

PART A - CIRCUMSTANCES IN WHICH APPEAL ARISES

- pp. 969-970
pp. 919-936)
pp. 937-968)
2. This is an appeal from orders of the Full Court of the Supreme Court of Queensland made on 10th May, 1979 whereby the Full Court by a majority (Stable S.P.J. and Kelly J., dissentiente Dunn J.):-
- p. 624
- (a) allowed with costs an appeal by the defendant (the present respondent) the State of Queensland against a judgment given in the Supreme Court on 26th October 1978 by Connolly J. that the plaintiff (the present appellant) recover against the defendant (the present respondent) the sum of \$164,036.58 and costs of the action; 10
- (b) dismissed with costs a cross-appeal by the plaintiff (the present appellant) against the refusal of the trial judge Connolly J. to make certain declarations sought at trial by the plaintiff (the present appellant). 20
- pp. 971-973
3. By order made on 22nd May 1979 the Full Court gave to the appellant final leave to appeal to the Judicial Committee of Her Majesty in Council.
4. The principal question involved on the appeal is one of law, namely, whether -
- pp. 70 - 72
pp. 90-92
- on the proper construction of clause 3 of an instrument entitled -
- "MEQ Debt Restructuring Deed" and "FQN Debt Restructuring Deed", both dated 1st April 1977, 30
- p. 70.6)
p. 91.4)
- the expression "Subject Loan" means or refers to:-
- (a) (as the respondent submits) an amount of Australian \$2,500,000 lent by the appellant to each of Metals Exploration Queensland ("MEQ") and Freeport Queensland Nickel Incorporated ("FQN") -
- or (b) (as the appellant submits) an amount of Australian dollars equivalent, at the exchange rates prevailing at the dates for repayment thereof, to the amount of United States \$3,636,202.00. 40

5. The proceedings on this appeal arise out of an action no. 1460 of 1978 instituted by the present appellant against the present respondent as nominal defendant representing the State of Queensland and appointed for the purpose of defending that action pursuant to the Claims against Government Act of 1866. In that action the appellant claimed against the respondent -

p. 3.6

- 10 (a) two sums of \$82,018.29 (totalling \$164,036.58) alleged to be due, as "Scheduled Interest" pursuant to the said Deeds, but unpaid by the State of Queensland;
- 20 (b) a declaration which, in the amended form claimed before the Full Court, was (in substance) that, in calculating the appellant's entitlements pursuant to each of the aforementioned Deeds, the amount of "Deferred Interest" attributable to the "Subject Loan" is in the case of each such Deed the sum of \$398,968.00;
- 30 (c) a declaration which, in the amended form claimed before the Full Court, was (in substance) that, in calculating the appellant's entitlements pursuant to each of the said Deeds, the amount of "Scheduled Principal" to which the appellant would have been entitled at a Maturity Date is the amount of principal to which the appellant would have been so entitled calculated in accordance with clause 9(2) of each of two Supplemental Deeds (entered into by MEQ and FQN) on the basis that the amount of "Overseas Deposits in Relation to the Loan" notified in accordance with clause 9(1) of each such Supplemental Deed was United States \$3,636,202.
- 40 6. As to the claim :-
- (a) numbered (a) above, for a total of \$164,036.54 moneys due and owing (the "Scheduled Interest" claim) the trial judge (Connolly J.) gave judgment for the appellant, but this judgment was reversed on appeal by the Full Court (Dunn J. dissenting);
- (b) numbered (b) above, for a declaration (the "Deferred Interest" claim) that the sum in question was \$398,968.00, the trial

Record

p. 624)
p. 623.5)
p. 969 - 970

judge (Connolly J.) refused to make such a declaration, and the Full Court (Dunn J. dissenting) affirmed this decision for reasons that are referred to;

p. 388.6)
p. 350.1)
p. 624
p. 969-970

(c) numbered (c) above, for a declaration (the "Scheduled Principal" claim) with respect to such Scheduled Principal the trial judge (Connolly J.) refused to make such a declaration, and the Full Court (Dunn J. dissenting) affirmed this decision.

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7. Since the decision of the Full Court was delivered on 10th May, 1979 the Crown Solicitor for the State of Queensland has on behalf of the respondent by letter dated 11th January, 1980 written to the solicitors for the appellant advising that, for the purpose of reducing the number of matters in dispute before Her Majesty in Council, and without in any way admitting the correctness of the arguments of the appellant alleged to lead to that conclusion, the respondent is prepared to consent to a declaration (in the case both of MEQ and FQN) in terms of that now claimed as (a) by the appellant and set out at p. 934.2 of the reasons of His Honour Mr. Justice Kelly in the Full Court. The full text of the said letter dated 11th January, 1980 appears as Appendix 1 to the Case of the Respondent herein.

p. 934.2)
p. 934.3)

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8. In consequence of the matter referred to in 7 above, the only claims of the appellant which now arise for consideration on this appeal are those numbered (a) and (c) in paragraphs 5 and 6 above, being the money claim in respect of "Scheduled Interest", and the declaration in respect of "Scheduled Principal" respectively. The circumstances in which these claims have arisen appear in the ensuing paragraphs 9 to 20 of this Case, under the heading "Events Leading to Claims".

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Events Leading to Claims

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9. The Greenvale area is located approximately 175 kilometres inland west from the city and port of Townsville in north Queensland. In 1967 deposits of laterite nickel and cobalt were discovered in that area in quantities such as to render extraction and processing an economic proposition at then prevailing world prices for nickel.

Proposals for a project for development of the deposits at Greenvale, and their processing at Yabulu near Townsville, were pursued by two companies incorporated for that purpose, namely, Metals Exploration Queensland ("MEQ") and Freeport Queensland Nickel Incorporated ("FQN"). In order to carry out the development project it was necessary for MEQ and FQN to borrow around A\$300,000,000. The persons, bodies and institutions from whom these funds were ultimately borrowed were some 23 Australian, United States, West German and Japanese lenders the names of which appear in the Debt Restructuring Deeds which are among the instruments requiring interpretation on this appeal.

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10. As part of the overall arrangements between the State and the Companies for the development of the nickel deposits, the Government of the State of Queensland agreed to provide certain assistance to the project, and accordingly the Greenvale Agreement Act 1970 was passed by Parliament and received assent on 16th December 1970. This Act in s. 2 thereof authorised execution of an Agreement (contained in the Schedule thereto) between the State of Queensland and MEQ and FQN, to which Agreement the Act in s. 3 gave the force of law. By s. 5 of the Act the Treasurer of the State, in pursuance of clause 5 of Part I of the Scheduled Agreement, was authorised to guarantee on behalf of the State the repayment of certain monies borrowed by MEQ and FQN, provided that by s. 5(3) of the Act -

"any guarantee with respect to any such borrowing shall be limited to such amount of principal and to such rate of interest thereon, as the Governor in Council may by Order in Council prescribe."

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By clause 5 of Part I of the Scheduled Agreement, the State agreed that it would "unconditionally guarantee" repayment over 20 years by MEQ and FQN of moneys borrowed from certain of the lenders (herein referred to as "the Lenders") for the purposes of the project "not exceeding in the aggregate \$43,000,000 and the payment of interest at a rate not exceeding 8 per centum per annum". Before the borrowings proposed to be guaranteed were arranged, however, Clause 5 of the

Record

p. 476.5 Scheduled Agreement was amended to provide that "the State agrees that it will unconditionally guarantee" moneys borrowed by the Companies, or either of them, "not exceeding in the aggregate \$50,000,000, and the payment of interest on the outstanding balance thereof from time to time". It further provided that "Notwithstanding the rate of interest in fact charged such guarantee shall in relation to interest be limited to a guarantee of payment of a rate of 8 per centum per annum or the rate actually payable whichever is the lesser". (The amount guaranteed by the State has since been increased to \$77 million principal and, in addition interest on such principal generally at a maximum rate of 8% p.a. Certain interest agreed to be paid by the Companies on deferrals of interest payments which fell due during a period in 1975 and 1976 has also been guaranteed). 10

p. 102.7) 11. Pursuant to the said Act and Scheduled Agreement an Order in Council dated 11th November 1971 was made which set out details of Loan Agreements entered into by the two Companies MEQ and FQN, including the dates thereof, the names of the guaranteed Lenders and the amounts of principal and rate of interest to which the State's guarantee was limited. The lenders so specified numbered in all 13 in respect of each of MEQ and FQN, and included the appellant herein. As appears from the Order in Council, at the date of the Order in Council, MEQ and FQN had already on 1st October 1971 entered into agreements with the appellant herein (and on the same or earlier or subsequent dates) with other Lenders for the loan of money for the purpose of the development project. In the case of the appellant herein, the relevant agreements were the MEQ Financing Agreement and the FQN Financing Agreement, both dated 1st October 1971. (Because the terms of these and other Agreements and Deeds made by MEQ and FQN are in substance identical, it is convenient to refer hereafter only to MEQ Agreements Deeds and Instruments). 20

p. 102.3 30

pp. 113-124
pp. 103-112 40

pp. 115.9-116.4
pp. 105.2-105.6 12. The function of these Financing Agreements was to define the terms and conditions on which the lender was agreeing to lend money, and to record guarantees given by MEQ and FQN in respect thereof. Because a large number of borrowers of different origins were involved, on 5th December 1971 MEQ executed a General Loan Deed, the major functions

pp. 180-222

of which were, in the first place, to regulate and restrict the terms on which each loan by each lender might take place: this object was achieved by :-

