

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

B E T W E E N :

EURO-PACIFIC FINANCE CORPORATION LIMITED

Appellant
(Plaintiff)

- and -

LEO ARTHUR HIELSCHER

Respondent
(Defendant)

10

CASE FOR APPELLANT

1. This case is divided into Parts as follows:-

Record

Part A - Introduction (paragraphs 2 to 11).

Part B - Events leading to the Debt Restructuring Deeds (paragraphs 12 to 59)

Part C - The Money Claims and the Decision of the Full Court thereon (paragraphs 60 to 69).

20

Part D - Appellant's Submissions in Relation to the Money Claims (paragraph 70).

Part E - The Claims for Declarations and the Decision of the Full Court thereon (paragraphs 71 to 84)

Part F - Appellant's Submissions in Relation to Claims for Declarations (paragraphs 85 to 90).

Part G - The Reasons of Appeal (paragraph 91)

PART A - INTRODUCTION

2. The respondent in this appeal is a nominal defendant appointed to represent the Government of Queensland pursuant to the provisions of "The Claims Against Government Act" (1866), and is for convenience hereinafter called "the State".

3. The appellant's claims against the State arise under and turn upon the construction of two agreements executed on 1st April, 1977 to which the appellant and the State are parties. Those agreements are:-

10

pp.61-81

(a) the "MEQ Debt Restructuring Deed"; and

pp.82-101

(b) the "FQN Debt Restructuring Deed".

4. The appellant's claims fall into two categories, namely money claims, and claims for declarations.

5. The money claims total \$164,038.58 and are:-

(a) a claim for \$82,019.29 due from the State pursuant to clause 3(2)(a) of the MEQ Debt Restructuring Deed; and

20

(b) a claim for \$82,019.29 due from the State pursuant to clause 3(2)(a) of the FQN Debt Restructuring Deed.

6. The claims for declarations relate to:-

(a) the amount which is "Deferred Interest" in clause 3(1) of the MEQ Debt Restructuring Deed;

(b) the amount which is "Deferred Interest" in clause 3(1) of the FQN Debt Restructuring Deed;

30

(c) the manner of calculation of "Scheduled Principal" for the purpose of clause 3(2)(c) of the MEQ Debt Restructuring Deed; and

(d) the manner of calculation of "Scheduled Principal" for the purpose of clause 3(2)(b) of the FQN Debt Restructuring Deed.

7. The action was tried by Connolly J. (sitting without a jury) as a commercial cause and on 26th

October, 1978 Connolly J. gave judgment in favour of the appellant on the money claims but declined to make the declarations sought and ordered that the appellant's claims for declarations be reserved (indefinitely).

8. The State appealed to the Full Court of the Supreme Court of Queensland against the judgment in favour of the appellant upon the money claims. The Full Court by its judgment given on 10th May, 1979 allowed the State's appeal by a majority (Stable S.P.J. and Kelly J., Dunn J. dissenting).

10

9. The appellant had contended before the Full Court that the Full Court should vary the judgment of Connolly J. by making the declarations sought by the appellant. The Full Court, by the same judgment, dismissed that cross-appeal.

10. These appeals are brought against those judgments and orders of the Full Court pursuant to leave to appeal granted to the appellant by the Full Court on 22nd May, 1979. The Full Court at that time also ordered that the appeals against the said judgments of the Full Court be consolidated.

20

11. Although the appellant's claims turn essentially upon the construction of the provisions of clause 3 of the MEQ Debt Restructuring Deed and clause 3 of the FQN Debt Restructuring Deed, those provisions incorporate terms which are defined in other documents, and it is necessary to refer to those other documents in order to make the Debt Restructuring Deeds intelligible.

30

PART B - EVENTS LEADING TO THE DEBT
RESTRUCTURING DEEDS

12. On 17th December, 1970 the State, Metals Exploration Queensland Pty. Ltd. ("MEQ") and Freeport Queensland Nickel Incorporated ("FQN") entered into an agreement for the development by MEQ and FQN of nickel deposits in the Greenvale area of Queensland.

40

13. The entry of the State into that agreement was authorised by the "Greenvale Agreement Act 1970", and the agreement which was executed was in the form set out in the Schedule to that Act.

14. Both the 1970 Act and the agreement contemplated that it would be necessary for MEQ and FQN to borrow large sums of money in order to

Record

carry out the development, and that the State would, within specified limits, guarantee to lenders the performance by MEQ and FQN of their obligations in respect of those borrowings.

15. In this regard it was contemplated initially that the borrowings would total \$43,000,000.00 (see clause 5 of the agreement), but this amount was increased to \$50,000,000.00 by an amendment of the agreement made by Order in Council on 5th November, 1970.

10

16. The appellant was one of a number of financiers which agreed to advance to MEQ and FQN monies to enable the development of the Greenvale nickel deposits, and it agreed to lend \$A2,500,000.00 to MEQ and a further \$A2,500,000.00 to FQN. The agreements to lend were evidenced by:-

pp.113-124

(a) a document called the "Euro-Pacific MEQ Financing Agreement" entered into on 1st October, 1971 between the appellant as lender, MEQ as borrower and FQN as guarantor; and

20

pp.103-112

(b) a document called the "Euro-Pacific FQN Financing Agreement" entered into on 1st October, 1971 between the appellant as lender, FQN as borrower and MEQ as guarantor.

