

Euro-Pacific Finance Corporation Limited - - - - *Appellant*

v.

Leo Arthur Hielscher - - - - *Respondent*

FROM

**THE FULL COURT OF THE SUPREME COURT OF
QUEENSLAND**

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 8TH MAY 1980

Present at the Hearing :

LORD WILBERFORCE

LORD DIPLOCK

LORD RUSSELL OF KILLOWEN

LORD KEITH OF KINKEL

LORD LANE

[Delivered by LORD WILBERFORCE]

This is an appeal from a judgment of the Full Court of the Supreme Court of Queensland which by majority (Stable S.P.J. and Kelly J., Dunn J. dissenting) allowed an appeal from a judgment of Connolly J. in favour of the appellant for \$164,036.58. The Full Court also dismissed a cross-appeal by the appellant against a refusal by Connolly J. to grant certain declarations. The appeal turns upon the construction of two deeds dated 1 April 1977 to which the appellant and the State of Queensland are parties. The respondent is a nominal defendant appointed to represent the State.

The two deeds dated 1 April 1977 are described as the "MEQ Debt Restructuring Deed" and the "FQN Debt Restructuring Deed". MEQ (Metals Exploration Queensland Pty. Ltd.) and FQN (Freeport Queensland Nickel Incorporated) are two companies concerned in the exploitation of nickel deposits in the Greenvale area of Queensland. The Debt Restructuring Deeds of 1 April 1977 were, at the time they were entered into, the last of a series of documents concerned with the financing of the exploitation. For all purposes relevant to this appeal, they contained identical provisions: for convenience their Lordships will generally refer only to the documents to which MEQ was a party. The State of Queensland has throughout been concerned in the financing arrangements, originally by way of guarantee, but in the Deeds of 1 April 1977 as a principal contracting party. The issues relate to the extent of the State's obligations.

The history of the matter starts in 1970 with the enactment of the "Greenvale Agreement Act 1970". There was a schedule to that Act setting out the terms of an agreement, to which the State, MEQ and FQN were parties, for the development of the nickel deposits. The Act authorised the State to enter into the agreement, and to guarantee the repayment of money borrowed by the Companies, such guarantee to be limited to such amount of principal and to such rate of interest thereon as should be prescribed by Order in Council. Under the scheduled agreement, the State agreed to guarantee the repayment of money borrowed by the Companies from lenders including the appellant for the purposes of the project not exceeding \$43,000,000 (later increased) and the payment of interest on the outstanding balance at a rate not exceeding 8% per annum.

On 1 October 1971 the appellant entered into an agreement with MEQ (and also with FQN) called the "Euro-Pacific MEQ Financing Agreement". Under this agreement the appellant agreed to lend amounts aggregating not more than \$2.5m. There were scheduled to this agreement a form of "General Loan Deed" and of a "Supplemental Deed" which set out the terms and conditions as to the repayment of the loan to be made by the appellant, the payment of interest thereon and other matters.

On 11 November 1971 an Order in Council was made (as contemplated by the Act of 1970) in relation to the Financing Agreement. This set out in a Schedule a statement of

(A) Loan Agreements entered into by MEQ and

(B) Loan Agreements entered into by FQN.

As regards each company the Schedule specified the date of the agreement (1 October 1971), the Lender (the appellant), the "Amount of Principal to which Guarantee shall be Limited" (\$2,500,000) and the "Rate of Interest to which Guarantee shall be Limited" (8% per annum). The Order in Council provided that the guarantee of the State should be limited as set out in the Schedule—i.e. to \$2,500,000 and 8% interest.

The MEQ General Loan Deed was executed on 15 December 1971; the MEQ Supplemental Deed on 12 October 1972. It was provided by the Supplemental Deed that advances should be made out of the proceeds of Overseas Deposits. In the case of the appellant, this meant that it would obtain the necessary funds in United States currency, and would make advances in Australian currency out of the proceeds of that currency. The appellant was obliged to notify the Borrower (MEQ) of the amount of Overseas Deposits In Relation To The Loan. This amount, after successive advances had been made up to the maximum contracted for, was "consolidated" as at 5 March 1975 at a figure of \$U.S. 3,636,200.00, (which for convenience will be taken as \$U.S. 3.6m.). The repayment of the loan, though to be made in Australian currency, was to be calculated by reference to this amount, there being an express provision that the Borrower (MEQ) should bear the risk of currency fluctuation, so that, depending on fluctuations in the rates of exchange the amount repaid might either exceed, or fall short of, \$A 2.5m., but was unlikely to be exactly that amount. Repayment was to be in ten six-monthly instalments starting in March 1977 and continuing until September 1981. On the first nine payment dates the Borrower was to pay the \$A equivalent of one tenth of the total of \$U.S. 3.6m. taken to the next whole \$U.S. 100. The tenth payment in effect was to represent the residue theretofore unpaid.