- 10 (a) requiring the terms of each loan to be evidenced by a Supplemental Deed "which shall be expressed to be supplemental and subject to this (General Loan) Deed": see cl.4; p. 188.9
- (b) requiring a certified copy of every such Supplemental Deed to be furnished to each other lender: see cl. 5. p. 189.1
- 20 (c) requiring that such Supplemental Deed should, with respect to the Loan to which it related, specify certain matters, such as the amount of the loan, and the method of calculation of interest payable on the loan: see cl.6; p. 189.2
- (d) restricting the provisions which might be inserted in a Supplemental Deed: see cl. 7(h); p. 190.2
- 30 (e) providing that, insofar as a provision of a Supplemental Deed was inconsistent with the General Loan Deed, that provision should be "read and construed subject to this (General Loan) Deed and any Loan to which such Supplemental Deed relates shall be enforceable and recoverable accordingly" see cl. 11. p. 190.7
- 40 13. The second major function of the General Loan Deed was to create a charge by way of security over the assets of each of the Companies to secure the indebtedness of each Company to each lender: see cl. 13 - 15, in particular. Such charge was by cl. 19 thereof to be : pp. 192.5-193.6
pp. 194.9-195.1

"for the equal and proportionate use benefit and security of the Lenders for the payment of the moneys hereby secured without any discrimination preference or priority of any Lender over any

Record

other Lender by reason of priority in the time of making of a Loan the date of maturity thereof the currencies in which the same is expressed to be payable the time of execution or registration of this Deed or of any Supplemental Deed or otherwise howsoever

pp.205.8-206.9
pp. 178-179
Furthermore, moneys coming to the hands of any Receiver appointed under the General Loan Deed were to be applied (inter alia) in or towards payment to the lenders pari passu of arrears of interest and thereafter in repayment of Principal Moneys: cl. 27. The said General Loan Deed was, pursuant to the Companies Act of Queensland, duly registered as a charge, as required by that Act. 10

pp. 250-266
p. 251.7
14. The next relevant instrument, in chronological order, executed by MEQ was the MEQ Supplemental Deed dated 12th October 1972. The primary function of this instrument was to "evidence the terms of the loan to be made" by the appellant to the Borrower (Recital B), and it provided in particular:- 20

- p. 256.2 (a) that the appellant agreed to be bound by the General Loan Deed : see cl.4;
- p. 189.2 (b) the matters required by cl.6 of the General Loan Deed to be specified, including -
- p. 256.3 (i) the maximum amount of the loan cl.5(1);
- pp. 256.5-257.9 (ii) how the rate of interest was calculated and payable : cl.6; 30
- pp.258.3-258.8 (c) for repayment of the loan : cl.9;
- pp. 259.4-259.6 (d) the currency of repayment, and for "exchange risk adjustment" : cl.11.
- p. 264.5 (e) that in the case of inconsistency of any provision of the Supplemental Deed with the General Loan Deed, the former should be read and construed subject to the latter "and the Loan shall be enforceable and recoverable accordingly": cl.17

15. The Supplemental Deed contains the following further provisions relevant to matters in issue in this appeal:- 40

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| | | <u>Record</u> |
| | (a) <u>in cl.6(2)</u> , for the computation and payment of interest on the Loan, such interest being computed at a rate which is expressed to be an aggregate of three distinct factors (a) (b) and (c) specified in cl.6(2). | pp. 256.9-257.1
pp. 256.9-257.1 |
| 10 | (b) <u>in cl.11(2)</u> , that the Loan should be made out of the proceeds of "Overseas Deposits" (meaning deposits with the appellant in U.S. dollars); but that, although all payments, whether of principal or interest, in respect of the Loan were expressed to be payable in Australian dollars, nevertheless the Borrower should "accept the exchange risk and therefore agrees that repayment of principal and interest shall be subject to adjustment"; | p. 259.5
p. 252.9
p. 259.6 |
| 20 | (c) <u>in cl.9(2)</u> , that the Loan should be repayable by 10 instalments, of which, subject to clause 11, each instalment should be equal to one tenth part of the amount in U.S. \$ of the Overseas Deposits. | p. 258.4 |

16. With the proceeds of the loans made by the appellant and the other lenders and the equity capital provided by MEQ and FQN, the nickel mining project at Greenvale and the processing plant at Yabulu were constructed, and mining and refining of the nickel and cobalt deposits commenced. Unfortunately for all concerned, the expectations of the Borrowers were not realized. The world nickel market became depressed, costs (including the cost of constructing the project and of fuel oil) increased dramatically, and the project became incapable of generating funds sufficient to enable the obligations of MEQ and FQN to their various lenders (including the appellant herein) to be met. Accordingly a form of moratorium (the first of three) was devised in terms of which (so far as concerns the appellant) the obligation to make on dates between 30th June 1975 and 31st December 1976 certain interest payments (called "Deferred Interest") to lenders was deferred. Such interest payments were then to be paid by three equal instalments commencing with the Interest Payment Date next occurring after the Interest Payment Date on which the last instalment of the Loan was pursuant to the Supplemental Deed due to be repaid (see clause 5(1) of the Deed of Deferral dated 27th June 1975 now referred to). The last instalment of the loan was due to be repaid on 30th September, 1981 and the first instalment of

Record

pp. 303-337 Deferred Interest became due on 31st March, 1982. This was accomplished by means of a Deed of Deferral dated 27th June 1975 executed by MEQ and by all the lenders, including both those who did, and those who did not, enjoy the benefit of the guarantees given by the State pursuant to the Greenvale Agreement Act 1970. The State's guarantee was amended to guarantee the payment of interest agreed to be paid by FQN and MEQ on such Deferred Interest. Subject to such amendment, the State's previous guarantee was preserved by the Greenvale Agreement Amendment Act 1975 together with the Amending Agreement which was scheduled thereto. 10

17. Despite the assistance so provided, the profitability of the nickel project continued to decline, and in 1977 a further moratorium operation became necessary. This was achieved by means of two separate instruments executed by MEQ:-

- pp. 375 - 410 (a) the Deed of Postponement dated 1st April 1977; and 20
- pp. 61-81 (b) the Debt Restructuring Deed also dated 1st April 1977.

The Deed of Postponement which, again, was executed by all lenders, had as its principal objects and effects the following:-

- p. 384.6) (a) the deferment of the obligation of MEQ and FQN to pay interest on Deferred Interest in respect of the period 1st January 1977 to 31st December 1985: see c.4(1), after which interest on Deferred Interest should proceed to accrue: cl.4(2); 30
- p. 311.2)
- p. 390.5
- p. 390.6
- p. 385 (b) the application of what was termed "Excess Cash" (being the amount by which the cash, moneys on deposit, and marketable securities held by MEQ exceeded \$5,000,000) by payment of such cash :-
- p. 388.1) (i) first in payment of what was described as Scheduled Interest : cl.5(1)(a); and 40
- p. 391.8)
- p. 388.7 (ii) secondly in payment of what was described as Scheduled Principal : cl.5(1)(b).
- pp. 391.9-392.2)
- (c) subject to (b) above, the Deed of Postponement freed MEQ from the obligation to pay interest and to

repay principal which would otherwise have become payable between 1st January 1977 and 31st December 1985: see cl. 2.

pp. 389.6-390.1

18. The result of the Deed of Postponement was to create a shortfall in payments which MEQ would otherwise have been bound to make to the various lenders, including the guaranteed Lenders. (The extent of such shortfall is the amount by which cash generated by the project's operations in excess of that applied to meet project costs (other than debt servicing costs) is less than instalments of principal and interest scheduled for payment by MEQ and FQN.) However, simultaneously with the execution of the Deed of Postponement, the State Government and MEQ and all of the lenders executed the MEQ Debt Restructuring Deed dated 1st April 1977. This Deed was, by the Greenvale Agreement Act 1977 to which it formed a Schedule, given the force of law : see s. 4 of the Act. By cl. 2 of that Deed the guarantees earlier given by the State to the particular Lenders specified in the Order in Council dated 11th November 1971 were preserved. In addition, however, the State by cl. 3 of the Deed undertook in favour of those guaranteed Lenders direct obligations as follows:-

pp. 61-81

(a) by cl.3(1), to pay to those Lenders amounts equal to interest on Deferred Interest foregone pursuant to cl.4 of the MEQ Deed of Postponement, "namely interest calculated at the rate of 10½% per annum on so much of the Deferred Interest to which each such lender is entitled as is attributable to the Loan or Loans of such Lender described" in Part A of the Schedule to the said Order in Council - "(which Loan or Loans are hereinafter called "Subject Loan" or "Subject Loans" as the case may be)";

pp. 70.1-70.7

p. 390.5

p. 102

(b) by cl.3(2)(a), to pay to each of those named Lenders "the amount by which the sum in respect of Scheduled Interest calculated in respect of that party's Subject Loan paid to such party pursuant to Clause 5 of the MEQ

pp. 70.8-71.6

p. 388.1

p. 391.7

Record

Deed of Postponement is less than the amount of Scheduled Interest calculated as aforesaid to which that party would were it not for the MEQ Deed of Postponement have been entitled
Provided that the amount payable by the State shall not exceed the amount by which the aforesaid sum is less than an amount equal to interest at the rate of 8% per annum calculated in respect of that party's Subject Loan

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p. 72.2 (c) by cl.3(2)(c), to pay to each of those named Lenders "the amount by which the sum in respect of Scheduled Principal which forms part of that party's Subject Loan paid to such party pursuant to Clause 5 of the MEQ Deed of Postponement is less than the amount of Scheduled Principal which forms part of that party's Subject Loan to which that party would were it not for the provisions of the MEQ Deed of Postponement have been entitled"

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p. 68.4 19. By clause 1 of the MEQ Debt Restructuring
p. 375 Deed, words and expressions defined in the MEQ Deed of Postponement were, when used in the Debt Restructuring Deed, to have the meanings ascribed to them by the Deed of Postponement. However, although meanings are so ascribed to the words "Deferred Interest", "Scheduled Interest" and "Scheduled Principal", the expression "Subject Loan" is not so defined. It is the meaning to be attributed to the expression "Subject Loan" in the Debt Restructuring Deed that has given rise to the present proceedings, in which:-

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(a) the respondent submits that "Subject Loan" means the amount of \$2,500,000 lent by the appellant to MEQ;

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(b) the appellant submits that "Subject Loan" means the amount repayable by MEQ to the appellant; that is to say, an amount in A\$ which is the equivalent of the amount of U.S. \$3,636,202 at the rate of exchange prevailing at

the dates for repayment of the instalments thereof.