17. By section 5 of the 1970 Act it was provided, inter alia, that:-

(a) any borrowing by MEQ and FQN in pursuance of the agreement to be guaranteed by the State should be secured in the manner prescribed by the Governor in Council by Order in Council and should be otherwise in accordance with the loan agreements submitted to the Treasurer in compliance with the provisions of clause 4 of Part I of the agreement between the State, MEQ and FQN;

30

(b) any guarantee with respect to any such borrowing should be limited to such amount of principal and to such rate of interest thereon, as the Governor in Council might by Order in Council prescribe.

40

18. The Order in Council contemplated by section 5 of the 1970 Act was made in relation to the Euro-

Pacific MEQ Financing Agreement and the Euro-Pacific FQN Financing Agreement on 11th November, 1971. The Order in Council dealt also with other proposed loans to MEQ and FQN, the loans totalling, in the case of each borrower, \$25,000,000.00.

Record

p.102

10 19. The Financing Agreements were in similar terms and each provided (clause 2(3)) that the terms and conditions as to repayments and pre-payments of the loan, interest thereon and other moneys payable in relation to the transaction should be as provided in documents described therein as the "General Loan Deed" and the "Supplemental Deed". The form which each of those documents was to follow was contained in annexures to each Financing Agreement.

20. The MEQ General Loan Deed and the FQN General Loan Deed were each executed on 15th December, 1971.

pp.178-232
pp.125-177

20 21. The MEQ Supplemental Deed and the FQN Supplemental Deed were each executed on 12th October, 1972.

pp.250-266
pp.233-249

22. During the period 7th December, 1972 to 5th September, 1974 the appellant advanced to each of MEQ and FQN amounts totalling the whole of the \$A2,500,000.00 which it had agreed to lend.

30 23. Each Supplemental Deed provided that the principal was repayable in 10 instalments (clause 9(2)), the first of which was to be on the date fixed by the method specified in clause 9(3). It was admitted that that date was 3rd March, 1977 (see paragraph 1 of the Amended Defence and paragraphs 19(b) and 20(b) of the Amended Statement of Claim).

p.43
p.12
p.13

24. The remaining nine instalments of principal were to be repaid at intervals of approximately six months. This was because clause 9(3) of each Supplemental Deed required those payments to be made on successive "Interest Payments Dates" and:-

40 (a) An "Interest Payment Date" was a "Maturity Date" - clause 1(1)(1) of each Supplemental Deed.

(b) A Maturity Date was a date on which "Overseas Deposits In Relation To The Loan" were repayable by the lender - clause 1(1)(o)(ii) of each Supplemental Deed.

Record

- (c) "Overseas Deposits In Relation To The Loan" were "Overseas Deposits" (itself defined in clause 1(1)(q)) out of the proceeds of which the Loan was made or refinanced from time to time - clause 1(1)(s) of each Supplemental Deed.
- (d) Once the "Consolidation Date" (clause 1(1)(c)) had arrived, the lender was obliged to obtain all Overseas Deposits for a "Period" - clause 5(2) of each Supplemental Deed. 10
- (e) The term "Period" meant the period of approximately six months which "is commonly known as a period of six months on the London Eurodollar Market and which ends on... the Maturity Date of Overseas Deposits in Relation To the Loan" - clause 1(1)(t) of each Supplemental Deed.

p.43
p.11
p.12

25. The "Consolidation Date" was 5th March, 1975 (paragraph 1 of the Amended Defence and paragraphs 17(a) and 18(a) of the Amended Statement of Claim). 20

26. The dates on which the principal was repayable were thus:-

- (a) 3rd March, 1977;
(b) 30th September, 1977;
(c) 31st March, 1978;
(d) 29th September, 1978;
(e) 30th March, 1979;
(f) 30th September, 1979;
(g) 31st March, 1980;
(h) 30th September, 1980; 30
(i) 31st March, 1981; and
(j) 30th September, 1981.

p.43
p.33-36

and this was admitted (paragraph 3 of the Amended Defence and Annexure "B" to Amended Statement of Claim).

27. Although the amount which the appellant had lent to each borrower was \$A2,500,000.00, the amount of principal which the borrower was required to repay might, expressed in \$A, be higher or lower than \$A2,500,000.00 and indeed the figure of \$A2,500,00.00 became irrelevant, it is submitted, after the Consolidation Date. 40

28. This situation occurred because the borrower and each lender recognised that the advances to MEQ

and FQN would be made by the appellant from funds which had been advanced to the appellant in ~~SUS~~, and that the amount which MEQ and FQN would have to repay the appellant was an amount in ~~SA~~ equal, at the prevailing exchange rates, to the number of ~~SUS~~ which the appellant was itself obliged to pay. See the definitions of "Overseas Deposit" and "Overseas Deposit In Relation To The Loan" in clauses 1(1)(q) and 1(1)(s), and also clause 6(8) of each Supplemental Deed.

10

29. The amount of each of the 10 instalments of principal was to be calculated in the following way:-

(a) The appellant was obliged to notify the borrower of the amount, in ~~SUS~~, of "Overseas Deposits In Relation To The Loan" (clause 9(1) of each Supplemental Deed). That amount was ~~SUS~~3,636,202.00 (Amended Statement of Claim, paragraph 18(b); Paragraph 18(b) was not admitted in the Defence, but was later admitted. See para. 3 and Ex. "B" and "C" to Fitzgerald's affidavit). p.12 p.46 pp.50-53.