Interest was to be paid on dates corresponding to those on which instalments of principal were repayable, at rates fixed according to a stated formula. It was not disputed that, in the end result, payments of interest were, as in the case of repayments of principal, to reflect possible changes in exchange rate as between U.S. and Australian currency, but there was a dispute as to the method by which this result was to be achieved.

In 1975 fresh arrangements were made by "Deeds of Deferral", with the object of deferring the Borrowers' obligations as regards repayment of principal and payment of interest. As regards four instalments of principal (called "Deferred Principal") which were due to be repaid in 1977 and 1978, the MEQ Deed of Deferral provided, in effect, for deferment for five years.

As regards interest, there was defined as "Deferred Interest" that interest which would otherwise have been payable in the period 30 June 1975 to 31 December 1976. Their Lordships consider it to be clear that this amount, in the case of each loan by the appellant, was \$A 398,968.00. The effect of the MEQ Deed of Deferral was to make this Deferred Interest payable in three instalments on 31 March 1982, 30 September 1982 and 31 March 1983. Provision was also made for interest to be paid on the Deferred Interest. This was to be calculated at 10½% (without compounding) as from the dates when the Deferred Interest would otherwise have been paid, but this interest was not to be paid until the Deferred Interest was itself paid (i.e. in 1982 and 1983 as above). By an amending Act No. 28 of 1975 and an agreement scheduled thereto the State agreed to guarantee this interest on Deferred Interest.

By 1977 the Borrowers required further accommodation, which requirement gave rise to the matters now in dispute. This resulted in the two sets of agreements contemporaneously made on 1 April 1977 called respectively "Deeds of Postponement" and "Debt Restructuring Deeds".

The MEQ Deed of Postponement (dated 1 April 1977) established new definitions of what were called "Scheduled Principal" and "Scheduled Interest".

"Scheduled Principal" was defined as the amount (of principal) which would have been payable at a particular maturity date if the original arrangements, as varied by the Deed of Deferral, had been observed. It is quite clear, in their Lordships' opinion, that, through reference back to the MEQ Supplemental Deed, each amount of Scheduled Principal remained as the \$A equivalent of one tenth of the total of \$U.S. 3.6m. (with adjustment as regards the tenth instalment). The effect of the MEQ Deed of Postponement was that the Lender gave up the right, prior to 31 December 1985, to be paid instalments of principal as they fell due. Instead, the Lender obtained the right to such payments as the Borrower could make on each Maturity Date, out of what was called "Excess Cash" (a conception which it is not necessary to explain) subject to a minimum which the Borrower had to pay in any event. Payment in full was to be made on 31 December 1985.

"Scheduled Interest" was defined as interest which would have been payable on a particular Maturity Date if the original arrangements, as varied by the MEQ Deed of Deferral, had been observed. Scheduled Interest was not so to be paid, but was only payable out of "Excess Cash", subject to a prescribed minimum. The definition of "Scheduled Interest" did not extend to interest on "Deferred Interest" (see above) so that the Lender gave up any right to interest on Deferred Interest in respect of the period 1 January 1977 to 31 December 1985.

In the interest of brevity and to avoid repetition their Lordships have not attempted to do more than briefly to summarise the above complex documents. They have been presented in detail in the judgment of Dunn J. in the Full Court. More detailed examination is necessary of the Debt Restructuring Deeds.

The general objective of the MEQ "Debt Restructuring" Deed—contemporary with the Deed of Postponement—was evidently, and without doubt, to compensate the Lender for the principal and interest forgone

by the Deed of Postponement through an obligation on the part of the State to make the forgone payments. Their Lordships use the words "general objective" so as to leave open the possibility that the arrangement, as executed, might, in fact, in some way, fall short of what the Lenders might expect. The extent of the State's obligations must depend upon the terms of the Debt Restructuring Deeds as executed.

The State was authorised to enter into these Deeds by the Greenvale Agreement Act 1977, to which was scheduled the form of the contemplated deeds. This Act gave the Deeds, when executed, the force of law. The parties to the MEQ Debt Restructuring Deed were the State, MEQ, the appellant, and a number of other Lenders. It is important to note at the outset that the State entered into it as a principal, not merely as a guarantor, and assumed direct and primary obligations. As the appeal depends upon the terms of the Deed, it is necessary to set out some relevant provisions in full.

In Clause 1 it was provided that words and expressions used in the relevant Deed of Postponement should have the meanings thereby ascribed—this imports the meaning (as above) of "Scheduled Principal" and "Scheduled Interest".