In other words, the respondent's contention is that "Subject Loan" refers to the amount of principal lent, whereas the appellant's contention is that "Subject Loan" refers to the total of amounts repayable.

p. 70.6

20. If the respondent's submission is correct, then:-

- 10 (a) the State has paid in full all amounts due to the appellant by way of "Scheduled Interest" pursuant to clause 3(2)(a) of the Debt Restructuring Deed, and accordingly there should be no money judgment against the respondent in the sum of \$164,036.58 or any other sum; and - p. 388.1 pp. 70.8-71.6
- 20 (b) the State is not and will not be liable in respect of "Scheduled Principal" pursuant to clause 3(2)(c) of the said Deed other than to the extent of the amount not in fact paid by MEQ short of \$A2,500,000. p. 388.6 p. 72.2

PART B - REASONS FOR JUDGMENT OF THE MEMBERS OF THE FULL COURT

21. Of the three members of the Full Court, Kelly J. (with whose reasons Stable S.P.J. agreed) and Dunn J. (who dissented) gave separate reasons for judgment. These reasons are summarised below.

pp. 919-936
pp. 937-968

30 22. Kelly J., after setting out relevant provisions of the instruments and enactments hereinbefore referred to, concluded that:-

- 40 (a) the last two columns of Part A of the Schedule to the Order in Council dated 11th November 1971 were of "no assistance" for the purpose of determining what was the "Subject Loan" referred to in cl. 3 of the MEQ Debt Restructuring Deed; and that, in order to ascertain what that Loan was, it was necessary to look to the documents constituting the Loan Agreement referred to in the Order in Council. p. 102 pp. 928.7-928.9
- (b) His Honour's reason for reaching the conclusion that the aforesaid columns were of no assistance was that those columns were headed respectively "Amount of p. 928.7

Record

Principal to which guarantee shall be limited" and "Rate of Interest to which guarantee shall be limited", and so referred only to the guarantee by the State and not (it is to be inferred from His Honour's reasons) to the "Subject Loan".

- pp. 929.6-929.8 (c) His Honour further concluded that the "Subject Loan" from the appellant to the respondent described in Part A of the said Schedule was "the transaction of loan", under which the amount borrowed was \$A2,500,000 but under which the obligation was to repay the equivalent in Australian currency at various repayment dates of amounts which aggregated U.S. \$3,636,202. 10
- p. 70.5 His Honour thus, in effect, read the expression "Loan described in", as meaning "transaction of Loan referred to in", Part A of the Schedule to the Order in Council. The respondent will respectfully submit that this conclusion is incorrect. 20
- p. 102
- pp. 929.9-931.6 23. Kelly J. also considered the question of how interest pursuant to cl. 6(2) of the MEQ Supplemental Deed ought properly to be calculated as between borrower and lender:-
- p. 256.9
- p. 931.2 (a) While remarking that cl.6(2)(c) was "difficult to construe and its meaning was far from clear", His Honour concluded that on a proper reading of cl.6(2)(c), no effect could be given to it because there was not a question in the present case of additional interest arising under cl.6(3) or cl.6(4); 30
- p. 931.5
- p. 931.6 (b) His Honour also considered cl.11(2)(a) and said that, although "the position with respect to payment of interest is less clear", and although "no completely satisfactory answer" could be found, cl.6(2) must be so read as to lead to the result that, as between borrower and lender, interest under the MEQ Supplemental Deed was to be 40
- p. 932.2
- p. 932.4-932.6

Record

calculated in accordance (only) with sub-clauses (2)(a) and (2)(b) of clause 6 on the Australian equivalent of U.S. \$3,636,202; that is to say in the manner calculated by the appellant in its Statement of Claim.

p. 256.9

p. 42

10 His Honour thus, in effect, accepted the appellant's submission that, in calculating interest on the Loan pursuant to cl.6(2), no effect was to be given to factor (c) in cl.6(2)(c). Again, the respondent will respectfully submit to the contrary.

p. 257.1

24. Having concluded that, as between borrower and lender, the appellant's method of calculating interest (and in particular Scheduled Interest) was correct, His Honour then proceeded to the following further conclusions:-

20 (a) That the obligations of the State to make payments of Scheduled Interest under cl.3(2)(a) of the Debt Restructuring Deed were not subject to the same considerations;

p. 933.1

pp. 70.8-71.6

(b) His Honour in this regard agreed with the trial judge (Connolly J.) that one should not assume that the State necessarily took over the precise obligations of the borrowers.

p. 933.25

30 (c) Consequently, in determining the meaning to be given to the words "calculated in respect of that party's Subject Loan in respect of which such Scheduled Interest is payable", the final words served only to identify the loan, and did 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.

pp. 933.4-933.5

40 (d) Accordingly, in applying the proviso to cl. 3(2)(a) of the Debt Restructuring Deed (whereby the State's liability was limited to an amount equal to interest at the rate of 8% p.a.), the interest was to be calculated in respect of the Subject Loan: in determining that amount, it would be inappropriate to have regard to the amount to be repaid,

p. 933.6

p. 933.8

Record

- p. 933.9 and for this purpose interest should be calculated at the rate of 8% per annum on the amount borrowed.
- pp. 933.9-934.1 (e) His Honour's conclusion therefore was that, because the limit of the State's liability under the said cl.3(2)(a) was an amount equal to interest at the rate of 8% per annum on A\$2,500,000 less the amount actually paid by the borrower in respect of Scheduled Interest, and because that amount had already been paid, the appellant was not entitled to recover more and its money claim therefore failed. 10

With the foregoing conclusion of His Honour (in which Stable S.P.J. concurred), the respondent respectfully agrees.

25. As to the matter of the appellant's claim for declarations in respect of Scheduled Principal, Kelly J. considered that - 20

- p. 936.6 (a) it could not be said that the declarations sought would necessarily resolve all questions which might arise in relation to cl.3(2)(c) of the Debt Restructuring Deed, nor would the declarations sought (in the words of the trial judge) "formulate with precision" how the sums should be calculated.
- p. 72.2
- p. 937.8 (b) accordingly, in declining at that stage to make the declarations sought, the trial judge could not be said to have failed properly to exercise his discretion. 30

26. In his dissenting judgment Dunn J., after setting forth provisions of the instruments and enactments already referred to, said -

- p. 949.3 (a) that one should concentrate upon the Debt Restructuring Deed and the Deed of Postponement rather than upon the earlier documents. His Honour gave four reasons for adopting this approach, saying that, because the aforesaid deeds had been amended (although in respects not specified by His Honour), reliance should "not necessarily" be placed 40
- pp. 949.4-951.3
- p. 949.9

10 upon the early documents and the definitions they contained, which might now have "different meanings"; that the earlier contractual intentions of the parties "may be" irrelevant in construing the 1977 Deeds; and that, although in those Deeds certain words are to have the meanings ascribed to them in the General Loan Deed, those meanings "may have been" varied by the operation of cl.12(2) of the Deed of Postponement.

p. 950.8
p. 951.3
pp. 397.9-399.5

20 (b) Accordingly, His Honour concluded that the expressions "Loan" and "Subject Loan" in cl. 3(1) of the Debt Restructuring Deed were to be construed having regard, not only to Part A of the Schedule to the 1971 Order in Council but also to the definitions (as deemed to have been amended) in the General Loan Deed, and that particular regard must also be had to the intention of the parties as it appeared from the Deed of Postponement and the Debt Restructuring Deed read together.

pp. 951.5-951.7

With respect, the respondent submits that no amendment to the General Loan Deed, relevant in any way to the resolution of the present dispute, can be seen to have resulted from the execution of the 1977 Deeds.

30 27. His Honour considered the expression "Loan described" in cl.3(1) of the Debt Restructuring Deed, and concluded that:-

pp. 951.7-954.7
p. 70.5

(a) Reference to Part A of the Schedule to the 1971 Order in Council did not convey to him that the loan "described" in it was a loan of any particular sum of money, and that the said Part A did not support the proposition that "loan" meant "the amount advanced"; that the "description" was rather an identification of some transaction of loan the subject of a "loan agreement" entered into by MEQ.

40 p. 951.8
p. 951.9

(b) His Honour further concluded that, in the expression "amount of Principal to which guarantee should be limited" in the said Part A, the word "Principal" was not used as an exact synonym for

p. 102.6

Record
p. 952.1

"the amount advanced".

p. 954.1

- (c) His Honour also considered that it was "artificial" to treat the expression "Subject Loan" as being restricted in meaning to "amount advanced", with the consequence that the liability of the State may be a liability to make good, partially and not wholly, short payments of principal and interest by MEQ.

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With respect, the respondent invites attention to the fact that, in this respect, Dunn J. appears to be disagreeing both with the trial judge and with the other members of the Full Court.

p. 960.6
p. 931.6
p. 960.6

28. Like the other members of the Court, Dunn J. considered that the Supplemental Deed "was difficult to construe"; but His Honour agreed with Kelly J. in rejecting the respondent's submission that factor (c) in cl.6(2) of the Supplemental Deed was to be taken into account, as between borrower and lender, in calculating interest, and consequently "Scheduled Interest".

20

29. As to the declarations as to Scheduled Principal sought by the appellant, Dunn J. concluded that:-

p. 966.5

- (a) there were good reasons why the discretion to make declaratory orders should have been exercised;

pp. 966.5-966.6

- (b) because it was not possible to identify a reason why the discretion should not have been exercised, the discretion of the trial judge must have miscarried;

30

p. 967.9

- and (c) that, after admission of the further evidence tendered, the matter of the appellant's claim for the declarations sought by it should be listed for further consideration by the Full Court.