20

(b) The amount thus payable for each of the first nine instalments (calculated in accordance with clause 9(2) of each Supplemental Deed) was the ~~SA~~ equivalent of ~~SUS~~363,700.00, i.e. one-tenth of ~~SUS~~3,636,202.00 taken to the next whole ~~SUS~~100.00). The amount payable in ~~SA~~ would be more than ~~SA~~250,000 if the exchange rate was less favourable to the ~~SA~~ than ~~SUS~~1.4548 = S/A1.00.

30

(c) The tenth payment was dealt with separately because it was appreciated that it might not be possible to obtain Overseas Deposits which exactly matched the amount required to make an advance, and so some of the moneys advanced might not in fact have been derived from Overseas Deposits. These moneys were called "the Australian Portion of the Loan" and were not to exceed the ~~SA~~ equivalent of ~~SUS~~1,000. See clauses 9(2) and 11(2)(b) of each Supplemental Deed.

40

30. Interest was payable on each "Interest Payment Date" (in respect of the "Period" ending on that "Interest Payment Date" (clause 6(5) of each Supplemental Deed), and the rate of interest, after

Record

the Consolidation Date, was to be the aggregate of the three figures specified in clause 6(2) of each Supplemental Deed.

31. The amount upon which interest was to be calculated was the amount of "Overseas Deposits in Relation To The Loan" (clauses 6(8) and 11(2)(a) of each Supplemental Deed).

32. Payments of principal and interest were to be made in Australia in \$A (clause 11(2)(a) of the Supplemental Deeds) and were to be calculated on the basis of the exchange rate ruling not earlier than seven days prior to the due date for payment (clause 11(2)(a) of each Supplemental Deed). Any alteration in the exchange rate between the date of calculation and the date when the payment was due was to result in a further payment by or refund to the borrower, as appropriate (clause 11(2)(c)).

10

33. As time passed it became apparent that MEQ and FQN might not be able to satisfy their obligations to lenders under the various loans made to them and on 27th June, 1975 documents described as the "MEQ Deed of Deferral" and the "FQN Deed of Deferral" were executed.

20

pp.301-337
pp.267-300

34. The parties to each Deed of Deferral were the borrowing company, the various lenders to it and the "Representative" under the relevant General Loan Deed.

35. The essential feature of each Deed of Deferral was to defer the borrower's obligation to pay certain amounts of principal (called "Deferred Principal") and of interest (called "Deferred Interest").

30

36. "Deferred Principal" was defined to mean the instalments of principal which would otherwise have been repayable by the borrower during 1976, 1977 and 1978 (see clause 1(1)(viii) of each Deed of Deferral). In the case of the appellant there were four such amounts, each being of the \$A equivalent of \$US363,700, otherwise payable by each borrower. Those instalments would have been payable on:-

40

3rd March, 1977
30th September, 1977
31st March, 1978
29th September, 1978

(Amended Statement of Claim paragraphs 19(b) and 20(b) and paragraph 1 of the Amended Defence).

p.12
p.13
p.43

10

37. Clause 2 of the Deeds of Deferral then relieved the borrower from the obligation to pay Deferred Principal in accordance with the original arrangements (clauses 2 and 4(1)(a)) and made the Deferred Principal payable in four instalments on Interest Payment Dates after the date on which the last instalment of principal would otherwise have been payable.

38. The practical effect was that the Deferred Principal became payable in four instalments on:-

31st March, 1982
30th September, 1982
31st March, 1983
30th September, 1983

(Annexure "D" to Amended Statement of Claim and in particular Note 3. The accuracy of these calculations was admitted).

p.38

20

39. "Deferred Interest" was defined (clause 1(1) (vi) of the Deeds of Deferral) as the interest which was payable under the original arrangements in the period 30th June, 1975 to 31st December, 1976. The amount in the case of each loan by the appellant was \$A398,968.00. See page 4 of Annexure "A" and page 4 of Annexure "B" to the Amended Statement of Claim.

p.32
p.36

30

40. Clause 2 of the Deeds of Deferral relieved the borrower from the obligation to pay Deferred Interest in accordance with the original arrangements, and provided instead that Deferred Interest was to be payable in three equal instalments on Interest Payment Dates commencing on the first Interest Payment Date after the date on which the last instalment of principal would have been payable under the original arrangements.

41. The practical effect was that the Deferred Interest of \$A398,968 became payable in three instalments on:-

40

31st March, 1982
30th September, 1982
31st March, 1983

Record

p.38

(Annexure "D" to Amended Statement of Claim, and in particular Note 1).

42. The Deeds of Deferral made provision for interest to be payable on Deferred Interest. That interest was to be calculated in accordance with clause 5(2)(a) and was to be interest at a rate of $10\frac{1}{2}$ per cent per annum calculated without compounding as from the dates on which Deferred Interest would have been payable under the original arrangements. Payment of such interest on Deferred Interest was not to take place, however, until the Deferred Interest itself became payable, i.e. in 1982 and 1983 (see clause 5(3) of each Deed of Deferral).

10

pp.374-411
pp.338-373

43. By 1977 further financial difficulties on the part of MEQ and FQN resulted in the execution by the borrower and lenders of the "MEQ Deed of Postponement" and the "FQN Deed of Postponement". These documents were executed on 1st April, 1977.

44. Each of the Deeds of Postponement made provision for further deferral of the borrower's obligation to pay principal and interest to the lenders.