Clause 3 of the MEQ Deed contains the following provisions [the FQN Deed is identical as regards the relevant clauses except as regards numeration]:—

"3.(1) In respect of the period commencing on the 1st day of January 1977 and ending on the 31st day of December 1985 the State shall pay to each Lender named in part A of the Schedule to the said Order in Council made the eleventh day of November 1971 or in part A of the Schedule to the said Order in Council made the twenty-fifth day of September 1974 or both amounts equal to interest on Deferred Interest foregone pursuant to Clause 4 of the MEQ Deed of Postponement namely interest calculated without compounding at the rate of ten and one-half per centum 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 either or both of the said parts A (which Loan or Loans are hereinafter called "Subject Loan" or "Subject Loans" as the case may be). Such amounts shall be paid at the respective times stipulated for payment of interest on Deferred Interest Instalments pursuant to Clause 5 of the MEQ Deed of Deferral.

(2) Within five business days after each Maturity Date the State shall:—

(a) pay to each party hereto which is named in the aforesaid Orders in Council or either of them the amount by which the sum in respect of Scheduled Interest calculated in respect of that party's Subject Loan or Subject Loans paid to such party pursuant to Clause 5 and Clause 6 of the MEQ Deed of Postponement is less than 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 on that Maturity Date Provided That except in respect of Scheduled Interest which consists of Accrued Interest on Deferred Interest the amount payable by the State pursuant to this paragraph (a) shall not exceed the amount by which the aforesaid sum 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 or Subject Loans in respect of which such Scheduled Interest is payable after deducting from such principal amount any amount paid pursuant to paragraph (c) of this

sub-clause in respect of Scheduled Principal of that party's Subject Loan or Subject Loans falling due for repayment on any Maturity Date prior to that Maturity Date;

(b) [Not relevant]

(c) pay to each party hereto which is named as aforesaid the amount by which the sum in respect of Scheduled Principal which forms part of that party's Subject Loan or Subject Loans paid to such party pursuant to Clause 5 and Clause 6 of the MEQ Deed of Postponement is less than the amount of Scheduled Principal which forms part of that party's Subject Loan or Subject Loans to which that party would were it not for the provisions of the MEQ Deed of Postponement have been entitled on that Maturity Date;"

No difficulty, in their Lordships' opinion, arises as regards Clause 3(1). It precisely makes good to the Lender the interest on Deferred Interest in respect of the period 1 January 1977–31 December 1985, which, as explained above, the Lender forwent under the MEQ Deed of Postponement. Attention should however be drawn to the use of a new expression viz. "Subject Loan" or "Subject Loans" defined by reference to the Schedule to the Order in Council of 11 November 1971, on which the respondent places much reliance. Whatever use may be made of this definition later, it is clear in this clause (3(1)) that Deferred Interest bears the meaning given to it in previous documents: the words "attributable to the [subject loans]" are quite appropriate, as a matter of description, and cannot cut down the meaning of Deferred Interest. As stated above the amount of Deferred Interest here referred to is, beyond doubt, \$A. 398,968·00. This conclusion is relevant to the first declaration sought by the appellant.

Equally, in their Lordships' opinion, there is no difficulty presented by Clause 3(2)(c). This is a clear reference to the "Scheduled Principal" forgone by the appellant under the Deed of Postponement: the amount which the State agrees to pay matches exactly that which the Lender has given up. This conclusion is relevant to the second declaration sought by the appellant.

The coincidence between what the Lender had forgone under the Deed of Postponement and what the State agreed to pay under Clause 3(1) and Clause 3(2)(c) *prima facie* reinforces the likelihood that a parallel result is intended to be achieved as regards Scheduled Interest under Clause 3(2)(a). This may be displaced by the language used, but, in view of the other provisions, their Lordships would need to be satisfied by clear language that a different approach was intended in this case. The first portion of Clause 3(2)(a) viz. the portion preceding "Provided" follows the same pattern as Clause 3(1) and Clause 3(2)(c). It is only the proviso which gives rise to difficulty. The appellant contends that the maximum rate of 8% is to be calculated in exactly the same way as the "Scheduled Interest" is calculated—viz: upon the Australian dollar equivalent of the amount (in \$U.S.) of unpaid instalments of principal, namely \$U.S. 3·6m. less any repayments. The respondent submits that the 8% is to be calculated on the original amount of the Loan, viz \$A. 2·5m., and it has paid interest on this basis. The difference between these two contentions is quantified in the sum of \$A 82,018·29—in respect of each loan—which sum is claimed by the Lender and for which the trial judge gave judgment. The respondent finds, in the main, upon the words "calculated in respect of that party's Subject Loan . . .": he refers back to Clause 3(1) for the definition of "Subject Loan" which, in turn, refers back to Schedule A to the Order in Council of 11 November 1971. This schedule mentions only the sum of \$A 2·5m.