40

PART C - RESPONDENT'S SUBMISSIONS

30. The appeal against the decision of the Full Court should it is respectfully submitted fail for the following reasons:-

pp. 61-81

- A. First, on the proper construction of the MEQ Debt Restructuring Deed, read with

Record

- part A of the Schedule to the Order in Council dated 11th November, 1971, the "Subject Loan" in clause 3 of that Deed describes a Loan of the amount of A\$2,500,000 which appears in that Part A opposite the name of the appellant, and does not operate to identify a "transaction" of loan. p. 102
p. 70.6
- 10 B. Secondly, for the reason given by Kelly J. in his judgment (with which Stable S.P.J. agreed) that, in applying the proviso in clause 3(2)(a) of the said Deed limiting the liability of the State for Scheduled Interest regard should be had to the amount borrowed and not to the amount to be repaid. p. 933.8
- 20 C. Thirdly, for the reason that, in the MEQ Financing Agreement dated 1st October, 1971 (which is the only instrument referred to in the said part A of the Schedule to the Order in Council dated 11th November, 1971), the "Loan" is the amount agreed to be lent and borrowed, that is, amounts aggregating not more than A\$2,500,000. pp. 113-124
p. 102
p. 114.9
p. 115.9
p. 115.8
- 30 D. Fourthly, that in the MEQ Supplemental Deed dated 12th October 1972, which sets out the terms of payment of interest and repayment of principal, the maximum amount of the Loan is expressed to be A\$2,500,000. pp. 250-266
p. 256.3)
p. 254.8)
- 40 E. Fifthly, that, in terms of clause 6(2) of the MEQ Supplemental Deed, the proper method of computing interest (and therefore Scheduled Interest) for the purpose of clause 3(2)(a) of the MEQ Debt Restructuring Deed is to calculate that interest on a principal sum of A\$2,500,000 employing all three factors (a), (b) and (c) specified in the said clause 6(2). pp. 256.9-257.1
pp. 70.8-71.6
pp. 256.9-257.1
- F. Sixthly, that if it were to be accepted that the said clause 6(2) is capable of being interpreted so as to permit interest to be calculated in a manner different from the method referred to p. 256.9

Record

- p. 189.3 in E above, such interpretation would be and is inconsistent with clauses 6(a) and 6(c) of the General Loan Deed, and consequently "subject to" the provisions of the latter Deed.
- p. 388.6 G. Seventhly, that the declaration or declarations sought by the appellant with respect to the liability of the State for sums of Scheduled Principal did not and do not with precision formulate how such sums should be calculated, and would not finally resolve the dispute between the appellant and the State. 10

In the following paragraphs of this Case, the above submissions of the respondent are developed in detail.

- pp. 61-81
p. 102 A. FIRST SUBMISSION : MEANING OF LOAN IN CLAUSE 3 OF MEQ DEBT RESTRUCTURING DEED READ WITH ORDER IN COUNCIL 20

p. 70.6 31. The first submission of the respondent is that the word "loan" forming part of the expression "Subject Loan or Loans" in cl. 3 of the MEQ Debt Restructuring Deed refers, throughout that clause, to the amount of principal described in column 3 of Part A of the Schedule to the Order in Council.

p. 102

p. 70.6 32. The expression used in clause 3 of the MEQ Debt Restructuring Deed is "Subject Loan". Neither this expression, nor the word "loan" is defined, but it is accepted that in each of clause 3(2)(a) and clause 3(2)(c) that expression must bear the same meaning as it does in clause 3(1). This is because in referring to the "Loan or Loans of such Lender" clause 3(1) adds parenthetically:- 30

p. 70.8)
p. 72.2)
p. 70.1
p. 70.5

p. 70.6 "(which Loan or Loans are hereinafter called the "Subject Loan" or "Subject Loans", as the case may be)". 40

33. The only indication given by clause 3(1) as to the meaning of "Subject Loan" is that it is -

p. 70.5 "The Loan of such Lender described in either or both of the said parts A"

The identity of "the said parts A" is to be found

earlier in clause 3(1) which refers to -

"each Lender named in Part A of the Schedule to the said Order in Council made the eleventh day of November 1971"

p. 70.2

34. The problem therefore is to find the loan of such named lender which is described in part A of the Schedule to the Order in Council. It is to be observed that -

p. 102

10

(a) clause 3(1) uses the word "described" and not the words "identified" or "referred to". The ordinary meaning of "describe" is given by the Concise Oxford English Dictionary as "Set forth in words, recite the characteristics of";

p. 70.5

(b) clause 3(1) says that the Subject Loan is described "in" Part A, not in other parts of the Order in Council or in other documents, whether or not referred to in the Order in Council.

p. 70.2

20

35. Part A of the Schedule to the Order in Council consists of four columns and a heading:-

p. 102

(a) the third column comprises the names of lenders; however, clause 3(1) itself uses the expression "each lender named in part A of the Schedule", so that the name of the lender in part A cannot have been intended to be regarded as part of what "describes" the loan;

p. 70.2

30

(b) using the name to identify the lender, the remaining words and figures in part A must be what comprise the description or characteristics of the loan. As to these, the date in the left-hand column is not the "loan", although it may be the date of the loan or of the instrument of loan. The latter is the likely explanation because of the heading "Loan agreements entered into" A loan agreement is, however, not a loan, although it may be the instrument pursuant to which the loan is or will be made.

p. 102

40

Equally, the rate of interest in column 4 is not "the loan" described, because 8% per annum is not a loan. This leaves only column 3, which contains an amount headed by a \$sign. It is submitted

p. 102.5

Record

that it is this amount (in the case of the plaintiff \$2,500,000) that is "the loan" described in part A and therefore the Subject Loan.

- p. 70 36. Against this construction, it has throughout been submitted by the appellant that the heading to column 3 says, not merely \$, but "Amount of Principal to which Guarantee shall be Limited". It is said that these words so qualify the description of the loan as to prevent the amount (\$2,500,000) from being regarded as "the loan". The words "Amount of Principal" create no such difficulty: it is only the following words ("to which guarantee shall be limited") that can be said to create the problem. As to this, however, clause 3 is not concerned with a guarantee, but with an amount payable directly by the State. The words "to which guarantee is limited" can therefore form no part of "the loan described in part A". But that does not mean that everything in column 3 is to be rejected. If there were no headings to the columns it could not be doubted that the "loan described" was \$2,500,000. Because there is a heading, of which a part (only) is not a description of the loan or its characteristics, it does not follow that the whole heading and the whole column is to be discarded as irrelevant. 10 20
- p. 70.1 37. The result, if the respondent's submission on this point is accepted, is what a reader of clause 3(1) of the MEQ Debt Restructuring Deed would expect to find. That reader is informed that the Subject Loan of a named lender is "described in" part A of the Schedule to the Order in Council. In ordinary speech the word "loan" connotes an amount of money lent, or what is commonly referred to as "the principal". In column 3 of part A, the amount of \$2,500,000 appears under a heading which includes the words "Amount of Principal". The presence of the additional words "to which Guarantee shall be Limited" would, it is submitted, not be regarded by the ordinary reader as detracting from the description of the loan so described as an amount of A\$2,500,000: the reason for this is that those 30 40
- p. 102

additional words are not words which describe either the loan or the amount of the loan.

B. The second submission of the Respondent is as mentioned above the reason given by Kelly J. and set out in paragraph 24 of this Case.

C. THIRD SUBMISSION : "SUBJECT LOAN" MEANS "LOAN" AS DEFINED IN FINANCING AGREEMENT

10 38. If the appellant is confined to the description in part A of the Schedule to the Order in Council, the appeal will, it is submitted, necessarily fail. This is because there is nothing in part A itself that supports an argument that the Subject Loan means something more than the amount of the principal of the loan (A\$2,500,000) or that it includes, as the appellant contends, the amount repayable on the loan.

20 39. What the appellant therefore does is to reject everything in part A except the heading "loan agreements entered into" and the date. The appellant then relies on the heading "Loan agreements entered into" to travel outside part A of the Schedule to the Order in Council, in order to reach a loan agreement dated 1st October, 1971. The respondent submits that, on ordinary principles of interpretation, such an excursus is not permissible because clause 3(1) does not say that the Subject Loan is "described in part A or in any agreement therein referred to".

p. 102.5

p. 70.1

30 40. If, however, the step is taken of passing outside part A of the Schedule, then the only loan agreement entered into by the appellant and dated 1st October, 1971 is the MEQ Financing Agreement. This is an agreement to lend and borrow; see Recitals A and B. The Financing Agreement contains the following relevant provisions:-

pp. 113-124

p. 113.6

(a) In clause 1(1)(o), a definition of "loan" as meaning - pp. 114.9-115.1

40 "the aggregate of the amounts required to be advanced by the Lender pursuant to notices to be given under Clause 7 of this Agreement or so much thereof as shall not for the time being have been repaid";

It is (it is submitted) relevant that "the loan" is defined not merely as

Record

the aggregate of amounts to be advanced, but as the aggregate of amounts to be advanced or so much thereof (i.e. so much of the aggregate of those amounts to be advanced), as shall not have been repaid. In other words, "the loan" can never exceed the aggregate amounts to be advanced, irrespective of how much has been repaid. The question then to be considered is, What is the "aggregate of the amounts to be advanced?"

10

p. 115.9

(b) In clause 2(1), it is provided that -

"The Lender agrees to lend and the Borrower agrees to borrow from the Lender amounts aggregating not more than \$2,500,000

p. 115.8

(c) In clause 1(1)(u), "the symbol "\$" shall mean Australian dollars except where otherwise provided."

20

p. 119.5

(d) In clause 7 there is specified a procedure for obtaining the advances, by written notice to the lender, of the amount of each advance, which is ordinarily to be in multiples of \$1,000.

pp. 113-124

41. The result (in the submission of the respondent) is that under under the MEQ Financing Agreement -

The loan is the aggregate of amounts to be advanced by the Lender, that is, amounts aggregating not more than 2,500,000 Australian dollars.

30

Even if there is a repayment of part of that principal sum, "the loan" (or aggregate of advances) can never be more than A\$2,500,000. If nothing is repaid, "the loan" remains A\$2,500,000. It is not at any time increased by the amount of interest payable on the loan (interest is not specified in the Financing Agreement), nor by any other sums payable, such as exchange risk adjustment (which is also not dealt with in that Agreement).