20

45. The Deeds of Postponement related essentially to the principal and interest which, under the original arrangements as varied by the Deeds of Deferral, would have been payable in the period 1st January, 1977 to 31st December, 1985. In so doing they introduced four new defined terms, namely:-

- (a) "Postponed Principal";
- (b) "Scheduled Principal";
- (c) "Postponed Interest"; and
- (d) "Scheduled Interest".

30

46. "Postponed Principal" was defined by clause 1(1)(xvii) of the FQN Deed of Postponement and by clause 1(1)(xviii) of the MEQ Deed of Postponement (respectively) as being, in effect, the total of instalments of principal which would have been payable under the original arrangements, as varied by the Deeds of Deferral, during the period 1st January, 1977 to 31st December, 1985. In the case of the loans by the appellant, all the principal was repayable during that period. See paragraphs 26 and 38 above.

40

47. "Scheduled Principal" was defined by clause 1(1)(xix) of the FQN Deed of Postponement and by clause 1(1)(xxi) of the MEQ Deed of Postponement (respectively) as the amount which would have been payable at a particular Maturity Date if the original arrangements, as varied by the Deeds of Deferral, had been observed.

10 48. "Postponed Interest" was defined by clause 1(1)(xv) of the FQN Deed of Postponement and by clause 1(1)(xvii) of the MEQ Deed of Postponement (respectively) as the interest which would have been payable in the period 1st January, 1977 to 31st December, 1985 if the original arrangements, as varied by the Deeds of Deferral, had been observed. In the case of the appellant all of the interest was payable in that period. See paragraphs 40 and 41 above.

20 49. "Scheduled Interest" was defined by clause 1(1)(xviii) of the FQN Deed of Postponement and by clause 1(1)(xx) of the MEQ Deed of Postponement (respectively) as the interest which would have been payable on a particular Maturity Date if the original arrangements, as varied by the Deed of Deferral, had been observed. It did not, however, include "interest on Deferred Interest".

30 50. Clause 2 of the Deeds of Postponement absolved the Borrower from the obligation to pay Postponed Principal and Postponed Interest otherwise than in accordance with the Deeds of Postponement, and the Deeds of Postponement then went on to make several new provisions.

51. In the first place, all Postponed Principal and Postponed Principal not earlier repaid was to be repaid in full on 31st December, 1985 (clause 7(1)).

40 52. Secondly, the Deeds of Postponement provided for the calculation, as at each Maturity Date, of the borrower's "Excess Cash" (see clause 1(1)(vii)). That Excess Cash was to be applied, on each Maturity Date, in making the payments set out in clause 5(1), i.e.:-

- (a) firstly, in payment of Scheduled Interest due at that Maturity Date;
- (b) secondly, in payment of Scheduled Principal due at that Maturity Date; and

Record

(c) thereafter, payment in the order set out in clause 5(1).

(Because "Maturity Dates" were quarterly under the Deeds of Postponement (clause 1(1)(xiv) in the case of FQN and clause 1(1)(xii) in the case of MEQ) but approximately half-yearly in the case of the appellant's loans, a special adjustment was made for the appellant by clause 5(4)).

53. The borrower was obliged to pay at least a specified percentage of the amount of Scheduled Interest and Scheduled Principal due on a Maturity Date even though Excess Cash might not be sufficient for that purpose (clause 6(1) and the definition of "Scheduled Debt Service" in clause 1(1)(xvii) of the FQN Deed of Postponement and clause 1(1)(xix) in the MEQ Deed of Postponement). 10

54. Thirdly, no interest was payable on Postponed Interest or Deferred Interest in respect of the period 1977 to 1985 (clause 4(1)).

55. Thus, by entering into the Deeds of Postponement, the appellant and other lenders:- 20

(a) lost their rights to the interest on Deferred Interest which would have accrued during the period 1st January, 1977 to 31st December 1985;

(b) were no longer entitled prior to 31st December, 1985, to be paid principal as it fell due but were entitled only to either the minimum percentage or so much as might result from the distribution of "Excess Cash" as at each Maturity Date; 30

(c) were no longer entitled prior to 31st December, 1985, to be paid interest as it fell due, but were entitled only to either the minimum percentage or so much as might result from the distribution of "Excess Cash" as at each Maturity Date.

pp.61-81 56. In order to encourage lenders to enter into the Deeds of Postponement, the State (on 1st April, 1977) entered into agreements with the lenders under which the State undertook certain primary obligations to the lenders to pay amounts of principal and interest foregone by their entry into the Deeds of Deferral and the Deeds of Postponement. 40
pp.82-101

57. Those agreements are the MEQ Debt Restructuring Deed and the FQN Debt Restructuring Deed referred to in paragraph 3 above and the entry of the State into them was authorised by the "Greenvale Agreement Act 1977".

58. The relevant provisions of the Debt Restructuring Deeds relate to three obligations undertaken by the State, namely:-

- 10 (a) an obligation to pay an amount equal to the interest on Deferred Interest which would have accrued during the period 1st January, 1977 to 31st December, 1985 (clause 3(1) of each Debt Restructuring Deed);
- 20 (b) an obligation to pay the difference between interest which would have been payable at a Maturity Date but for the Deed of Postponement, and that which was in fact paid by the borrower under the Deed of Postponement, but limited its obligation to interest calculated at eight per cent (clause 3(2)(a) of each Debt Restructuring Deed);
- (c) an obligation to pay the difference between the principal which would have been payable by the borrower at a Maturity Date but for the Deed of Postponement, and that which was in fact paid (clause 3(2)(c) of the MEQ Debt Restructuring Deed and clause 3(2)(b) of the FQN Debt Restructuring Deed).