The main argument relied upon to support the contention that "Subject Loan" means \$A. 2.5m. and nothing else was based upon provisions in the Supplemental Deed governing the calculation of interest. The submission was that, under Clause 6(2) of that Deed, interest was to be calculated upon \$A 2.5m.: the necessary currency rate adjustment being effected by increasing the rate of interest, rather than, as the appellant contends, by adjusting the indebtedness to \$U.S. 3.6m., or its Australian equivalent. This argument was an intricate one, and was supported by some elaborate calculations set out as an annex to the respondent's printed case. Their Lordships have given it full consideration: they will not however, with all respect to its careful presentation in argument, deal with it in detail, because they agree with all of the learned judges (including the majority) in the Full Court in rejecting it. They agree with the appellant that from the moment when advances were made, out of Overseas Deposits, and from the consolidation of these advances into the sum of \$U.S. 3.6m., and throughout the subsequent transactions, the interest was calculated, and treated as having been calculated, at the stipulated rate, upon the figure of \$U.S. 3.6m., and that the figure of \$A 2.5m., had no relevance for this calculation. In construing the references to "Subject Loan" in the Debt Restructuring Deeds, it is therefore quite inappropriate to refer back only to a figure which arose in 1971 as if nothing had taken place since that time. The Debt Restructuring Deeds must be set in the context of the Supplemental Deed and Deed of Postponement. That this was the intention is made clear, as their Lordships have already explained, in the treatment of Deferred Interest in Clause 3(1) and of Scheduled Principal in Clause 3(2)(c). Moreover the whole of the clause, by using the expressions "attributable to the [Subject Loan]"—Clause 3(1)—"[Scheduled Interest] calculated in respect of that party's Subject Loan"—Clause 3(2)(a), line 3—" [Scheduled Principal] which forms part of that Party's Subject Loan", indicate that the elements referred to are to be calculated in accordance with the whole series of documents, and are not merely to be calculated on an original figure now superseded. It is to be noted that the words "calculated on" do appear in Clause 3(2)(b) of the MEQ Debt Restructuring Deed (but not in the FON Debt Restructuring Deed) and seem to have been studiously avoided in the other and relevant paragraphs.

It cannot, their Lordships fully agree, be said that the terms of Clause 3(2)(a), particularly of the proviso, are entirely clear: the division of opinion among the learned judges below testifies to the contrary. But their Lordships have, in the end, come to the clear view, in agreement with the judgments of the trial judge and of Dunn J. in the Full Court, that the whole intention of Clause 3 of the Debt Restructuring Deeds is to make good, as nearly as possible, to the appellant the amounts given up by the Deeds of Postponement, and that, with the exception of the limitation of the rate of interest to 8%, that intention has been carried out. It follows that the trial judge was right in giving judgment in favour of the appellant for the shortfall in interest paid, namely (as agreed) \$A 164,036.58.

As regards the declarations sought by the appellant, these, after recasting at the trial, are in the following form:—

"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 \$A 398,968.00.

2. A declaration that in calculating the plaintiff's entitlements pursuant to clause 3(1) of the FON 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 \$A 398,968·00.

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 \$US 3,636,202·00.

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 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 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 \$US 3,636,202·00."

The learned trial judge did not grant these declarations: instead he took the unusual course of ordering that they be reserved. Precisely why he took this course is not entirely clear—he referred to "other factors which have not been debated before me" but learned counsel for the respondent was not able, in any concrete form, to state what these factors might be. The majority of the Full Court upheld the decision, as a matter of discretion with which they would not interfere. Since then, however, it has been intimated that the State does not oppose the granting of declarations 1 and 2. These therefore will be granted.

As regards declarations 3 and 4 the respondent was not able to put forward any solid objection to them, beyond a general assertion that they are uncertain, and might prejudice or give rise to other claims. As regards the latter, they are in terms limited to the plaintiff's (i.e. appellant's) entitlements under clause 3(2)(c) and 3(2)(b) of the Debt Restructuring Deeds. As to their substance, their Lordships have already concluded in their discussion of (MEQ) Clause 3(2)(c) that the appellant's contention is well founded, and the declarations do no more than to establish this. Payment under this clause became due within five days from 31 March 1979 and at six-monthly intervals thereafter. Their Lordships give full recognition to the principle that in general the granting of declarations is a matter of discretion, and that the discretion of the trial judge should be respected. However, with all respect, their Lordships cannot find any valid ground for the unusual course of reserving the declarations. They agree with Dunn J. that in the circumstances the right course would have been to grant them. Their Lordships therefore will also grant declarations 3 and 4.

Their Lordships therefore will humbly advise Her Majesty that this appeal be allowed, the judgment of the trial judge for \$164,036·58 restored, and that declarations 1–4 as above be granted. The respondent must pay the appellant's costs here and in the Full Court.

In the Privy Council

**EURO-PACIFIC FINANCE
CORPORATION LIMITED**

v.

LEO ARTHUR HIELSCHER

DELIVERED BY
LORD WILBERFORCE