40

42. Hence, if the appellant is permitted to travel beyond the Order in Council (and so to reach the Financing Agreement) it remains correct to say that -

(a) it is the sum of not more than A\$2,500,000, being the aggregate of the amounts to be advanced under the MEQ Financing Agreement dated 1st October, 1971 -

pp. 113-124

10 (b) which is the "Loan Agreement entered into" with MEQ on that date -

(c) which is referred to in part A of the Schedule to the Order in Council -

p. 102

(d) which is the loan "described" therein -

(e) which is referred to in clause 3(1) of the MEQ Debt Restructuring Deed as the "Subject Loan".

p. 70.6

20 D. FOURTH SUBMISSION : MEANING OF "LOAN" IN MEQ SUPPLEMENTAL DEED

pp. 250-266

43. The Financing Agreement therefore does not, it is submitted, support the appellant's argument that "Subject Loan" means the amount repayable and not the amount lent of A\$2,500,000. In order to support such an argument the appellant seeks to travel to another document, and one that is not (even indirectly) referred to in the Order in Council. This is the MEQ Supplemental Deed, which is referred to in clause 2(3) of the MEQ Financing Agreement only as follows:-

30 p. 116.3

"The terms and conditions relating to repayments and prepayments of the Loan and interest on the Loan and payment of other moneys shall be as provided in the General Loan Deed and the MEQ Supplemental Deed."

p. 116.3

pp. 180-232
pp. 250-266

As can be seen, clause 2(3) of the MEQ Financing Agreement is concerned not to describe "the loan" but to state the terms and conditions of repayment of "the loan" and the payment of interest and "other moneys". It thus itself distinguishes between "the loan", its "repayment", and the payment of such interest and "other moneys".

40 p. 116.3

44. The terms and conditions of such repayment appear in the MEQ Supplemental Deed

pp. 250-266

Record

which is dated 12th October 1972, that is, more than a year after the date of the Financing Agreement of 1st October 1971. This MEQ Supplemental Deed is, like all the Supplemental Deeds of other Lenders, subject to the overriding provisions of the General Loan Deed.

p. 251.8 45. The MEQ Supplemental Deed dated 12th October 1972 recites that it is "executed to evidence the terms of the Loan to be made by the Company to the Borrower". This Deed contains the following material provisions - 10

(a) in clause 1(1)(n), a definition of "Loan" as meaning -

p. 252.8 "so much of the amount advanced by the Company to the Borrower pursuant to the MEQ Financing Agreement as has for the time being not been repaid."

p. 251.9 (b) in clause 1(1)(a), a definition of "Advance" as meaning - 20

"an advance on account of the Loan"

p. 256.3 (c) in clause 5(1), a provision that - "the maximum amount of the Loan shall be \$2,500,000"

p. 254.8 (d) in clause 1(1)(ff) that -

"The symbol "\$" shall mean Australian dollars"

Hence, even the Supplemental Deed, on which the appellant necessarily reposes its whole case, provides that the maximum amount of "the loan" is A\$2,500,000. In view of this it is, in the respondent's submission, unnecessary to examine other specific provisions of the MEQ Supplemental Deed in order to ascertain the meaning of "Subject Loan" in clause 3 of the MEQ Debt Restructuring Deed. For all purposes, whether for the purpose of ascertaining the amount of Deferred Interest referred to in clause 3(1) of that Deed, or of Scheduled Interest referred to in clause 3(2)(a) of that Deed, or of Scheduled Principal referred to in clause 3(2)(c) of that Deed, the "Subject Loan" is \$A2,500,000. 30

p. 70.6

pp. 70.1-72 40

E. FIFTH SUBMISSION : CALCULATION OF INTEREST
UNDER CLAUSE 6(2) OF
SUPPLEMENTAL DEED

pp. 256.9-257.1

46. In case a different view of the matter should prevail, the respondent proceeds now to explain its approach to the proper calculation of interest, pursuant to the terms of the MEQ Supplemental Deed and consequently of Scheduled Interest. Clause 3(2)(a) of the MEQ Debt Restructuring Deed requires that the State pay to the appellant what for present purposes may be described as "the difference" between -

p. 388.1

pp. 70.8-71.6

10

(a) "the amount by which the sum in respect of Scheduled Interest calculated in respect of that party's Subject Loan paid to such party pursuant to the MEQ Deed of Postponement" -

p. 70.9

pp. 375-411

and (b) "the amount of Scheduled Interest calculated as aforesaid to which that party would were it not for the provisions of the MEQ Deed of Postponement have been entitled" -

20

pp. 70.9-71.1

p. 71.1

Provided That the amount so payable by the State shall not exceed the amount by which "the difference" is less than an amount equal to interest at the rate of 8 per centum per annum calculated in respect of that party's Subject Loan after deducting from such principal any amount paid pursuant to clause 3(2)(c) in respect of Scheduled Principal.

30

p. 71.3

The effect of the latter proviso is to limit the amount payable by the State in any event to an amount equal to interest at 8%p.a. calculated on the Subject Loan.

47. The first question is what is meant by Scheduled Interest. The second question is how such Scheduled Interest is to be calculated. Both of these questions necessarily raise again the question of what is the "Subject Loan".

40

48. "Scheduled Interest" is defined in clause 1(1)(xx) of the MEQ Deed of Postponement as -

p. 388.1

"the amount that would have been payable by way of interest pursuant to a

Record

Supplemental Deed."

p. 256	For the purpose of ascertaining the amount that would have been payable by way of interest the relevant provision of the MEQ Supplemental Deed is clause 6 thereof. This clause is directed to prescribing a <u>rate</u> of interest and it deals separately -	
p. 256.5 p. 30.8	(a) <u>in clause 6(1), with interest before the Consolidation Date (which was 15th March 1975), in which event interest is payable "on each Advance" (meaning "advance on account of the Loan"; see clause 1(1)(a) of the Supplemental Deed); and -</u>	10
p. 251.9		
p. 256.9	(b) <u>in clause 6(2), with interest after the Consolidation Date, in which event interest is payable on "the Loan" (meaning "so much of the amount advanced pursuant to the MEQ Financing Agreement as has not been repaid" see clause 1(1)(n) of that Deed).</u>	20
p. 252.8		
p. 256.9	Since the question in the present case concerns interest payable after the Consolidation Date, it is clause 6(2) which is primarily relevant in ascertaining the amount of Scheduled Interest, although clause 6(1) is also relevant in determining the meaning of the whole of clause 6.	
p. 256.5		
p. 256.9	49. Clause 6(2) provides that interest -	
	(i) shall be " <u>computed</u> on the Loan";	30
	(ii) shall be " <u>payable</u> on the Loan";	
	(iii) shall be so computed and payable "in respect of the Period commencing the day following the Consolidation Date <u>and in respect of each successive Period thereafter</u> "	
pp. 256.9-257.1	(iv) shall be the <u>aggregate</u> of "three factors listed as (a), (b) and (c)."	40

Each of these factors (a), (b) and (c) is a rate, so that the total of these factors is the aggregate rate at which interest is to be (i) computed, and (ii) payable. Such aggregate

rate is the rate at which interest is to be calculated "on" the Loan.

50. The respondent submits that, in order correctly to calculate the interest payable pursuant to clause 6 of the MEQ Supplemental Deed (and so to ascertain the amount of Scheduled Interest payable pursuant to clause 3(2)(a) of the Debt Restructuring Deed), the following factors must be used:-

p. 70.8

- 10 (i) "the Loan" on which interest is payable, and must be computed, pursuant to clause 6(2) of the Supplemental Deed is A\$2,500,000 (or so much thereof as has not been repaid); and - p. 256.9
- (ii) all three of the above factors (a), (b) and (c) must be aggregated in order to arrive at the rate at which such interest is to be computed. pp. 256.9-257.1
- 20

By way of comparison and contrast, the appellant's submission is that -

- (i) "the Loan" on which the same computation is to be made is US \$3,630,000 (adjusted for exchange rate of fluctuation in terms of clauses 9(2) and 11(2)(a) of the Supplemental Deed) or so much thereof as has not been repaid; and - p. 258.3)
p. 259.6)
- 30 (ii) only factors (a) and (b) of clause 6(2) are to be included in the aggregation in order to ascertain the rate of interest. Appellant assigns to factor (c) either no function, or the extremely limited function hereafter to be mentioned. p. 256.9

40 51. Factor (c) Factor (c) is the subject of clause 6(2)(c) of the MEQ Supplemental Deed, and this provision expressly incorporates clause 6(1)(c). The first part of clause 6(2)(c) is concerned with "all amounts required to be paid by the Borrower by way of additional interest"; the second part (commencing with "less such rate") is concerned with amounts which the Company (meaning the respondent) is required to repay to the Borrower. The first part thus deals p. 257.1

Record

with additions to the rate of interest; the second part with deductions from it.

p. 256.8 52. In order to compute the rate of interest payable, the first part of clause 6(2)(c) requires:-

(a) that a rate of interest be ascertained ("interest at such rate") as will produce by way of interest an amount;

(b) that such "amount" be "equal to the aggregate of all amounts required to be paid by the Borrower by way of additional interest" pursuant to -

10

p. 257.1 (i) clause 6(3); and

p. 257.2 (ii) clause 6(4); and

p. 259.5 (iii) clause 11

The second part of clause 6(2)(c), dealing with deductions from the interest rate, provides for subtraction of a rate that will produce an amount equal to the amount repayable to the Borrower pursuant to -

20

p. 257.2 (i) clause 6(4); or

p. 259.5 (ii) clause 11

p. 259.6) 53. Appellant's submission to the Full Court was that no amount by way of "additional interest" is payable pursuant to clause 11(2)(a). However, p. 259.9) clause 11(2)(a) and clause 11(2)(c) deal expressly with payments of interest:-

p. 259.6 (i) clause 11(2)(a) provides that "the Borrower shall accept the exchange risk";

30

p. 259.6 (ii) clause 11(2)(a) provides that repayment of principal and interest shall be "subject to adjustment";

p. 259.9 (iii) clause 11(2)(c) provides that "payment of interest hereunder shall be calculated by the Borrower on the basis of the exchange rate ruling"; and, further, that "the amounts of such payments shall be based on such calculation";