30 59. The fundamental question on these appeals is the meaning of the term "Subject Loans" as used in clause 3 of the Debt Restructuring Deeds. The appellant submits that in calculating the amounts payable or to become payable (as the case may be) by the State to the appellant pursuant to clauses 3(1) and 3(2)(a) of each Debt Restructuring Deed, and pursuant to clause 3(2)(c) of the MEQ Debt Restructuring Deed and clause 3(2)(b) of the FQN Debt Restructuring Deed, the amounts of the loans by the appellant referred to therein as "Subject Loans" are the amounts repayable by MEQ and FQN in respect of principal. The State contends on the other hand that the amount of such "Subject Loans" is limited to \$A2,500,000, that is, the amount advanced.

40

PART C - THE MONEY CLAIMS AND DECISION OF THE FULL COURT THEREON

p.40
p.42
p.39
p.41

60. The appellant's method of calculation of the amounts payable by the State under clause 3(2)(c) of each Debt Restructuring Deed appears from Annexures "F" and "H" (in the case of MEQ) and "E" and "G" (in the case of FQN) to the Amended Statement of Claim.

61. The essence of that calculation is that three elements are involved, namely:-

(a) The "amount of Scheduled Interest calculated" in respect of each loan to which the appellant "would were it not for the provisions of the...Deed of Postponement have been entitled on that Maturity Date". 10

The appellant calculates that figure by calculating interest for the appropriate period at the appropriate rate on \$US3,636,202.00, and by converting the figure so obtained to \$A at the applicable exchange rate. 20

(b) The "sum in respect of Scheduled Interest calculated in respect of" the appellant's "Subject Loan...paid to such party pursuant to Clause 5 and Clause 6 of the...Deed of Postponement".

This is an amount actually received.

(c) An "amount equal to interest at the rate of 8 per centum per annum calculated in respect of that party's Subject Loan".

The appellant calculates this figure in exactly the same manner as that referred to in (a) save that the interest rate is eight per cent rather than that determined in accordance with the appropriate Supplemental Deed. 30

62. The amount, if any, payable by the State in accordance with clause 3(2)(a) is then calculated by:-

(a) subtracting the figure referred to in paragraph 61(b) from that referred to in paragraph 61(a); and 40

(b) subtracting the figure referred to in paragraph 61(b) from that referred to in paragraph 61(c).

The lower of the two figures so reached is the amount payable by the State.

10 63. On the other hand, the State contended before Connolly J. that the maximum amount payable by the State was to be calculated on the basis of interest at eight per cent per annum on \$A2,500,000.00 for the period in question. This contention was founded upon the submission that because the term "Subject Loan" in clause 3(2)(a) was defined in clause 3(1) as "the Loan or Loans of such Lender described in either or both of the said" parts A (in the case of FQN) or parts B (in the case of MEQ) of the relevant Orders in Council, the calculation must be made on the basis of the amount originally advanced, rather than the amount required to be repaid.

20 64. Connolly J., at first instance, was of the view that the appellant was correct in its approach, and that the appellant had been underpaid to the extent of the amounts claimed. p.623

65. When the matter came before the Full Court, the State argued that:-

- 30 (a) the maximum obligation of the State under clause 3(2)(a) was on the basis of 8 per cent per annum on \$A2,500,000.00; and
- (b) that as between borrower and lender in each case, the appellant's method of calculation of interest was incorrect, and that all calculations should be done on the basis of principal being \$A2,500,000.00.

66. The competing contentions of the parties as to the method of calculation of interest are set out in the judgment of Dunn J.

pp. 937.968

40 67. All the members of the Full Court were of the view that the appellant was correct in its method of calculation of interest, and in consequence in its calculation of "Scheduled Interest" in terms of clause 3(2)(a) of each Debt Restructuring Deed.

68. The majority of the Full Court, however, (per Kelly J.) took the view that the respondent's submissions in relation to the calculation of the

Record

maximum amount payable by the State under clause 3(2)(a) should not be accepted. In this regard the only statement of reasons by Kelly J. is as follows:-

p.933-934

"The same considerations do not, however, apply when the State's obligations to make payments under cl. 3(2)(a) come to be considered. As was pointed out by the learned trial judge the Debt Restructuring Deed is not one of guarantee but one which imposes primary obligations upon the State and one should not assume that the State necessarily took over the precise obligations of the borrowers. In determining then the meaning which is to be given to the words in the proviso 'calculated in respect of that party's Subject Loan...in respect of which such Scheduled Interest is payable' it appears that the final words serve only to identify the loan and do not require that the interest payable by the State should be calculated in the same way as the Scheduled Interest was calculated as between borrower and lender. The component of the interest payable under the proviso whereby the amount of the State's liability is limited, namely, the amount equal to interest at the rate of 8 per centum per annum, is to be calculated in respect of the Subject Loan, that is, the transaction of Loan under which, as I have already indicated, the amount borrowed was \$A2,500,000.00 but the obligation was to repay the equivalent in Australian currency at various repayment dates of amounts which aggregated \$US3,636,202. So far as the State is concerned I am of the opinion that, in determining the amount equal to interest at the rate of 8 per centum per annum referred to in the proviso upon which its obligation is based, it would be inappropriate to have regard to the amount to be repaid and for this purpose interest should be calculated at the rate of 8 per centum per annum on the amount borrowed.

