in the First Schedule, the Creditor with respect to each debt covenants with the respective Debtor that during the Moratorium such Creditor shall not demand repayment of such debt.

.....

19. Within fourteen (14) days of delivery of mortgage documents Nadi Bay shall execute or cause to be executed by the appropriate party or registered proprietor as the case may be a mortgage in favour of Offshore and Aureole over the property referred to in the Fourth Schedule and on the terms and conditions set out therein and containing such other terms and conditions as the solicitors for Offshore shall require including a provision that the relevant mortgagor shall commence from the date of the mortgage and thereafter continue with due diligence to realise the land the subject of the mortgage. The mortgage shall secure all indebtedness of Nadi Bay and Acron Pacific to Aureole and Offshore respectively. Nadi Bay shall on the date of this Deed appoint the Examining Accountant to execute the mortgage documents on its behalf.

Clause 20, so far as relevant, provides :-

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 deeds to which it is a party..... 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.....

.....

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.

.....

THE FOURTH SCHEDULE

(1) Property:

Any freehold, leasehold or other land of other title or tenure whatsoever in Fiji which Nadi

Bay Beach Corporation Limited or Acron Pacific Limited or any corporation related to any of them may own or have any beneficial interest in whatsoever or on any account.

(2) Term: Principal sum to be repayable on 31 December, 1985.

(3) Interest Rate: The maximum rate permitted by the Fijian Money Lenders Act but in no event greater than 14% annum.

Interest to be paid (without compounding) on 31st December 1985. "

"Fiji" in the fourth last line of Clause 10.1 is the plaintiff company. The reference to Clause 20 in Clause 10.1 is an error and should read Clause 19.

Needham J. in the Supreme Court of New South Wales (Equity Decision) in Action 2419 of 1983 (not reported) between Offshore Oil N.L. as plaintiff and Acron Pacific Ltd. as defendant considered the foregoing clauses and schedule in an action where Offshore petitioned for the winding up of Acron Pacific. The debtor company contended that the sum claimed by the petitioning company was not then presently due.

That case was very similar to the present case but differs in one respect. Needham J. on his interpretation of the Deed held that Offshore, not having complied with its obligations under the Deed to deliver mortgage documents (Clause 19) could not proceed against Acron as if that obligation did not exist and the debt remained immediately payable.

Although the plaintiff company is referred to in Clause 10.1 it was not required to give security to the defendant company and the debt remains unsecured.

Mr. Gruzman, however, relies on Clause 20 and the correspondence annexed to Mr. Tosio's affidavit which indicates the loan was for a term of three years. Mr. Gruzman's

argument is that the plaintiff has a right to notice of not less than two years to repay and the notice already given demanding immediate payment is not an effective notice.

The letter (MAT 5) annexed to Mr. Tosio's affidavit purports to confirm the terms of the "shareholder's loans". The defendant company is a major shareholder in the plaintiff company. That letter clearly indicates that the loans are repayable on notice of not less than two years at a variable rate of interest related to the Fiji Bank overdraft rate.

There is no specific mention of the plaintiff company (Fiji) in the recitals in the Moratorium Deed but there is specific mention of Acron Pacific and Nadi Bay Companies in recital B which mentions that the indebtedness of those two companies is the subject of agreed security. The terms of that security are those set out in the fourth schedule.

Needham J. stated it was obvious that the Deed was drafted "without conspicuous clarity". I have found the Moratorium Deed a complex one and difficult to interpret.

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.

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.

Clause 10.1 states "such indebtedness is unconditionally repayable.....on demand". Until demand is made the debt is not "due and presently payable".

In the instant case the plaintiff's debt becomes due and payable on demand but there was in existence at the time the Deed was entered into an agreement which prevented the defendant from seeking immediate payment. The agreement was that two years prior notice had to be given requiring repayment.

Clause 20 operates in my view to preserve that right. In coming to that decision I had first to decide what the words "unconditionally repayable" meant. I asked myself the question "Is an agreement to give two years notice requiring repayment a condition?" I came to the conclusion it did not make repayment on demand a conditional repayment but operated to determine when demand could be made. Had clause 10.1 contained an admission that the indebtedness of each debtor was "presently due and unconditionally repayable on demand" the clause would be even more difficult to interpret.

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.

It follows that I am also of the view that the purported demand made on the 3rd October, 1983, pursuant to section 168 of the Companies Act seeking repayment of the principal sum of A$871,927 within twenty one days is not a valid notice. On the evidence before me the plaintiff is entitled to two years prior notice requiring repayment of the loans.

It appears to me that there could be a dispute also as to the amount which the plaintiff has to pay when repayment of the debt is demanded. As at the 30th June, 1982, there was allegedly the sum of A$159.088 interest owing on a principal sum of A$664,780. As at 30th November, 1982, the amount owing, presumably capital and accumulated interest amounted to A$871,927 on which sum according to the Deed interest is to be paid calculated at the maximum rate permitted by the Fiji Moneylenders Act. The letter acknowledging the terms of the loan refers to a variable rate of interest.

There is in the fourth schedule a stipulation that interest is to be paid (without compounding) on the 31st December, 1985. This stipulation does not refer to the plaintiff's loan but it is an indication that interest is not to be compounded. The letter MAT 5 provides that interest is to be allowed to accrue for 3 years and thereafter be payable half year in arrears. There is no mention of compounding interest and there could be a dispute on this issue.

These possible disputes are better dealt with in an action for debt which would enable the plaintiff company full scope to raise any defences it saw fit. I do not consider that the hearing of a petition is the proper time and place for resolving such possible disputes.

Mr. Hely also argued that the defendant company has a right under section 222 of the Companies Act as a contingent or prospective creditor to seek an order winding up the Company.

If they have that right which I do not decide in view of the order I propose to make proviso (iii) of section 222(1) would have application. The company in such event would have to establish a prima facie case for winding up before the petition was heard.

The defendant company by giving the plaintiff a statutory notice under section 168 of the Companies Act (now section 221(a) of the 1983 Act) has indicated its intention to found a petition on non-compliance with such notice. It is that threatened action which has given rise to the present action.

I grant the plaintiff the relief claimed in respect of the action now or hereafter threatened by the defendant in respect of the said debt and make 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.

The plaintiff is to have the costs of this action to be taxed if not agreed.

(R.G. KERMODE)
J U D G E

S U V A,
6th APRIL, 1984.