40

(iv) it is necessary that some meaning and operation be given to clause

Record

11(2)(a) in relation to interest
payments: appellant's submission
would confine the operation of clause
11(2)(a) to repayments of principal
(clause 9) and what are here
called "interest credits":
clause 11(2)(d).

p. 259.5
p. 258.3
p. 260.2

10 54. The purpose and effect of this submission
of the appellant is to remove from the application
of clause 6(2)(c) the adjustment of interest
payments due to exchange rate fluctuations by
giving to factor (c) either no value, or little
value. The appellant's submission would confine
the application of clause 6(2)(c) to adjustment
of interest payments under clause 11(2)(d) in
consequence of a repayment of the Loan pursuant
to clause 10, which will produce what is an
"interest credit". The weakness of this
20 submission is that it fails to accomodate the
calculation of interest in the case of advances:-

p. 257.1
p. 260.2
p. 258.9

(a) interest is, by clause 6(1), also
required to be computed and payable
on each Advance on and before the
Consolidation Date;

p. 256.6

(b) there were in fact 22 separate
Advances, and interest was in fact
paid thereon (see pp. 33 and 34),
although appellant's Counsel said
at the trial that such interest was
30 paid out of the next ensuing advance
(such Statement being in the
respondent's submission incorrect):
see Transcript at trial, p. 498 line
45 to p. 499 line 33);

pp. 33-34

pp. 498.7-499.6

(c) precisely the same formula (comprising
the aggregate of the same three
factors (a), (b) and (c)) governs the
computation of interest on Advances as
governs computation of interest on
the Loan: see clause 6(1), as compared
40 with clause 6(2)

p. 256.6)
p. 256.9)

(d) the provisions of clause 6(3) to
clause 6(8) are therefore equally
applicable to interest payable on
Advances before Consolidation, and,
in fact clause 6(8) (last sentence)

pp. 257.1-257.9

p. Record
257.9 expressly refers to both clause 6(1)(b) and clause 6(2)(b);

p. 260.2 (e) because the provisions of clause 11(2)(d) for interest credits in the event of pre-payment apply only to "the Loan" (see clause 10), those provisions cannot operate until all Advances have been made: consequently, the application of clause 6(1)(c) and clause 6(2)(c) cannot (as appellant has contended) be confined to interest credits in consequence of prepayment of the Loan under clause 10;

p. 258.9

pp. 256.6-257.1

p. 258.9

p. 260.2 (f) it is therefore not possible to ignore factor (c) or to give to it an operation which confines it to an interest credit under clause 11(2)(d).

It therefore follows that factor (c) must operate so as to include the adjustment of interest referred to in clause 11(2)(a).

F. SIXTH SUBMISSION : INCONSISTENCY OF APPELLANT'S INTEREST CALCULATION WITH GENERAL LOAN DEED

55. As mentioned above, the evident purpose of the General Loan Deed was to regulate in certain essential respects the terms on which all lenders lent money to the Borrower, thus ensuring that there was uniformity of those terms and so precluding a particular lender from imposing terms that were more favourable to him (and disadvantageous to the Borrower) compared with those of other lenders. The respondent's submission is that, if the appellant's submissions as to Scheduled Interest are correct, then the Supplemental Deed is, to that extent, inconsistent with the provisions of the MEQ General Loan Deed, and, to the extent of any such inconsistency, the provisions of the General Loan Deed prevail. This has the consequence, not that the Supplemental Deed is rendered void or unenforceable, but simply that the appellant's submissions as to the meaning of "the loan" or "Subject Loan" must necessarily be rejected as being inconsistent with the provisions of the General Loan Deed: clause 11.

56. The matters of specification of the amount of the Loan, and of the method of calculation of the rate of interest payable thereon, are the subject of express provision in the General Loan Deed. Clause 6 of the General Loan Deed provides -

p. 189.2

"Each Supplemental Deed shall with respect to the Loan to which it relates -

10

(a) specify the amount or maximum amount of the Loan;

p. 189.2

(b)

(c) specify or provide the method of calculation of the rate of interest payable on the Loan from time to time."

p. 189.3

20

It is (it is submitted) quite clear that the "the Loan" referred to in clause 6(a) and the "the Loan" referred to in clause 6(c) must be and are one and the same loan : in addition to the fact that those words appear in one and the same clause (clause 6), they also share a common definition of "Loan" in clause 1(1)(xii) of the General Loan Deed. It necessarily follows that when clause 6(c) of the General Loan Deed requires that the Supplemental Deed "specify or provide" the method of calculation of the rate of interest payable on "the Loan", what is required is that "the Loan" on which that interest is to be calculated and payable should be the same "Loan" as that of which the amount (or the maximum amount) is required by clause 6(a) to be specified in the Supplemental Deed.

p. 185.7

p. 189.3

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p. 189.3

It is because of the foregoing provisions (as well as other provisions hereafter to be mentioned) of the General Loan Deed that -

(a) the amount of A\$2,500,000 must be

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and (b) the Australian equivalent of the amount of US \$3,630,000 (or as adjusted) cannot be -

regarded as "the Loan" on which interest is to be calculated and payable under clause 6(2) of the MEQ Supplemental Deed.

p. 256.9

Record

57. The reasons advanced in support of this submission are as follows:-

- p. 189.3 (a) Clause 6(a) of the General Loan Deed requires that a Supplemental Deed "specify the amount of the Loan or the maximum amount of the Loan";
- p. 189.4 (b) the ordinary meaning of the word "specify" is to make specific, definite or certain; and in the present context that word is to be contrasted with the expression used in clause 6(c) of the General Loan Deed, which is "specify or provide"; 10
- p. 258.4 (c) the Australian \$ equivalent of the amount of US \$3,630,000 is not specified in clause 9(2), or anywhere else in the MEQ Supplemental Deed: it is incapable of being so specified because, by its nature, it varies from time to time according to currency exchange rate fluctuations; 20
- (d) the Australian \$ equivalent of the amount of US \$3,630,000 cannot be regarded as "the maximum amount of the Loan" because the Australian \$ equivalent of that amount will be greater if, at the date at which a repayment is due, there has been an adverse currency fluctuation: in short, as the appellant's submission has always accepted, "it is impossible to say how many \$A will be required to pay the principal (Appellant's written submission to the Full Court, para. 4(a)). 30
- p. 258.3 58. It follows that if (contrary to the above submission) clause 9 of the MEQ Supplemental Deed is properly to be regarded (as appellant contends) as expressing the amount of "the Loan", or as stating a means by which that amount is from time to time to be ascertained, then clause 9 of the Supplemental Deed is inconsistent 40

with the requirement of clause 6(a) of the General Loan Deed that the amount (or maximum amount) of the Loan be "specified" in the Supplemental Deed. Clause 11 of the General Loan Deed declares what is to be the consequence of such inconsistency in the following terms :-

p. 189.3

p. 190.7

10 "In so far as any Supplemental Deed may contain any provision which is inconsistent with this Deed that Supplemental Deed shall not be thereby rendered invalid but shall be read and construed subject to this Deed and any Loan to which such Supplemental Deed relates shall be enforceable and recoverable accordingly."

20 Likewise the MEQ Supplemental Deed itself provides in clause 17 that:-

p. 264.5

30 "It is specifically declared that insofar as this Deed contains any provision which is inconsistent with the General Loan Deed this Deed shall not be thereby rendered invalid but shall be read and construed subject to the General Loan Deed and the Loan shall be enforceable and recoverable accordingly."

p. 264.5

(See also clause 4 of the MEQ Supplemental Deed, by which the appellant "agrees to be bound by the General Loan Deed"; also clause 2 of the same Deed, which provides that the MEQ Supplemental Deed is "subject to the General Loan Deed"; and also clause 7(h) of the General Loan Deed, which permits a Supplemental Deed to contain only provisions "which are not inconsistent with the provisions of this "General Loan Deed".)

p. 256.3

p. 254.9

40 p. 190.2

59. From this it follows that if (as the appellant contends) the amount repayable is the Australian \$ equivalent of US \$3,630,000 adjusted under clause 9 for currency

p. 258.4

Record

- p. 258.4
p. 189.3
p. 264.6
- fluctuations at the date of such repayment, then that amount cannot be known in advance. If it cannot be known in advance, it cannot (and could not) be specified in the MEQ Supplemental Deed. If incapable of being so specified, then, insofar as the MEQ Supplemental Deed purports to make that repayable amount "the Loan", the MEQ Supplemental Deed and in particular clause 9(2) of that Deed, is inconsistent with clause 6(a) of the General Loan Deed. There being such an inconsistency, the MEQ Supplemental Deed must be "read and construed subject to the General Loan Deed", with the consequence that "the Loan shall be enforceable and recoverable accordingly". : see clause 17 of the Supplemental Deed.
- 10
- p. 189.3
60. In order to determine what is "the Loan" that is "enforceable and recoverable accordingly", it is necessary to find in the MEQ Supplemental Deed a provision that is "not inconsistent" with the requirement of clause 6(a) of the General Loan Deed that the Supplemental Deed is to "specify the amount or maximum amount of the Loan". It is submitted that such a provision is to be found in clause 5(1) of the MEQ Supplemental Deed which states:-
- 20
- p. 256.3
- "The maximum amount of the Loan shall be \$2,500,000."
- with respect to this provision:-
- (a) clause 5(1) does specify the maximum amount of the Loan;
- 30
- p. 189.3
- (b) this specification conforms with clause 6(a) of the General Loan Deed, and is "not inconsistent" with it;
- (c) it follows that the aforesaid amount of \$2,500,000 is the maximum amount of the Loan; that such amount is "enforceable and recoverable accordingly"; and that a provision having the effect of making "the Loan" any other amount (such as the Australian \$ equivalent of US \$3,630,000) is inconsistent with the General Loan Deed and is to be
- 40
- p. 264.6

read and construed subject to that Deed.