10

20

30

40

The limit of the State's liability under cl.3 (2)(a) is therefore an amount equal to interest at the rate of 8 per centum per annum on \$A2,500,000.00 less the amount actually paid by the Borrower in respect of Scheduled Interest.

As the State has already paid this amount for the period in question the respondent is not entitled to recover more and its money claim therefore fails."

Record

69. On the other hand, Dunn J. was of the view that the appellant's approach was correct, and that the State had underpaid the appellant in each case to the extent of the amount claimed.

p.961

10 PART D - APPELLANT'S SUBMISSIONS IN RELATION TO THE MONEY CLAIMS

70. The appellant's submissions in relation to the money claims are as follows:-

(a) The term "Subject Loan" in clause 3(2)(a) is defined in clause 3(1) as meaning relevantly a Loan described in either Part A or Part B of the Order in Council of 11th November, 1971. An examination of the Order in Council makes it clear that the reference to it does not mean that all calculations in respect of the loan are to be treated, artificially, as being made upon a principal of ~~₹~~₹2,500,000.00. The reference simply identifies the transaction of loan involved.

p.102

(b) Clause 3(2)(a) uses three expressions which are relevant, namely:-

(i) "Scheduled Interest calculated in respect of that party's Subject Loan";

(ii) "Scheduled Interest calculated as aforesaid"; and

(iii) "interest...calculated in respect of that party's Subject Loan...".

The use of the terms "in respect of" in (i) and (iii) and "as aforesaid" in (ii):-

A. makes it clear that even if the words "Subject Loan" mean ₹2,500,000.00, the interest is to be calculated not "upon" that figure but "in respect of" that loan; and

B. makes it unlikely that the words "in respect of that party's Subject Loan" in both (i) and (iii), are used in two different senses in clause 3(2)(a) of

Record

the Debt Restructuring Deeds, which is the effect of the majority's judgment.

- (c) The contention that the appellant adopted an incorrect approach in its calculation of "Scheduled Interest" should be rejected for the reasons specified by Kelly J. and Dunn J.

PART E - THE CLAIMS FOR DECLARATIONS AND THE DECISION OF THE FULL COURT THEREON

71. The declarations sought by the appellant at the trial and by cross-appeal in relation to clause 3(1) of the Debt Restructuring Deeds were as follows:- 10

p. 61-81

"1. A declaration that in calculating the plaintiff's entitlements pursuant to clause 3(1) of the MEQ Debt Restructuring Deed (Exhibit 1 at the trial), the amount which is referred to in the said clause 3(1) as being 'so much of the Deferred Interest to which' the plaintiff 'is entitled as is attributable to the Loan' of the plaintiff described in Part A of the Schedule to the Order in Council made on 11th November, 1971 (Exhibit 3 at the trial) is the sum of \$A398,968.00. 20

p.102

2. A declaration that in calculating the plaintiff's entitlements pursuant to clause 3(1) of the FQN Debt Restructuring Deed (Exhibit 2 at the trial), the amount which is referred to in the said clause 3(1) as being 'so much of the Deferred Interest to which' the plaintiff 'is entitled as is attributable to the Loan' of the plaintiff described in part B of the Schedule to the Order in Council made on 11th November, 1971 (Exhibit 3 at the trial) is the sum of \$A398,968.00." 30

pp.82-101

p.102

72. The figure of \$A398,968.00 was in each case an already established figure (see paragraph 39 above) and it was conceded, as Kelly J. noted:- 40

p.p.935-936

"As to the declarations sought...relating to interest on Deferred Interest, counsel for the appellant concedes that there is no particular objection to declarations in that form."

73. The declarations sought by the appellant at the trial and by cross-appeal in relation to clause 3(2)(c) of the MEQ Debt Restructuring Deed and clause 3(2)(b) of the FQN Debt Restructuring Deed were as follows:-

- 10 "3. A declaration that in calculating the plaintiff's entitlements under clause 3(2)(c) of the MEQ Debt Restructuring Deed (Exhibit 1 at the trial), the amount of 'Scheduled Principal' to which the plaintiff would have been entitled as at a 'Maturity Date' is the amount of principal to which the plaintiff would have been entitled as at that Maturity Date calculated in accordance with clause 9(2) of the MEQ Supplemental Deed (Exhibit 9 at the trial) on the basis that the amount of 'Overseas Deposits In Relation To The Loan' notified in accordance with clause 9(1) of such MEQ Supplemental Deed was \$US3,636,202.00. pp.61-81
- 20 4. A declaration that in calculating the plaintiff's entitlements under clause 3(2)(b) of the FQN Debt Restructuring Deed (Exhibit 2 at the trial), the amount of 'Scheduled Principal' to which the plaintiff would have been entitled as at at 'Maturity Date' is the amount of principal to which the plaintiff would have been entitled as at that Maturity Date calculated in accordance with clause 9(2) of the FQN Supplemental Deed (Exhibit 8 at the trial) on the basis that the amount of 'Overseas Deposits In Relation To The Loan' notified in accordance with clause 9(1) of such FQN Supplemental Deed was \$US3,636,202.00." pp.250-266
- 30 4. A declaration that in calculating the plaintiff's entitlements under clause 3(2)(b) of the FQN Debt Restructuring Deed (Exhibit 2 at the trial), the amount of 'Scheduled Principal' to which the plaintiff would have been entitled as at at 'Maturity Date' is the amount of principal to which the plaintiff would have been entitled as at that Maturity Date calculated in accordance with clause 9(2) of the FQN Supplemental Deed (Exhibit 8 at the trial) on the basis that the amount of 'Overseas Deposits In Relation To The Loan' notified in accordance with clause 9(1) of such FQN Supplemental Deed was \$US3,636,202.00." pp.82-101
- 40 74. Although no payment under those clauses of the Debt Restructuring Deeds had fallen due at the time of the trial (October, 1978), the first payment was to be made within five days after 31st March, 1979, and payments were to be made at six monthly intervals thereafter. pp.233-249
75. As Dunn J. indicated in his reasons, the dispute as to the appellant's entitlement to "Scheduled Principal" was confined to whether the pp.937-968