61. What has been submitted above with respect to "the Loan" also affects the calculation of interest. As has been mentioned above (paras. 56 and 57 of this Case) -

- (a) clause 6(c) of the General Loan Deed requires that a Supplemental Deed shall - p. 189.3

10 "specify or provide the method of calculation of the rate of interest payable on the Loan";
 - (b) such method of calculation is provided in clause 6(2) of the MEQ Supplemental Deed, which thus conforms with the requirements of clause 6(c) of the General Loan Deed; p. 256.9
 - (c) "the Loan" referred to in clause 6(c) of the General Loan Deed is one and the same with "the Loan" referred to in clause 6(a) of the General Loan Deed; p. 189.3

20
 - (d) for the reasons set out in the preceding paragraphs 55 to 59, "the Loan" is A\$2,500,000;
 - (e) in order to conform with the requirement of clause 6(c) of the General Loan Deed, clause 6(2) of the Supplemental Deed must be read and construed as providing that the rate of interest payable on the Loan is to be calculated "on" A\$2,500,000. p. 189.3
p. 256.9

30
62. By way of contrast if (as the appellant submits) "the Loan" referred to in clause 6(2) of the MEQ Supplemental Deed is not A\$2,500,000 but some other amount (e.g. US\$3,630,000 or its Australian \$ equivalent), then:- p. 256.9
- (a) "the Loan" referred to in clause 6(c) of the General Loan Deed is something different from "the Loan" referred to in clause 6(a) of the General Loan Deed; p. 189.3
p. 189.3
 - (b) "the Loan" referred to in clause 6(2) of the MEQ Supplemental Deed is different from "the Loan" referred to in clause 6(c) of the General Loan Deed; p. 256.9
p. 189.3

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Record
p. 256.9

(c) clause 6(2) of the Supplemental Deed is "inconsistent" with the foregoing provisions of the General Loan Deed;

p. 256.9

(d) therefore, to compute interest on some amount other than A\$2,500,000 (such as the A\$ equivalent of US \$3,360,000) is to construe clause 6(2) of the MEQ Supplemental Deed as requiring interest to be calculated by a method which renders it inconsistent with the provisions of the General Loan Deed.

10

63. The position may be summarised as follows:-

p. 256.3

(a) clause 5(1) of the MEQ Supplemental Deed specifies the maximum amount of "the Loan" as A\$2,500,000, and this provision is not inconsistent with clause 6(a) of the General Loan Deed;

p. 189.3

20

p. 256.9

(b) clause 6(2) of the MEQ Supplemental Deed provides the method of calculating interest "on the Loan", and this provision is not inconsistent with either clause 6(a) or clause 6(c) of the General Loan Deed;

p. 189.3

p. 258.3

(c) if (as the appellant contends) clause 9(2) of the MEQ Supplemental Deed provides for determining the amount of "the Loan", that provision does not specify (and is incapable of specifying) the amount of the Loan, and is therefore inconsistent with clause 6(a) of the General Loan Deed;

30

p. 189.3

p. 256.9

(d) If (as appellant contends) clause 6(2) of the MEQ Supplemental Deed requires interest to be computed on the amount determined under clause 9(2) of that Deed, then clause 6(2) of that Deed becomes inconsistent with clause 6(c) of the General Loan Deed.

p. 258.3

40

p. 256.9

p. 189.3

64. The only way in which the provisions of clause 9(2) and clause 6(2) of the Supplemental Deed can be "read and construed subject to the General Loan Deed", and so that those provisions are "not inconsistent" with that Deed is:-

p. 258.3
p. 256.9

(a) to construe clause 6(2) of the MEQ Supplemental Deed as providing that interest is to be computed on the maximum amount of the Loan specified in clause 5(1) of the Supplemental Deed = A\$2,500,000.

p. 256.9
p. 256.3

(b) to construe clause 9(2) of the MEQ Supplemental Deed as providing for the ascertainment of amounts which are not simply or solely "the Loan" or repayments thereof, but are amounts which embody two components:-

p. 258.3

(i) instalments of Loan (=A\$2,500,000) repayable; together with -

(ii) what are described in clause 7(g) of the General Loan Deed and in clause 2(3) of the MEQ Financing Agreement as "other moneys" which consist of exchange risk adjustments payable in respect of a Loan of A\$2,500,000.

p. 190.1
p. 116.3

65. If clause 6(2) and clause 9(2) of the MEQ Supplemental Deed are so read and construed, none of the "difficulties", whether real or imagined by the appellant, can arise. Any amounts paid (or repaid) under clause 9(2) in respect of US\$3,630,000 will be construed, not as amounts "repaid" as part of principal, but as amounts which, notwithstanding the provisions of clause 9(2) of the Supplemental Deed, are composed partly of an amount of principal (or "Loan") repayment, and partly of amounts representing "other moneys" which the Borrower agreed to pay in consequence of having accepted the exchange risk. (The converse will, of course, apply if the exchange rate fluctuation favours the Borrower). In short, the apparent inconsistency between -

p. 256.9
p. 258.3
p. 258.3
p. 258.3

p. 256.3	<u>Record</u> Loan = A\$2,500,000 specified in clause 5(1) of the MEQ Supplemental Deed	
p. 258.3	and Loan = amount repayable as provided by clause 9(2) of the MEQ Supplemental Deed -	
p. 258.3	must be resolved in favour of the former because the provisions of clause 9(2) are inconsistent with the General Loan Deed.	
	G. <u>SEVENTH SUBMISSION : DECLARATION SOUGHT BY</u> <u>APPELLANT AS TO SCHEDULED</u> <u>PRINCIPAL</u>	10
p. 934.4	66. The declaration with respect to the liability of the State for "Scheduled Principal" payments sought by the appellant in the Full Court was as follows:-	
	"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 " <u>Scheduled Principal</u> " 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 US\$3,636,202.00."	20
p. 258.3		30
p. 623.5 p. 934.8 p. 936.3	67. The declaration claimed as aforesaid is the third formulation submitted by the appellant of the declaration which it submits should be made in the case of Scheduled Interest. This third formulation was rejected both by the trial judge and by the Full Court essentially because of its imprecise character.	40
	68. The imprecision in the declaration sought is the inevitable consequence of a difficulty inherent in the appellant's	

submissions with respect to Scheduled Principal. That difficulty is that, according to the appellant's submission, Scheduled Principal comprises:-

- (a) not the fixed amount lent of A\$2,500,000; and
- 10 (b) not the now fixed amount of US\$3,636,202.00 representing the amount of "Overseas Deposits In Relation To The Loan" notified by the appellant pursuant to clause 9(1) of the Supplemental Deed; but - p. 253.1 p. 258.3
- (c) the amount expressed by clause 9(2) to be repayable in Australian currency in 10 (ten) instalments each of which will, by virtue of clause 11 of that Deed, vary according to the currency rate of exchange prevailing at the date at which each such payment is due. p. 258.3 p. 259.4

20 It necessarily follows that (as appellant's submission itself recognises) it is impossible with precision or at all to predict in advance the amounts so payable.

69. From the foregoing, it also follows that the liability of the State in respect of instalments of Scheduled Interest falling due in the future is incapable of being expressed in a money sum or amount. The appellant therefore 30 seeks (and, because of the meaning it attaches to Scheduled Interest, is compelled to seek) a declaration which, as appears above -

- (a) simply refers to provisions of the Supplemental Deed, or repeats the verbiage of provisions derived therefrom (e.g. "calculated in accordance with clause 9(2) of the Deed"); and -
- 40 (b) incorporates expressions which are fundamental to the dispute between the parties, e.g. that the "principal" of the loan is not A\$2,500,000.

70. Because it is the interpretation of those provisions of the Deed (together with other provisions

Record

which those provisions incorporate) that is in dispute between the parties, the declaration claimed by the appellant is not only imprecise, but, in the form sought, will not resolve the disputes between the parties. What is likely to occur, if a declaration in that form is made, is further litigation in which some or all of the declaration is itself the subject of further argument and judicial decision. The declaration in the form sought is therefore not likely to resolve, but to maintain and even promote, disputes as to the proper interpretation of the expression "Scheduled Interest".

10

PART D - REASONS

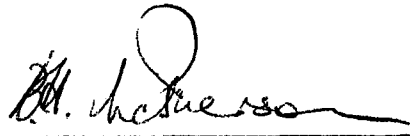
71. The respondent respectfully submits that the appeal should be dismissed with costs and that the order of the Full Court appealed from should be affirmed for the following reasons:-

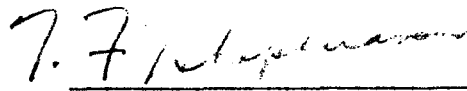
(a) for the reasons specified in the Respondent's Submissions numbered A to G hereof.

20

(b) for the further reason that the appellant's submissions equate "the Loan" with the amount repayable by the borrower; that this submission is fundamental; and that is (with respect) fallacious, in that the Loan is the amount lent, that is the "principal" of the loan or capital advanced to the borrower.

30

 M. Johnson V.C.

 J. F. [unclear]



TELEPHONE. 224 7572

WHEN TELEPHONING OR
CALLING PLEASE ASK FOR
Mr. Curcuruto
Ref. AC:GVD

Crown Solicitor,
Conaley House,
50 Ann Street,
Brisbane, Queensland. 4000.

11th January, 1980.

Gentlemen,

Re: Euro-Pacific Finance Corporation
Limited v. Hielscher - Your Ref:
MDK:gh

I refer to the above matter in which an appeal is at present pending before the Judicial Committee.

The relief sought by your client the plaintiff (the present appellant) has included a claim for a declaration which in the form sought before the Full Court was (in the case of MEQ) as follows:-

"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."

A declaration in similar form was also sought in the case of FQN.

Any obligations upon the State in respect of interest on Deferred Interest do not arise until 31st March, 1982. You will recall that argument before the Full Court in fact centred on the more current issues of interest presently payable and the amount of principal outstanding and that the Full Court (by a majority) declined to make such a declaration in the case of either MEQ or FQN. In so declining it noted that Counsel for the appellant conceded that there was no particular objection to such declarations, but it adopted the attitude that it could well be that factors other than those debated before the learned trial judge would require consideration prior to 31st March, 1982. It was of the view that the history of successive agreements which had been made in the seven years up to trial was such as might induce one against the belief that no further factor is likely to be introduced.

I assume that this declinature by the Full Court forms part of your client's appeal to the Judicial Committee.

Messrs. Feez Ruthning & Co.,
Solicitors,
BRISBANE. Qld. 4000.

2.

As you know, the parties differed as to the proper interpretation of the relevant clauses in the Deeds and consequently as to the proper method of calculating interest including the Deferred Interest referred to in the declarations sought.

The differences as to interpretation remain.

However, you will recall that, despite those differences, and even using their differing methods of calculating interest, both parties reached the same result as regards the amount of Deferred Interest referred to in the foregoing declarations; that is to say, that such amount in the case of each of MEQ and FQN is the amount of \$4398,968.00 mentioned in the declarations sought.

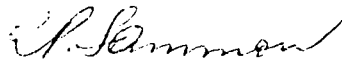
The Methods of Calculation A and B in the attachment hereto illustrate that although there is no dispute concerning such amount of Deferred Interest there is a fundamental difference concerning the method of calculating interest. Method of Calculation A represents my client's method of calculation of the Deferred Interest and Method of Calculation B your client's method.

In the circumstances I have advised my client, the present respondent, who agrees, that no purpose will be served by opposing your client's claim for declarations in the foregoing form. Accordingly, I am instructed to advise that at the hearing of the appeal before the Judicial Committee Counsel for the respondent is instructed to consent to the making of declarations as aforesaid.

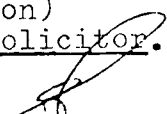
In order to avoid any misunderstanding however, I should emphasise that in adopting this course the respondent does not intend to concede and is not to be taken as conceding, the correctness of your client's contentions with respect to either the interpretation of the relevant clauses relating to interest in the Deeds or the method of calculating that interest. Whilst the difference in the method of calculation is of no significance to the resulting amount of Deferred Interest, it is of fundamental importance to the other issues in dispute.

I propose to include a copy of this letter in the case for the respondent on the appeal.

Yours faithfully,



(R.P. Sammon)
Acting Crown Solicitor.



ATTACHMENT

Method of Calculation of Deferred Interest as claimed by
the State of Queensland and as claimed by Euro-Pacific
Finance Corporation using the M.E.Q. Deed of Deferral as
an example.

1. Deferred Interest is defined in the M.E.Q. Deed of Deferral, to be:

"all interest in respect of Loans ... which were it not for the provisions of this Deed would pursuant to a Supplemental Deed have become payable on or after the 30th day of June 1975 and on or before the 31st day of December 1976....."
pursuant to the Euro-Pacific-M.E.Q. Supplemental Deed.

2. Three interest payments became payable during that 18 month period, namely:

(i) interest in respect of the period 5/3/75 to 5/9/75
(ii) " " " " " " 5/9/75 " 5/3/76
(iii) " " " " " " 5/3/76 " 3/9/76

3. The calculation of the amount of interest payable in each instance is made pursuant to Clause 6(2) of the Euro-Pacific-M.E.Q. Supplemental Deed.

Interest shall be computed and payable on the Loan.....
and shall be the aggregate of -

- (a) 1½ per centum per annum;
(b) The First Class London Bank Rate For The Period; and
(c) Interest at such rate as will produce by way of interest an amount equal to the aggregate of all amounts required to be paid by the Borrower (i.e. M.E.Q.) by way of additional interest pursuant to subclauses (3) and (4) of Clause 6 and Clause 11, less such rate as will produce an amount in respect of each Period equal to the amount which the Company (i.e. Euro-Pacific) is required to repay to the Borrower in respect of such Period pursuant to the said sub-clause (4) or the said Clause 11.

4. The First Class London Bank Rate for each of the three periods was as follows:

5/3/75 to 5/9/75	=	7.8125% p.a.
5/9/75 to 5/3/76	=	8.25 % p.a.
5/3/76 to 3/9/76	=	6.6875% p.a.

5. The Australian dollar - U.S. dollar exchange rates applicable, in accordance with Clause 11 of the Supplemental Deed, were:

5/9/75 : A\$1.00	=	U.S. \$1.2776
5/3/76 : A\$1.00	=	U.S. \$1.2577
3/9/76 : A\$1.00	=	U.S. \$1.2440

A Method of Calculation - State of Queensland

In summary:

(i) 5/3/75 to 5/9/75
 $10.6018\% \text{ p.a.} \times \frac{184}{360} \times A\$2,500,000 = A\$135,468.$

(ii) 5/9/75 to 5/3/76
 $11.2755\% \text{ p.a.} \times \frac{182}{360} \times A\$2,500,000 = A\$142,510$

(iii) 5/3/76 to 3/9/76
 $9.5728\% \text{ p.a.} \times \frac{182}{360} \times A\$2,500,000 = A\$120,990$

Total amount of deferred interest = \$398,968

The period 5/3/75 to 5/9/75 is selected to illustrate how the above calculations were arrived at:

1. "the Loan" is A\$2,500,000.
2. Interest computed and payable on "the Loan" is the aggregate of:

- (a) 1.5% p.a.
- (b) 7.8125% p.a.
- (c) interest at such rate as will produce by way of interest an amount equal to the aggregate of:

- (i) Subclause (3) of Clause 6 additional interest - relevant taxes - NIL
- (ii) Subclause (4) of Clause 6 additional interest - relevant taxes - NIL
- (iii) Clause 11 additional interest -
 - adjustment for exchange risk
 - subclauses 2(a) and 2(c) -

The amount of interest which would be payable per annum in the absence of Clause 11 would be:

$$9.3125\% \times \$2,500,000 = \$232,812.50$$

The total amount of interest payable per annum due to the application of Clause 11(2)(a) =

$$\begin{aligned} 9.3125\% \times \text{U.S. } \$3,636,202 \\ = \text{U.S. } \$338,621.31 \\ = \text{A. } \$265,044.86 \text{ (converted at the rate of } \\ \text{A\$1.00 = U.S. \$1.2776)} \end{aligned}$$

Therefore, the amount of additional interest required to be paid per annum pursuant to Clause 11 =

$$A\$265,044.86 - \$232,812.50 = \underline{\underline{A\$32,232.36}}$$

The rate of interest which will produce such amount - pursuant to the first leg of Clause 6(2)(c) is, then, = Additional interest required to be paid due to the operation of Clause 11(2)(a) Amount of "the Loan"

$$= \frac{\$32,232.36}{\$2,500,000.00}$$

$$= 1.2893\% \text{ p.a.}$$

Euro-Pacific is not required to repay to M.E.Q. any amount in respect of this Period pursuant to subclause (4) of Clause 6 and, because exchange rates moved adversely, and not favourably during the period between the draw-down of the loan and 5/9/75, Euro Pacific is not required to repay to M.E.Q. any amount pursuant to Clause 11, so that there is no rate of interest to be deducted in accordance with the second leg of Clause 6(2)(c)

The rate of interest determined pursuant to Clause 6(2) is thus the aggregate of:

- (a) 1.5% p.a.
- (b) 7.8125% p.a.
- (c) 1.2893% p.a.

10.6018% p.a.

3. The interest calculation is thus

$$10.6018\% \times \frac{184}{360} \times \text{A\$}2,500,000 = \text{A\$}135,467.44$$

A similar calculation may be made in respect of the periods 5/9/75 to 5/3/76 and 5/3/76 to 3/9/76.

B Method of Calculation - Euro-Pacific Finance Corporation
("Final page of Appendixes A & B to the Statement of Claim")

In summary,

- (i) 5/3/75 to 5/9/75
 $9.3125\% \text{ p.a.} \times \text{U.S.}\$3,636,202 \times \frac{184}{360} \times \frac{\text{A}\$1.00}{\text{U.S.}\$1.2776} = \$135,467.37 = \$135,468$
- (ii) 5/9/75 to 5/3/76
 $9.75\% \text{ p.a.} \times \text{U.S.}\$3,636,202 \times \frac{182}{360} \times \frac{\text{A}\$1.00}{\text{U.S.}\$1.2577} = \$142,509.71 = \$142,510$
- (iii) 5/3/76 to 3/9/76
 $8.1875\% \text{ p.a.} \times \text{U.S.}\$3,636,202 \times \frac{182}{360} \times \frac{\text{A}\$1.00}{\text{U.S.}\$1.2440} = \$120,989.54 = \$120,990$

The period 5/3/75 to 5/9/75 is again used to illustrate how the above calculations were arrived at:

1. "the Loan is U.S.\$3,636,202.
2. The rate of interest payable on "the Loan" is the aggregate of (a) 1.5% p.a.
(b) 7.8125% p.a.

Clause 6(2)(c) is claimed to operate, with respect to additional amounts required to be paid by M.E.Q. pursuant to Clause 11, only in the event that a prepayment of interest is made pursuant to Clause 10, and interest earned thereon is credited against interest payable by M.E.Q. to Euro-Pacific on the next Interest Payment Date. Euro-Pacific claims that paragraph (d) of subclause (2) of Clause 11 is the only part of Clause 11 to which Clause 6(2)(c) applies.

3. The interest rate of 1.5% and 7.8125% = 9.3125% p.a. is applied to U.S.\$3,636,202, with the resultant amount of interest payable being converted to Australian dollars at the exchange rate ruling at that time.
Thus $9.3125\% \times \text{U.S.}\$3,636,202 \times \frac{184}{360} = \text{U.S.}\$173,073.12$

Converted to A\$: $\frac{1}{1.2776} = \text{A}\$135,467.37$

Conclusion:

Both methods A and B result in an amount of Deferred Interest of \$398,968, but in method A the amount of "the Loan" is A\$2,500,000 and in method B the amount of "the Loan" is U.S.\$3,636,202.

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

- and -

LEO ARTHUR HIELSCHER

Respondent

CASE FOR THE RESPONDENT

FRESHFIELDS,
Grindall House,
25 Newgate Street,
London, E1A 7LB

Solicitors for the Respondent