Record

base calculation figure should be ~~£~~US\$3,636,202 as the appellant contended, or ~~£~~A\$2,500,000 as the respondent contended. The declarations sought were quite appropriate in form if the appellant's contentions were correct.

p.623

76. Connolly J. ordered at first instance that the appellant's claims for declarations be reserved. He said:-

"It will be apparent from the judgment I am giving for the liquidated sum that in my view the calculation of Scheduled Interest falls to be made exactly as the borrower would have to make it as between itself and the lender. I take a similar view of interest on Deferred Interest and Scheduled Principal. I have been pressed by Mr. Jackson to make declarations with respect to both these heads of liabilities. I am reluctant to do so, not because I doubt the jurisdiction of the Court to declare the nature and extent of rights to moneys which have not yet fallen due for payment but because it seems to me unwise to do so at this stage. The argument in these proceedings has centred upon one aspect of the problem namely, to put it in very general terms, whether the State is to carry the exchange risk as well as the original loan expressed in Australian currency together with various of its incidents. When the time for payment arrives the calculation of the sums actually due may bring into prominence other factors which have not been debated before me and I think it imprudent to attempt to formulate with precision how the sums should be calculated at this stage."

10

20

30

p.936

77. In dismissing the cross-appeal, the majority in the Full Court held that it could not be said that in declining to make the declarations sought at the trial, Connolly J. failed properly to exercise the discretion reposed in him.

40

p.936

78. In relation to the claims for declarations referred to in paragraph 71 above relating to interest on Deferred Interest, Kelly J. stated that "it could well be that factors other than those debated before the learned trial judge would require consideration prior to" 31st March, 1982 the date upon which the first instalment is payable.

79. Similarly with the claims for declarations concerning Scheduled Principal, Kelly J. stated that although the first instalment thereof fell due on 31st March, 1979 (six weeks prior to the date upon which the Full Court gave judgment), other factors not debated before the learned trial judge could arise. His Honour also said that he thought that it could not be said that the declarations referred to in paragraph 73 above would necessarily resolve all questions which might arise in relation to clause 3(2)(c) of the MEQ Debt Restructuring Deed and clause 3(2)(b) of the FQN Debt Restructuring Deed. p.936

10

80. There was no evidence before Connolly J. or before the Full Court of any "other factor", or of any other matter which might make the terms of the declarations ought inapt or otherwise unsatisfactory, or which might make it inappropriate to grant the declarations sought, and as appears from the judgment of Dunn J.:-

20

"It appears from the Order which was perfected that the claims for declarations were treated as having been reserved for further consideration. p.964

We were provided during the hearing of the appeal with a full transcript of the argument which took place before His Honour. I have been unable to determine from a perusal of the transcript, and from a consideration of the matter generally, what His Honour had in mind when he referred to 'other factors which have not been debated before me.'

30

In the proceedings at first instance, the appellant accepted that it was appropriate to decide whether the respondent was then entitled to a money judgment, but counselled caution with respect to the making of declarations on the bases that the matters involved were complex, that the amounts at stake were large, that something might have been overlooked in the mass of documents, and that 'things might change' (meaning, I take it, that another Deed might come into existence).

40

It was a matter of public knowledge at the time of the trial, as appears from the transcript, that negotiations with a view to

Record

assisting FQN and MEQ were taking place between the then Treasurer of Queensland and the various financial institutions which had lent money to the companies."

81. When the matter came before the Full Court, the State contended that a further matter had occurred which should of itself dissuade the Full Court from making any declarations. In the course of submissions to the Full Court on Friday 23rd February, 1979 counsel for the State referred to the "Greenvale Agreement Act 1978" (which was not in force at the time of the trial and had not previously been referred to in the proceedings before the Full Court) asserting that it altered the Debt Restructuring Deeds, that it provided that the alterations should be retrospective to July, 1978 (prior to the judgment of the trial judge), that it altered some definitions particularly those of "Scheduled Principal" and "Scheduled Interest", and that such altered definitions were contained in a new Amending Deed referred to in the Act which was not before the Full Court. Senior Counsel for the State submitted to the effect that the Full Court should not in such circumstances grant any declarations.

10

20

(It should be mentioned here that as Dunn J. pointed out any retrospectivity back to 1st July, 1978 of the Debt Restructuring Deed Amending Deeds provided for by the "Greenvale Agreement Act 1978" could not on any view affect the appellant's entitlement to the money sums claimed for they fell due prior to that date).

30

82. Counsel for the appellant then informed the Full Court that the provisions of the Deeds of Amendment and the Debt Restructuring Deed Amending Deeds referred to in the said Act had no effect on the matters before the Court.

83. When the Full Court resumed on Monday 25th February, 1979 counsel for the appellant sought pursuant to Order 70 Rule 10 of the Rules of the Supreme Court to tender an affidavit by Roy Ernest Ricker sworn in Melbourne on Sunday 24th February, 1979 deposing to the execution of the MEQ Deed of Amendment, the MEQ Debt Restructuring Deed Amending Deed, and the corresponding FQN Deeds, and exhibiting copies thereof. Counsel for the appellant informed the Court that in seeking to tender the said affidavit he sought to demonstrate

40

pp.633-634

that the "Greenvale Agreement Act, 1978" had no effect on any matter in issue in the appeal, and that there had been no change in any relevant definition or in any relevant obligation.

Record

84. Counsel for the State objected to the tendering of such affidavit. After a short adjournment the Court declined to permit the tendering of the affidavit. No reasons for that refusal were stated.

10 PART F - APPELLANT'S SUBMISSIONS IN RELATION TO CLAIMS FOR DECLARATIONS

85. It is respectfully submitted that the Full Court should have received the said affidavit of Roy Ernest Ricker pursuant to its power to do so under Order 70 Rule 10 of the Rules of the Supreme Court the text of which appears in the reasons for judgment of Dunn J. By admitting the said affidavit the Full Court could have removed any such uncertainty concerning the status of the Debt Restructuring Deeds which were before the Court as was raised by the said assertions made on behalf of the State, and it was wrong to permit the State to rely upon assertions as to the effect of the amending documents, without permitting the appellant to establish their terms.

pp.633-634

p.967

86. The ruling of the Full Court is not referred to in the reasons for judgment of Kelly J. but is referred to by Dunn J. who states:-

30 "...I have now concluded that we were wrong in taking this course. Speaking for myself, I misapprehended what the consequences of excluding the evidence would be, in the event that the respondent would satisfy the Court that declarations ought to have been made in the Court below.

p.967

40 However, it is not too late to cure the error. I therefore propose, with respect to the cross-appeal, that we revoke our ruling rejecting the evidence which was tendered, and that we admit the evidence, and that we list the matter for further consideration."

It is respectfully submitted that the said affidavit should be received upon the hearing of these appeals, if any reliance is placed by the State upon the matters referred to in paragraph 81 above.

Record

87. It is submitted that in declining to make the declarations sought Connolly J. failed to apply the principles applicable to the grant of declaratory relief in relation to the construction of contracts, established by such cases as Rediffusion (Hong Kong) Ltd. v. Attorney-General of Hong Kong (1970) A.C. 1136 especially at p.1157-8 per Lord Diplock, Russian Commercial & Industrial Trade Ltd. (1921) 2 A.C. 438 especially at p.452 per Lord Sumner, Ibeneweka v. Egbuna (1964) 1 W.L.R. 219 especially at p.224 per Viscount Radcliffe, and Forster v. Jadodex Australia Pty. Limited & Anor. (1972) 127 C.L.R. 421 especially at p.437 per Gibbs J. 10

88. It is respectfully submitted that the reasons of Connolly J. declining to make the declaration indicate misapprehensions of fact on his part because, contrary to His Honour's statements previously referred to:-

Firstly, all the events necessary to establish the accuracy of and the appellant's right to the declarations had occurred and were established by the evidence; 20

Secondly, there was no evidence to support the existence or possible existence of any relevant "other factor", nor might the existence of any such "other factor" have been inferred from the material before His Honour;

Thirdly, it was apparent on the pleadings and the other material before His Honour that there was a present dispute between the parties as to the matters the subject of the declarations. 30

89. It is further submitted that the learned trial judge erred in reserving as he did the claim for declarations. That reservation was equivalent to an indefinite adjournment of the claim and was on that account alone objectionable and insupportable: Hinckley & South Leicestershire Permanent Benefit Building Society v. Freeman (1941) 1 Ch. 32, 39 per Farwell J. 40

90. It is submitted that Dunn J. correctly approached the appellant's claim for declaratory relief. It is submitted that the said affidavit of Roy Ernest Ricker should be received and taken into account upon the hearing of these appeals and that the declarations sought by the appellant should be made.

PART G - THE REASONS OF APPEAL

Record

91. The appellant respectfully submits that the Orders and Judgments of the Full Court were wrong and ought to be reversed, and that these appeals ought to be allowed with costs for the following amongst other, reasons:-

- 10 (a) The Full Court was wrong in holding that no amount was due by the State of Queensland to the appellant pursuant to clause 3(2)(a) of the MEQ Debt Restructuring Deed and the FQN Debt Restructuring Deed;
- (b) The Full Court was wrong in holding that, in declining to make the declarations sought by the appellant, the learned trial judge did not fail to exercise his discretion properly;
- (c) The Full Court was wrong in declining to make the declarations sought by the appellant;
- 20 (d) The Full Court was wrong in refusing to receive upon the hearing of the appeal the affidavit of Roy Ernest Ricker sworn hereon on 25th February, 1979.

D.F. JACKSON

P. de JERSEY

No. 17 of 1979

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME
COURT OF QUEENSLAND

B E T W E E N :

EURO-PACIFIC FINANCE CORPORATION
LIMITED Appellant
(Plaintiff)

- and -

LEO ARTHUR HIELSCHER Respondent
(Defendant)

CASE FOR APPELLANT

COWARD CHANCE,
Royex House,
Aldermanbury Square,
LONDON EC2V 7LB.

Solicitors for the Appellant.